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Is Nothing Secret?

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> It's a—we're a transparent democracy. People know exactly what's on our mind. We debate things in the open.
>
> —President George W. Bush, June 21, 2006 (White House, ''President Bush Participates'')

How many can share a secret? Or, to ask the same question in reverse, is there any secret that is absolutely secret? Even the briefest consideration of the problematic obscurely traced in such questions reveals the outline of a certain aporia. A secret, at least that which we commonly call a secret, is something that is not or should not be shared. Yet in fact secrets are always being shared. The idea of a so-called ''state secret,'' whose history and contemporary resurgence in American law we will consider more specifically in a moment, obviously involves a secret that must be, in principle and in practice, both shared and concealed. Even the most expansive visions of executive sovereignty necessarily concede that such power must be delegated as it is exercised; and state secrets are thus inevitably shared, at least, by the ''agents'' of the ''agencies'' that carry out the policies of the state. At the same time, of course, a state secret is also rigorously concealed, not only from presumed enemies and aliens outside the state, but even from most of its own citizens. The very word ''state'' in this phrase seems to denote both

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the special status or quality of the secret (that it is a "top" secret, a kind of *arcani imperii* accessible only to those *at* the top) and its practical condition as something necessarily shared by some subset of that "body of people occupying a defined territory and organized under a sovereign government" whose "national security" is claimed to necessitate secrecy in the first place (OED "state" n., 30a).

As for the personal or private secret—the domain of what is more commonly called *privacy*—it too is commonly both shared and concealed: shared within the various limits of friendships, families, and communities, and concealed from everyone else. It is possible, no doubt, for a secret to be maintained by only *one*, by a unique and singular being. But is there any secret that remains absolutely unshared and un-communicated—not even, let us say, by actions that might later be followed back, as if in a detective story, to their secret source, nor, in the Freudian manner, by accidents, jokes, or symptoms that obliquely manifest that which is secreted within? Would not such a secret, if there were such a thing—a secret in every sense *private*, and thus wholly withdrawn into some pure subjective interiority—be as such *deprived* of all presence, and exist, if it can even be said to exist, only in the shape of a certain *privation*?

In any case, a secret evidently can—or *must*—be shared by *more than one*; and yet, to remain faithful in any sense to its own concept, it cannot be shared by *every one*. We therefore must conclude, at once, that a secret must not be shared, that a secret can only be shared, and that a secret can be shared by two, but not by three, or by three, but not by four, and so on. In those cases that are called, in English, "open secrets," and in French, "les secrets de Polichinelle," only the sharing of the secret is secret, not the secret itself; and even such sharing remains always suspended just this side of a necessary limit which it may always encounter in, for example, the voice of a child proclaiming an emperor's nakedness. Are these problems of number and limit (as such phrases and examples seem perhaps to indicate) the source of the faintly comic note that seems to play, as we shall see, around the whole idea of the secret, even in its most serious (and secretive) political form?

We will also suggest that this question of the secret is a kind of ghostly double of the question of *democracy* itself, to which it remains inescapably linked by exigencies at once practical and theoretical. Democracy and the secret pose a sort of double problem whose two sides can be denoted in French by the single phrase *plus un* (cf. Derrida, *Politics* 101). How many can share a secret? The secret replies, so to speak: this many, but *no more.* And how many

can join in a democracy? Democracy replies (and can only reply, with each repetition of the question): this many, and *one more*. For with each act of sharing, the secret becomes less itself while democracy becomes more itself. The secret is essentially defined by closure, by the separation of one from another,[1] but democracy would seem to be defined, at least in its essential aspiration, by an openness of literal borders ("give me your tired, your poor") as well as of its own procedures and decisions. But then, to broach one of the many urgent qualifications that must immediately be raised about such a point, how many "state secrets" can be maintained by a democracy that would still deserve this name?

We pose such questions during a legal and constitutional crisis, still unfolding as we write, regarding the state's power to subject its own citizens to electronic surveillance without judicial warrant, and the state's corresponding (or contrasting) power to maintain a veil of secrecy over the same power. The crisis involves a kind of perfectly symmetrical confrontation between state secrets and personal privacy. In the winter of 2005–6, it was revealed in the *New York Times* and elsewhere that the Bush Administration had, in the aftermath of 9/11, ordered the National Security Agency (NSA) to "intercept international communications into or out of the United States of persons linked to al Qaeda or related terrorist organizations" or phone calls with "one foot" in the United States and the other overseas (U.S. Dept. Justice 1). This program has apparently bypassed the procedures mandated by the Foreign Intelligence Surveillance Act of 1978 (FISA) according to which international intelligence activities are be supervised by special FISA courts. Such reports sparked more than 30 lawsuits by individuals and organizations including the American Civil Liberties Union (ACLU), the Center for Constitutional Rights (CCR), the Electronic Frontier Foundation and others; and in response, the administration has evoked the so-called "state secrets privilege," by which they allege that even to air the facts of the case would damage national security. Correspondingly, the administration has suggested, or at least implied, that the actions of the *Times* and others in publishing the details of this secret government program might themselves be actionable under the Espionage Act. In the current crisis, in other words, the state claims the right to uncover its citizens' secrets, and to do so *in* secret.

These recent events raise practical and theoretical questions, as urgent as they are momentous, not only about the foundational concepts of (state) secrecy and (personal) privacy, but also about the myriad ways in which new technologies of communication and surveillance are transforming both. In the rest of this essay, we

take some first steps toward mapping this difficult techno-political landscape. In the first two sections, we contrast the vexed state of contemporary Fourth Amendment jurisprudence with the apparent clarity and strength of the state secrets privilege. Then we go on to consider the corresponding question of the "separation of powers" in American constitutional governance, by way of accounting for the current political stalemate over the NSA warrantless wiretapping program. Finally, we circle back to make some tentative reflections about how new electronic technologies and the current legal and constitutional crisis force us to rethink the very limits of the public and the private, the citizen and the state.

1. The State of the Fourth

> All I want is to be left alone, in my
> average home
> But why do I always feel
> Like I'm in the Twilight Zone?
>
> —Rockwell, "Somebody's Watching Me"

Although one typically does not turn to law professors for entertainment, the entwined questions of state secrecy and personal privacy might well be an exception. Many legal writers confront what appears to be Americans' diminishing right to Fourth Amendment protection against unreasonable searches and seizures by turning to black comedy. The Fourth Amendment, writes Steven Osher, "isn't dead, but no one will insure it" (521). Surveying the recent history of courts and legal scholars trying to fine-tune Fourth Amendment jurisprudence, Eric G. Luna similarly concludes that "each [new] doctrine is more duct tape on the Amendment's frame and a step closer to the junkyard" (Luna, "Sovereignty" 787–88). In fact, however, these comic metaphors of body and car may be misleading, since they imply that the Fourth Amendment had an original, holistic integrity, that it was once healthy and young, or shiny and new. Akhil Amar, former editor of the *Yale Law Journal* and former legal consultant to *The West Wing* television series, comes closer to the crux of the problem of the Fourth Amendment when he summarizes derisively that, in American law, "warrants are not required—unless they are," and "all searches and seizures must be grounded in probable cause—but not on Tuesdays" (qtd. in Luna, "Sovereignty" 799).

Amar captures here a sense of the ongoing and increasing exceptionalism of Fourth Amendment doctrine, and it is important

to remember that there is already a kind of double (or triple) exception inscribed in the text of the Fourth Amendment itself. The amendment declares, in its first clause, that "the rights of the people to be secure in their persons, homes, papers, and effects against *unreasonable* searches and seizures shall not be violated," and then stipulates, in a second clause, that "no warrants shall issue, but upon *probable cause*" (emphases added). Not only does each clause in itself articulate an exception to the inviolability of persons and homes (which are open to "reasonable" searches, and to search warrants issued on "probable cause, supported by oath," etc.); but the grammatical relation of the two clauses is marked by an ambiguity that has sparked a long debate among legal scholars. As Luna remarks, once again introducing a certain note of mordant comedy to this dispute, "the comma between the two Clauses [. . .] has become a virtual Mason-Dixon line" ("Sovereignty" 791). As Luna also explains, a "conjunctive" reading assumes the second clause supports the first, meaning that all searches "are presumptively unreasonable without a warrant based on probable cause" (791). But a "disjunctive" reading, by contrast, reads the two clauses as distinct, meaning that only warrants themselves require "probable cause," and that warrantless searches are also permitted provided they are "reasonable" (791–22).

This, we argue, is the *original exceptionalism* of the Fourth Amendment, which thus provides no clear doctrine of privacy as such. The Fourth Amendment posits no original political wholeness to the body or the home; rather, it begins from an original (loop)hole, an always already puncturing of sovereign privacy, with the latter defined strictly, according to Catharine A. MacKinnon, as "conceptually [. . .] hermetic" and "inaccessible to, unaccountable to, unconstructed by, anything beyond itself" (190). Another way to say this: strict privacy, properly understood, would have some of the same characteristics as Leibniz's famed monads, which "have no windows, through which anything could come in or go out" (Leibniz n.p.). The Fourth Amendment, on the other hand, always leaves a "window" open to the eyes and ears of the State.

Indeed, as is well-known among legal scholars, "'reasonableness' may well be the law's favorite weasel word, beyond hard definition, simple in application and sufficiently elastic to reach nearly any result" (Luna, "Drug" 759). We should note here, too, the term's always potential linkage to the politico-philosophical idea of "reason of state," in which the stability and "security" of the State are believed to trump every other political consideration, including, of course, the privacy of its citizens. And this is not all. Historically, even the considerable flexibility already provided by the concept of "reasonableness" has not stopped the courts from

sometimes entirely eliminating warrant requirements and gutting the rules governing "suspicion" in non-warrant situations. U.S. Attorney General Alberto Gonzales, writing in defense of the NSA's warrantless wiretapping program, conveniently summarizes this progressive historical evisceration of the Fourth Amendment, enumerating numerous accepted exceptions to the warrant requirement that include, for example, the property of students in public schools, the drug screening of athletes and students involved in extracurricular activities, drug testing of railroad personnel involved in train accidents, and the search of probationers' homes (U.S. Dept. Justice 38).

We have written elsewhere about one other notable exception to the warrant requirement that is of particular concern here because of its direct theoretical linkage to the USA PATRIOT Act and therefore to FISA warranting procedures: the so-called "border exception," or what we have called "the permanent state of racial exception" (also, see Kerr). In a long series of Supreme Court rulings in the 1970s, the approximately 200,000 miles of the Mexico/U.S. borderlands were deemed exceptional with regard both to warrants and probable cause, thus permitting the U.S. Border Patrol to stop automobiles in random car stops and at checkpoints—searching for undocumented aliens—under a doctrine of suspicion that Chicano activists have long called "DWM" ("Driving While Mexican") (Michaelsen 96–97). In this way, Chicanos and Mexicanos have been subjected for decades to a rule of law in the borderlands that strips everyone riding in automobiles of even basic Fourth Amendment rights, as well as what the U.S. Supreme Court has called a "right to travel" that "has been firmly established and repeatedly recognized" (*United States. v. Guest* 757; and cf. Michaelsen and Shershow, "Practical Politics").

This overall doctrine of "border exception" was the crucial precedent for the FISA Court when it issued a rare public ruling in 2002 on the constitutionality of the dismantling of the "firewall" between law enforcement wiretapping governed by Title III (for example, by the FBI) and more generalized foreign surveillance operations governed by FISA law (CIA/NSA, for instance). In this decision, known as *In re: Sealed Case No. 02–001*, the three-member court suggested that the need to maintain the "integrity of the border" constitutes the sort of ongoing, permanent "emergency" that lays the constitutional foundation for the USA PATRIOT Act. This would be a rule of law in which, the court concedes, traditional "Fourth Amendment warrant standards" are not met, but in which we "come close" to meeting them. The only question that remains is whether "close" is the right word for a system in which the CIA, for instance, is entitled to wiretap whomever the

Secretary of State deems "an agent of a foreign power" (flexibly defined so as to equate the figure of the *typically racialized foreigner* with an *inherent criminality*) and to turn over any evidence of criminal activity directly to the FBI for prosecution (Michaelsen 93–94).

In other words, the ongoing, racialized application of the law of the U.S. Border Patrol and the USA PATRIOT Act has already stretched traditional Fourth Amendment requirements past the breaking point. The prosecution of all of the relevant cases falling within this network of emergency law, and the deportation of illegal immigrants by the United States Citizenship and Immigration Service, takes place in a legal environment that for decades has been dismantling the requirements of warrants and probable cause when it comes to persons of color. In effect, a permanent and fully-institutionalized exceptionalism, beginning in the Fourth Amendment and spreading progressively outward, has now dismantled the distinction between the "alien" and the "citizen" (or what Carl Schmitt called the "enemy" and the "friend") to such an extent that massive groupings of persons of color in the United States (Chicanos, Mexicanos, peoples of the southern Americas in general; and now Arab nationals, Arab-Americans, and Islamic peoples in general) live under what one has to call a fully-racialized rule of law.

Despite all of this, it does appear that the President's program, even on its face, does in fact controvert FISA law, even as inflected today by the PATRIOT Act, and even taking into account the multiple exceptions *already* built into FISA warrant procedures themselves. As noted, for example, in the original complaint filed in *ACLU v. NSA/Central Security Service* (2006), FISA law already permits warrantless wiretapping under conditions of emergency, war, and the investigation of foreign powers, for periods of three days, fifteen days and one year, respectively (ACLU Complaint 11–12). The President's completely warrantless program thus apparently circumvents a system that had already accorded the executive a virtual carte blanche when it comes to the gathering of foreign intelligence through wiretapping.[2]

So what did the President intend to accomplish via the program that has been officially acknowledged? Immediately following the revelations concerning the existence of the clandestine NSA wiretapping program, Secretary of State Condoleezza Rice appeared on the television program *Meet the Press,* and offered up her assessment of existing FISA law and the need for the NSA program:

> [. . .] it's important to talk about what [the President has] actually authorized. He's authorized the National Security Agency to collect information about the activities of a limited number of people with ties to Al-Qaeda so that there is not a seam between the territory of the United

> States and the territory abroad. One of the most compelling outcomes of the 9–11 Commission was that a seam had developed. Our intelligence agencies looked out, our law enforcement agencies looked in, and people—terrorists could exploit the seam between them. So the president is determined that he will have the ability to make certain that that seam is not there. (Rice)

Although Secretary Rice is explicitly discussing only the ''one foot'' NSA program, she seems also to be implicitly referring to the whole process in which the 2001 PATRIOT Act and its amendments have altered FISA law in order to collapse the distinction between laws governing the ''territory'' and those governing places and persons ''abroad.'' And indeed, we need to dwell on the particular figurality of her formulation, in which a so-called ''looking out'' and ''looking in'' become interchangeable. What does a state look like, both theoretically and practically, *when* and *where* it no longer has a ''seam'' between the inside and the outside? After all, all states have always defined themselves, first and last, on their occupation of a defined territory and on the integrity and security of their national borders. Given that Rice is discussing in general the conduct of an ongoing so-called ''war on terrorism,'' it is clear that the apparent symmetry of the looking-in/looking-out distinction merely conceals a process of bringing the outside in; or, in other words, Rice both advocates and describes certain politico-juridical innovations that involve bringing back to the ''homeland'' the techniques of surveillance and control formerly used on the rest of the world, and treating citizens as non-citizens—as enemies—for purposes of Fourth Amendment jurisprudence. Which is to say that the Fourth Amendment is, for this Administration, as ''obsolete'' and ''quaint'' as the Geneva Conventions' definitions of the rights of enemy prisoners (qtd. in Greenberg and Dratel 119). Although we have no doubt that the law is and will be racially applied, we finally would underline how Secretary Rice's Freudian slip (which equates ''terrorists'' with ''persons'') really forecasts the government's inability to shield its own citizens from itself, especially when the borderline at once opens and closes and the state begins to exercise its newly discovered inherent power to ''look inside.''

2. The State of Secrecy

> Yippee! You can't see me!
> But I can you.
>
> —Pink Floyd, ''Flaming''

To turn from the claims of the individual to be ''secure'' in his ''persons, houses, papers, and effects'' (always vulnerable, as we

have been seeing, to so-called "reasonable" intrusion) to the claims of the state to its "national security" (the ultimate goal guiding the "reasons" of state) is to confront a difficult combination of analogy and divergence. As Richard Tuck has shown, the autonomous social subject typically assumed in liberal political philosophy emerges hand-in-hand with, or perhaps even derives from, the vision of state sovereignty in international law. As Tuck writes, "the language in which we still describe this autonomous, right-bearing individual is in fact a language used originally to describe states or rulers" (844). As we will try to suggest, both the idea of a "state secrets privilege" and the idea of an individual "right to privacy," as they develop in American jurisprudence, continue to be inflected in problematic ways by this ancient analogy of the individual and the state. Such an analogy is also inseparable from what Carl Schmitt famously calls "political theology." Just as early-modern conceptions of monarchical power "identified the theistic God with the king," so modern theories of state sovereignty continue to envision the state itself as "an abstract person [. . .] a *unicum sui generis*, with a monopoly of power 'mystically produced' " (*Political Theology* 39). In short, as Schmitt concludes, "the state acts in many disguises but always as the same invisible person" (38). In more general terms, as Sissela Bok argues, prior to every administrative or military rationale for government secrecy is finally an "esoteric claim," an "aura of sacredness" originating historically with "the *arcana ecclesiae* of church, ritual and religious officials" and eventually transferred to the leaders of the secular state (172). Political philosophy has perhaps still barely begun to interrogate the effects of this sweeping analogical structure, in which political and personal sovereignty continue to inform one another and betray their own origins in this secularized political theology. Within the logic of this triple mirroring structure, the "reasons" and secrets of the State seem inevitably to trump those of the individual formed in its image, and the declaration "l'etat c'est moi" reveals itself as not merely the rubric for a vanished ideal of royalist absolutism but also as a frontier toward which all state executive power inexorable tends. And yet what other alternative to some model of representative sovereignty, of power ceded to an executive, or shared between "branches" of government that "check" and "balance" each other, is even conceivable today—save, perhaps, for a kind of radical anarchism that, within this same logic, must itself be envisioned as a world where autonomous and bounded individuals confront one another, in the Hobbesian manner, like miniature sovereign states, or what E.L.

Godkin calls "individual" "kingdom[s] of the mind" (qtd. in Solove and Rotenberg 4)?[3]

Given that the modern idea of state secrecy so obviously derives from a variety of ancient and early-modern doctrines and practices, it is striking to note that a formal "state secrets privilege" was established in American law only as recently as 1953, in the Supreme Court decision of *United States v. Reynolds.* The majority decision in this case acknowledges, on the one hand, that "judicial experience with the privilege which protects military and state secrets has been limited in this country," and yet also asserts, on the other hand, that such a privilege is "well-established in the laws of evidence," that its existence is "conceded [. . .] by the most outspoken critics of governmental claims to privilege," and that "the principles which control the application of the privilege emerge quite clearly from the available precedents" (6–7). This double formula will more or less characterize the whole, relatively brief history, in America, of the judiciary's encounter with state secrecy. The earliest of the precedents in American law cited by the court is the treason trial of Aaron Burr in 1807. Here, Chief Justice John Marshall, acting as judge in Burr's trial, initially allowed a defense motion to issue a *subpoena duces tecum* for certain documents to President Thomas Jefferson, who responded, in a letter to Virginia District Attorney George Hay on June 17, 1807, by agreeing to turn over certain documents while simultaneously claiming the right, as the executive, to withhold others:

> With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication. (Coombs 74)

The right to secrecy that Jefferson asserts here is, at one and the same time, limited to a single individual, the "executive functionary," and yet said to be an essential part of the conduct and affairs of all "nations." Jefferson's argument thus seems to operate via a certain deliberate oscillation between the claims and perspectives of the public and the private. Documents of obvious state importance such as grants, patents and proclamations are public; but at least some of what Jefferson calls "mere executive proceedings" must "remain known to their executive functionary only." These

latter are claimed as secret because they are private and personal (that is, they are "mere" proceedings pertaining only to the person from whom they proceed) and yet also because their disclosure might harm the "public interest." And the determination *of* such public interest, and of the precise degree of publicity that will preserve that interest, is in its turn reserved to the executive as "sole judge." Although Jefferson does not yet use this term, the state secrecy envisioned in this passage is precisely what would be later called a *privilege*—that is, a kind of private law, a law of the private (*privus lege*)—which seamlessly unites the claims of the individual executive and the nation for whom he speaks, and yet which only fulfills its purpose (to preserve the public interest) insofar as it paradoxically *limits* the public's own knowledge of the "conduct of *their* affairs." In ruling on the subpoena, Justice Marshall first asserts that, with regard to an executive, it is "certain" that "there may be matter, the production of which the court would not require." He also concludes that the documents Jefferson refused to produce were not, after all, crucial to the defendant's case. But if they had been, he adds: "What ought to be done, under such circumstances, presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country" (Coombs 51).

This, of course, is the unmistakable paradox that attends the very idea of state secrecy, as later decisions would explicitly acknowledge: that it is something best acknowledged by being unacknowledged, and best considered by not being considered. Some seventy years later, in *Totten v. U.S.* (1875) the Supreme Court first explicitly recognized and deferred to a particular domain of absolute secrecy in state affairs, one having to do with its activities of espionage and intelligence-gathering. *Totten* is regularly cited in more recent decisions relating to stage secrecy of various kinds, and its basic conclusions were strongly upheld by a unanimous Supreme Court as recently as 2005 in *Tenet v. Doe.* At issue in *Totten* was a suit for recovery initiated by the estate of a man who had been personally hired by President Abraham Lincoln to spy on the Confederacy during the Civil War, and who had allegedly never been paid his promised fee. Government secrecy is thus doubly at issue in a case that, in the first place, concerned the employment of "secret agents," and, in the second place, constrained this court to consider the very domain that its decision affirms should not be considered by courts. The lower court had rejected the claimant's suit by ruling that the President did not have the authority to contract with a private individual for secret services. But the Supreme Court affirms, by contrast, that the President "was undoubtedly

authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents.'' Rather, as they write, ''Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed'' (*Totten* 106). In other words, the suit constituted in itself a betrayal of the contract whose enforcement was at issue in the suit, because, as the Court writes, ''The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery'' (107).

In the end, the essential paradox of state secrecy produces a certain nexus of public and private claims in which, here again, a faint but unmistakable note of comic incongruity seems to announce itself. A secret service is ''sometimes indispensable to the government,'' the Court observes, yet the very secrecy of a secret service would be rendered impossible ''with liability to publicity.'' Therefore, in ''cases of contract for secret services with the government [. . .] the existence of a contract of that kind is itself a fact not to be disclosed'' (107). But isn't the existence of the contract already necessarily disclosed within the very discourse pertaining to its non-disclosure? The plaintiff's claims are rejected, however, because of what can only be described as his *personal* failure to observe a *state* secrecy that is thus reaffirmed in the very midst of its own manifest exposure. The claims of state secrecy are here absolutely affirmed even though they cannot quite, in practical terms, be enforced, insofar as such enforcement is itself rendered moot by a suit whose existence the Court deplores even as they participate in it. And such secrecy is justified quite specifically in its analogical relation to matters that, around a century later, would be understood as the domain of personal privacy:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government. (Totten 107)

The ''much greater reason'' that attends the application of this private-public principle to state secrecy can only stem, we presume,

from the collective claims manifest in the idea of the state itself, which would as such out-balance the merely private claims of the confessional or the marital bond, even as the "general principle" of all these is declared to be identical. The state's claims to secrecy are therefore at once precisely analogous to, even as they always in principle transcend, all individual claims to "confidentiality" or privacy.

In *United States v. Reynolds,* the next important case in this line of cases, the widows of civilian observers killed in the crash of a military aircraft had sued the government for damages under the Tort Claims Act. The Air Force refused to release the text of the accident investigation report, claiming that "the aircraft and its personnel were 'engaged in a highly secret mission' [. . .] [and] that the material could not be furnished 'without seriously hampering national security' " (*U.S. v. Reynolds* 1). As we have already observed, the court here stipulates that American law has little experience with such questions, and yet also claims that a privilege has *always* been given to "military and state secrets." Thus the court codifies for the first time an evidentiary principle with sweeping juridical implications by simply assuming that such a principle already exists. This "state secrets privilege," as it is now formally named, is thus a principle about which little is yet known, and about which perhaps little *can ever be* known, given that it pertains to aspects of statecraft that cannot or must not even be discussed, but whose absolute force and necessity is nevertheless declared to be beyond all dispute. Twelve years later, Justice William O. Douglas, writing for the majority in *Griswold v. Connecticut* (1965), would famously locate a right to individual privacy in a "penumbra" of the "specific guarantees in the Bill of Rights" which are "formed by emanations from those guarantees" (*Griswold* 484). Douglas' terminology, with its incongruous echoes of an occult or quasi-theological discourse, may perhaps have been more convincingly applied to the state secrets privilege, which is here envisioned as, so to speak, the unmistakable emanation of a power that itself remains necessarily hidden, and that is indeed knowable at all only in its manifestations and effects.

Indeed, the *Reynolds* decision explicitly analogizes the state secret privilege to the Fifth Amendment privilege against self-incrimination, one of the fundamental constitutional rights from which, according to Douglas, a more general right to personal privacy emanates. This analogy between the individual and the state is cited ostensibly only so as to limit the privilege accorded to either; that is, the court argues that, in either personal or state claims of

privilege, judges can and should inquire about the general circumstances in which the privilege is invoked and only then decide whether or not to defer to it. In either case, they write, ''too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses'' (8). Yet this is another case where an apparently perfect conceptual symmetry conceals an obvious disparity. The privilege against self-incrimination protects an individual from being constrained to assist the State's exercise of its power *on* that individual. Citizens necessarily acknowledge their general acquiescence to the rule of law precisely when they invoke their Fifth Amendment rights and refuse to testify. But when a government declares something secret it does so precisely because of ''reasons of state'' that are understood to transcend any moral or practical judgment above and beyond themselves (an assumption whose continuing power is attested by the Bush administration's refusal to place the United States under the jurisdiction of international legal institutions). The same point is particularly obvious in the current cases involving warrantless wiretapping by the NSA, where the government has once again invoked the state secrets privilege and claimed that to make any judicial determinations whatsoever about the particulars of any of the many suits currently unfolding (even the basic question of whether plaintiffs such as the ACLU or the CCR have legal standing to challenge the practice in court) would compromise national security. In the CCR case, for example, federal Judge Gerard E. Lynch, in oral arguments on September 5, 2006, told the government's lawyer that ''It's pretty uncharted ground that you're asking me to get on,'' and then added, ''Or, you're asking me to stay off of it'' (Liptak).

3. Separation of Powers or the Pitting of Force Against Force?

> Q.: Sir –
>
> THE PRESIDENT: You asked a multiple-part question.
>
> Q.: Yes, I did.
>
> THE PRESIDENT: Thank you for violating the multiple-part question rule.
>
> Q.: I didn't know there was a law on that. (Laughter.)
>
> THE PRESIDENT: There's not a law. It's an executive order. (Laughter.) In this case, not monitored by Congress—

> (laughter)—nor is there any administrative oversight. (Laughter.)
>
> —Exchange between George W. Bush and unidentified reporter, Presidential Press Conference, 19 December, 2005 (Bush)

Given the state of the Fourth Amendment, it is not surprising to find that the left-right political debate that emerged in the wake of the disclosure of the NSA program on 16 December 2005 was muted at best. In the days that followed, a few oppositional positions were staked out: Senators Russell Feingold (D-Wisc.) and Carl Levin (D-Mich.), for instance, situated themselves farthest to the left in the ensuing debate by claiming that FISA law necessarily trumps the President's emergency powers and could not be circumvented; thus, the President had broken the law (see Feingold; Levin). But this position was not without a certain equivocation regarding the Fourth Amendment implications. While expressing outrage that American phones were being wiretapped without warrant, Feingold's position is that existing FISA/PATRIOT Act law *already* provides the President everything he needs, since FISA historically has made "no denials of these requests" from the Attorney General. (The ACLU complaint also notes that FISA courts denied only four of 19,000 warrant applications made to it between 1978 and 2004 [ACLU Complaint 12].) And Levin sought to make clear his view that something like the framework of the PATRIOT Act remains "essential" so long as probable cause is clear and the Attorney General is not going on a "fishing expedition" of Americans' personal records. (Here, it should be clear, Levin does not seem to grasp the reach and extent of the "border exception" in American Fourth Amendment law, in which fishing expeditions are the name of the game.) Thus, the Feingold and Levin position does not precisely question *what* the President is doing—merely *how* he is doing it.

Senator Charles Schumer (D-NY) sketched out a more moderate democratic response when he argued that the President, recognizing the inadequacy of FISA law to meet the demands of the war on terrorism, should simply have come to Congress for additional help: "And my guess is we would have given them what they wanted. We just would have made sure there were safeguards there" (see Schumer). Indeed, relatively few Democrats have even been willing to affirm the adequacy of existing FISA law, or to deny that the President has no additional powers beyond its authority. As of this writing, Fall 2006, a U.S. House of Representatives bill to

that effect (H.R. 4976), introduced on 15 March 2006, has been sponsored and co-sponsored by only 15 of 535 members (see Library of Congress).

In other words, most members of Congress, on both sides of the aisle, not only accept the exceptionality both of Fourth Amendment jurisprudence in general and of the established FISA warrant process in particular, but seem positively eager to grant the President even more powers to order wiretaps outside of either framework. We must of course note the radically different position sketched out by Judge Anna Diggs Taylor in her memorandum opinion in the ACLU lawsuit, which takes what one must call an oneiristic view of privacy law by declaring that the NSA program is "obviously in violation of the Fourth Amendment" (*ACLU v. NSA* 31, and see 28–31). However commendable her attempt to deny, by a kind of solitary judicial fiat, the many evident holes we have noted in the Fourth Amendment, Taylor's decision, as nearly every commentator has suggested, leaves itself open to almost inevitable reversal by higher courts; and, as already noted, elected officials have by no means rushed to adopt anything like her position.

We conclude that, at least as far as Congress is concerned, the NSA "scandal," if one can even call it that, is not really about the Fourth Amendment and the right to privacy at all, but rather, about the balance of power between the executive and the legislature. Even Feingold and Levin, for instance, are clearest in their positions when it comes to the question of checks and balances, and they assert above all simply that Congress cannot be left out of the loop on something like an NSA wiretapping program. Yet even the Congressional Research Service is equivocal about whether Congress even has the "authority to cabin the President's use of any inherent constitutional authority" (Congressional Research 29). On this score, the CRS report simply concludes that "There are differing views" (29).

The NSA wiretapping case could thus be summarized quite simply. The President, under an extreme variant of what is called "unitary executive theory,"[4] has asserted not only his absolute control of the executive branch, but also his ability to house within himself versions of all of the other "separate" powers. He is thereby also asserting, more specifically, his own inherent ability to ignore or circumvent (Congressionally-approved) FISA law and even to provide his own (quasi-judicial) constitutional oversight for the NSA, at least during states of emergency—and probably the rest of the time as well. And the Congress, for its part, has at most countered by asserting, in the words of Senator Levin, that the President "is governed by the laws we write" (Levin).

What the case constitutes, therefore, is precisely what Levin says he wants to avoid: a "constitutional crisis" in which the powers of the executive and the legislature come into fundamental conflict. Since 1952, the most recognized way out of this dilemma is through reference to the so-called "Jackson test" embedded in the U.S. Supreme Court decision *Youngstown Sheet & Tube v. Sawyer*, a case that involved judging the constitutionality of President Truman's order to seize control of the steel industry during the Korean War in order to avert a union strike. Judge Taylor's memorandum opinion in the ACLU suit, for instance, fundamentally turns on this test, even though Justice Robert H. Jackson's concurring opinion in the Youngstown case was merely one of six quite distinct majority opinions in the case. The Jackson test, a deceptively simple one, calls for relations between the President and Congress to be placed on a continuum. At one end of this continuum, the "President acts pursuant to an express or implied authorization of Congress," and in such cases the President's "authority is at its maximum" (*Youngstown* 635). At the other end, "the President takes measures incompatible with the expressed or implied will of Congress," and therefore finds his total power and authority "at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter" (637). One can see the Jackson test clearly in action in Judge Taylor's decision. She treats the FISA law as the "expressed statutory policy of our Congress," concludes that the President's power is therefore at its "lowest ebb," and therefore invalidates the NSA wiretapping program (*ACLU v. NSA* 36). She is on firm ground on the first of these three points, but fatally weak on the third, since the Jackson test explicitly recognizes the President's "own constitutional powers," and a "low ebb" does not imply that there is no water at all.

Indeed, the Jackson concurrence in the Youngstown case makes bracing reading for anyone raised to believe that the "separation" of powers is a hard and fast principle of the U.S. Constitution, and that the Constitution makes crystal clear the difference between legislating, executing, and judging the law. Jackson explicitly concedes that, between the two poles where the powers of Congress or the President prevail, and in the middle section of his continuum of power, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain" (*Youngstown* 637). Even more dramatically, Justice Jackson concludes his opinion with a complexly-worded warning, at once mournful, nostalgic, and astonishingly aware of

the difficulties of reining in a sovereign exceptionalism always embodied in the executive branch:

> Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. Indeed, Woodrow Wilson, commenting on the President as leader both of his party and of the Nation, observed, "If he rightly interpret the national thought and boldly insist upon it, he is irresistible.[. . .] His office is anything he has the sagacity and force to make it [. . .]."
>
> I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers. (654)

We will argue that the implications of Jackson's vision of constitutional governance are even graver than they appear, for what he portrays as an extraconstitutional and merely historical "supplement" to such governance (political party power) is in fact its central and original condition of possibility. "Party politics" have not somehow invaded and contaminated a pristine, originally good space of "real executive power"; rather, such a phrase refers merely and simply to the specific set of opposed political forces that have as it were laid down their arms and allowed themselves to be included within a particular governmental system (to the exclusion, as it must always be remembered, of a wide variety of other political forces). Unless one believes in the tooth fairy, and that there was actually a time in the United States without "party politics," one can only conclude that "real executive power" has always been saturated and conditioned by what Jackson portrays as this dangerous supplement to constitutional authority.[5]

In other words, Jackson envisions and deplores an alleged historical *decline* that has produced a situation "now" in which the Constitution alone can no longer be counted on to ensure that the Executive remain "under the law" and in which power often slips "through the fingers" of a Congress necessarily under the sway of "party politics." Indeed, Jackson goes so far as to imagine a future in which "such institutions"—that is, laws "made by parliamentary deliberations" that even the executive must obey—

"may be destined to pass away"; and in the face of this dire prospect Jackson himself can do no more than declare that "it is the duty of the Court to be last, not first, to give them up" (655). We suggest, on the contrary, that this precarious situation is an always inherent possibility of the U.S. separation of powers, and perhaps of any scheme of separate governmental branches. In part, perhaps, this is because both the executive and the judicial branch always in principle legislate when they interpret the legislature's laws.[6] But Jackson clearly envisions something even broader: a system in which each branch remains in the space of Napoleon's maxim, possessing exactly as much power as they are willing to assert. The office of the President, as Jackson concludes, "is anything he has the sagacity and force to make it," and in the end, "no one, perhaps not even the President, knows the limits of the power he may seek to exert [. . .] and the parties affected cannot learn the limit of their rights" (655). Thus this extraordinary text, read not so much against the grain as with simply a clear-eyed view of its manifest insights, is a well-nigh Foucauldian account of a system not ordered by internal "checks and balances" but rather one in which force is simply pitted against force.

We recognize, of course, that all Constitutional (and, indeed, legal) interpretations are necessarily at war with one another, and that no single mode or method of interpretation can be absolutely decisive in Constitutional questions (indeed, we side with Derrida who advocates "following a rule of law" but also insists that every decision constitutes a "reinstituting act of interpretation" ["Force" 23]). Nevertheless, we suggest that, contrary to arguments being formulated today both on the Right and the Left, a rigorous analysis of the founding fathers' so-called "original intent" provides no clear evidence, on the one hand, for a "unitary executive" (whose decisions necessarily trump those of the other branches), nor, on the other hand, for any absolute "cabining" of executive power.

The very *locus classicus* of original intent, *The Federalist Papers* (1787–88), refuses and refutes any assertion of unchecked executive power, and indeed portrays a kind of original aporia at the core of American governance. James Madison is clear in *Federalists* 47 and 48 that the antifederalist objection to the "mixture of powers" is wrongheaded, and that Montesquieu's maxims regarding separation of powers have been misinterpreted (Kammen 187). Montesquieu, according to Madison, fully recognized the need for "*partial* agency in" and some "*controul* over" each power by the others (188).[7] "Separation" is paradoxically reliant upon that which is "connected and blended" in the first place, "so as to give

each a constitutional controul over the others," although "neither of them ought to possess directly or indirectly, an overruling influence over the others" (193). Madison also notes that each of the three branches of government "should have a will of its own" (202), and employs warlike metaphors in describing the clash of these separate wills. He suggests, for example, that each branch should "resist encroachment of the others" by making "provision for defence," and that the executive "should be fortified" (203). His rhetoric seems to evoke a vision of powerful leaders set against one another like Renaissance princes in a network of city-states, arguing that "ambition must be made to counteract ambition," and that "the different governments will controul each other" (203, 204–5). Finally, however, Madison in *Federalist* 49 cites Jefferson, even as he attempts to "cabin" the democratic energies unleashed in the latter's thought:

> The several departments [branches] being perfect co-ordinate in terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves; who, as the grantors of the commission, can alone declare its true meaning and enforce its observance? (Kammen 199)

Though the main lines of Madison's thought run counter to Jefferson's here, he is still willing to affirm this sovereignty of "people power"—at least on those "great and extraordinary occasions" when there can be no recourse to anything or anyone but what Rousseau calls the "general will." What we typically call separation of powers, in other words, is best understood as the pitting of three competitive, equally well-armed forces against each other, with the Constitution's "We the People" as referee.[8]

Thus, in the NSA wiretapping case, it is best to understand the posturing of both the President and the Congress as just that: less a standing on principle than a rhetorical campaign to take the ground of the other. There are, in short, no certainties here, and we can have no easy confidence in the victory of either side. But one must, at all events, welcome any outcome that is more rather than less democratic, and that thus involves an essential *sharing* of sovereignty. In both Madison's and H.R. Jackson's vision, sovereignty is of course presumed to be shared, but such sharing can never simply be taken for granted. Neither unanimity nor an orderly method for sorting rights and claims can ever be simply presumed. Accordingly, what we would most seek to salvage from such

visions, whatever their other failings, is their vigorous sense that each side must retain "controul" over the others, in order to keep open more space and time for what Derrida calls "fresh," responsible, and possibly more just decisions. The more sovereignty is shared, *in* and *with* the public, rather than being transacted in secret by the mere elites who control the game (or battle), the more democracy might flourish.

So who decides whether the NSA program is acceptable or not, and even constitutional or not? "We" do—at least theoretically, and always potentially in practice. In this way both sovereignty and law always find their ultimate ground in "our" politics.

4. The Limits of Privacy

> I'd rather have my country die for me.
>
> —Jefferson Airplane, "Rejoyce"

The arguments we have pursued in this essay finally confront one another in a pattern of tension and contradiction. We have suggested, for example, that a general analogy of the person and the state continues to inflect our theoretical understanding of both. Yet a general right to personal privacy has so far been justified only on a bewildering assortment of different legal and constitutional grounds, and as such always appears to be subject to an array of exceptions; whereas the privilege of state secrecy remains today a kind of monolithic and inviolable barrier to what one might at least imagine should be the essential openness of democratic governance. And the vision of the state as *unicum sui generis*, a kind of mystical source of "unitary" power vested in the executive as the uniquely privileged protector of a primordial "national security," meets its own practical contradiction in that interminable *agon* of warring forces among the various "branches" of government that we have also tried to sketch. To reach toward something like a conclusion, we now confront one final implicit paradox or contradiction, which begins when one observes how a Fourth Amendment jurisprudence always-already hollowed out by exceptions nevertheless assumes, as the source, goal and justification of an individual right to privacy, a kind of bounded, autonomous and sovereign personal subject: in short, a subject that analogically resembles a sovereign state.

In fact, however, it has been so far virtually impossible to think privacy as a legal *right* without, as it were, distorting and subverting its very concept. This word, privacy, etymologically conveys the

idea of a withdrawal or separation from other beings, a kind of deprivation, and thus seems to indicate in itself how singular being is constituted, not in some sovereign and autonomous solitude, but rather by what Jean-Luc Nancy calls an "originary or ontological 'sociality,'" a "being-in-common" (Nancy 28 and *passim*). Indeed, the word itself seems to figure singular being as inseparable from the always imminent and immanent prospect of deprivation or separation from other beings, which is to say from finitude and mortality itself. In this sense, what is usually called "privacy" must finally be grasped as the sphere of what Derrida calls "the secret," a term he uses to designate, not the claims of the State to shield itself from its own citizens, but rather a sphere of absolute singularity which is shared by all only because it is *not* shared, and which "interminably disqualifies any effort one can make to determine it" (Derrida and Ferraris 58).

Within the law, however, privacy presents itself quite otherwise: as the privileged and highly specific expression of a particular determination of "Man" that is itself evidently bound up in the same political theology that founds the state. Although this is not the place for a detailed survey of the long and problematic history of the right to privacy in American jurisprudence, let us try to lay out the general parameters of this broad point with a few brief and suggestive citations. Samuel D. Warren and Louis D. Brandeis, in their immensely influential essay "The Right to Privacy" of 1890, a text cited by innumerable legal decisions right up to the present moment, defines privacy as the protection of the "*dignity* [. . .] of the individual" and of "the *sacred* precincts of private and domestic life" (195, emphases added). The *Griswold* decision of 1965, in its closing lines, similarly denounces as "repulsive" the idea that the State might ever invade "the *sacred* precincts of marital bedrooms" (485) and declares that various specific practices (such as, in this case, the right to purchase contraceptives) should be accorded what it calls the "dignity" of fundamental rights (482). A unanimous Supreme Court in *Schmerber v. California* (1966) also asserts in general terms that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State" (767).[9] And, finally, Justice Sandra Day O'Conner, writing for the majority in *Planned Parenthood v. Casey* (1992)—a decision which famously and narrowly reaffirmed *Roe v. Wade* and the general right to reproductive choice—describes the right to privacy as protecting, above all, "personal dignity and autonomy" (882). In this conventional formulation, the realm of personal liberty, choice and autonomy—the realm, so to speak, of person-ality in every sense—is to be protected, but

only insofar as it is a source and expression of an ideal of "human dignity." We have argued elsewhere that the history and prevailing conception of such dignity is inseparable from a notion of the sacred (and hence from the same political theology that it might seem to challenge), and always characterized by a certain duplicity or paradox by which dignity is understood at once as the ground or source of legal rights and yet also something always in need of protection *by* the very right whose rightness it justifies (Michaelsen and Shershow, "Torture" 188–89). To see the consequences of this problematic formulation in the present context, one perhaps need only juxtapose the recent District Court decision in *El-Masri v. Tenet* (2006), a case involving the practice of "extraordinary rendition" whereby suspected terrorists are kidnapped and sent to other nations for interrogation and probable torture. In this case, the suit of German citizen Khalid El-Masri, who claimed that he had been subjected to such rendition, was dismissed by the judge following the government's invocation of the state secrets privilege. Despite the fact that the government had already conceded the general existence of rendition as a practice (in comments by Secretary of State Condoleezza Rice and others that are directly cited in the decision), and had even acknowledged that this plaintiff had in fact been mistakenly subjected to it, nevertheless, the judge concludes, "El-Masri's private interests must give way to the national interest in preserving state secrets" (14)—because "the state secrets privilege [. . .] is in fact a privilege of the highest *dignity*" (7). It is perfectly clear, here again, that we are dealing with a situation in which the dignity of the mere individual must always in principle "give way" to the analogous but transcendent dignity of the state.

But this is then the moment to reference a now-familiar point that numerous scholars, journalists and cultural critics have observed and deplored in recent years: that a myriad new technologies of electronic surveillance and data analysis have been "permitted to undermine sanctuaries of privacy that Americans took for granted throughout most of our history" (Rosen 25). An exemplary argument is that of Daniel J. Solove, who argues strongly that, in the Information Age, technology has made obsolete what he calls the "secrecy paradigm" of privacy law, according to which only that which is private—that is, deliberately concealed or hidden from view—is understood to be legally protected. "Unless we live as hermits," he argues, "there is no way to exist in modern society without leaving information traces wherever we go" (Solove 142). The research of Solove and many others suggests that even the most intimate borders of personal choice and

inclination are now permeable: we cannot communicate, consume or travel without leaving digital footprints and a range of other information that others can collect, compile and exploit. As Derrida has also argued, communication technology "is on the way to transforming the entire public and private space of humanity, and first of all the limit between the private, the secret (private or public) and the public" (*Archive* 17).

In other words, it is evidently no longer possible, if it ever was, to exist in the undisturbed "dignity" of a bordered self. As we cited above, Nancy argues that singular being is itself always constituted by an *ex-position* of beings to one another (Nancy 26, 58 and *passim)*; but today one must recognize such exposure in the manifest practical conditions of our social and political life. Today, therefore—to risk a schematic formulation with deliberate theoretical echoes—the inside is now the outside. But the current collision of techno-science, sovereignty and law manifest in the NSA scandal and the war on terror further suggests, perhaps, that this signal formula must also be reversed; that the outside is now the inside. On this point, indeed, both the most vigorous advocates of an unbridled American power, and the thinkers whose patient analyses of sovereignty and community inform our argument here, seem to converge in a certain ironic agreement. In the aftermath of the 9/11 attacks, Derrida observed a variety of ways in which they seemed to involve a mechanism of what he calls "autoimmunity": the terrorists were trained here, they used American planes to attack America, and so forth, and they neither represented nor were locatable in any sovereign enemy state, so that "no geography, no 'territorial' determination, is thus pertinent any longer for locating the seat of these new technologies of transmission or aggression" ("Autoimmunity" 101). As Derrida has also argued, in part through his rigorous readings of Carl Schmitt on "the political," it has always been difficult or impossible to determine rigorously the line between inside and outside in a political order in which all "friends" are always already potential "enemies" and in which "party politics" are finally inseparable from the "ever present possibility" of "civil war" (Schmitt, *Political* 32; Derrida, *Politics* Chs. 5–7). One perhaps need only recall the accusations of disloyalty and even treason that so quickly greeted anyone raising even moderate opposition to the Bush administration's policies in the war on terror to see this point vividly realized in the present situation. Yet today, as we have partly seen, it is the proponents of American power themselves who seem to embrace such arguments, attempting (as Secretary Rice does in the lines cited previously) to remove

the "seam" between inside and out, or declaring (as Vice President Richard Cheney did on September 11, 2006) that what we have learned from 9/11 is, above all, "that oceans do not protect us and threats that gather thousands of miles away can now find us here at home" ("Solemn Tributes").

As we have also already observed, however, and as the NSA scandal again vividly illustrates, the administration's response to this blurring of national and personal boundaries has been, so to speak, to subject the inside to the outside: to flatten the distinction between the citizen and the alien, the friend and the enemy, and so, finally, to produce, both at home *and* abroad, the figure that Giorgio Agamben calls "bare life" (see, especially, *Homo Sacer*) or what Aristotle calls the "tribeless, lawless, hearthless one" (Aristotle 1129). In other words, the Administration responds to the "new" openness of borders by installing fear at the heart of our civil and political life, using it to justify an ever greater secrecy of state and, correspondingly, ever more assaults on the beleaguered "secrets" of singular beings.[10] Here is the source of the questions repeatedly asked, as they must be, of the Bush Administration: how widespread is the warrantless wiretapping program? Who precisely is being monitored and does it include racially profiled Arab and Islamic persons, lawyers, journalists, political organizers, and academics, whose work necessarily involves overseas calls to perceived "hotspots" of terror? How many of "us," in other words, are now at risk of the loss of a constitutionally protected "hearth" or home? And in what ways is the NSA program "political" through and through, targeting in particular all those who seek to promote various forms of peace or justice?

Beyond even these urgent questions, however, we also assert here the absolute exigency of that even broader practical and theoretical project of turning all such policies, and even the prevailing concept of privacy itself, inside-out. At home, this project will certainly involve familiar liberal and progressive measures such as an insistence that warrants be based on "individualized" suspicion and that new mechanisms of oversight regulate the public *and* private agencies currently collecting and analyzing our personal information. But such laws must be enacted and enforced not out of vain fantasies that there will ever be some sacred "realm of personal liberty which the government may not enter" (*Planned Parenthood* 847), nor merely to endlessly produce and reproduce sovereign and "dignified" citizen-subjects, but, rather, in the name of that absolute "secret" that "has to do with not-belonging" and "the sharing of what is not shared" (Derrida and Ferraris 58–59). Abroad, this project will involve a state "sovereignty" newly inflected, for example, by something like the thought of Georges

Bataille's: that is, a sovereignty so powerful that it can make its own borders tremble (cf. Shershow 202 and Michaelsen and Shershow, "Beyond" 301). This new and difficult thought will necessitate unprecedented decisions that might include, for example: the withdrawal of the United States' military presence in Saudi Arabia and the rest of the vast surrounding area (which "the U.S. government has always understood was a root cause of al-Qaeda's terrorist activities" [Johnson 241]); a just, rapid and internationally brokered resolution of the problem of Palestine; an embrace of the nascent institutions of international law (such as the International Court of Justice), and a turning-away in general from neo-liberal fantasies of global dominance and our (always unstated) claims to control the world's oil supply.

At any rate, one thing is clear: the question of the Fourth Amendment and warrantless wiretapping does not exist in a vacuum; indeed, each and every question that touches on the United States' legal and economic relations to the world bears on our own schedule of rights. Can we imagine, as we must, a Bill of Rights premised, in the first place, on a strange type of "security" which does not stem from the political idea of "fear" (see Robin)? Or, to put it another way, can we find the will to sacrifice certain kinds of security (such as those provided by rogue-state terrorism and neoliberal aggression) for others, as yet untried, founded in what Derrida calls "the right to the secret" (Derrida and Ferraris 59)? And, furthermore, can we affirm the sort of *insecurity* that might open up a global future radically incommensurate with the past? What therefore remains to be thought are policies which might reverse the legal flow from outside to inside, and make more likely not only that U.S. citizens bear such rights, but every other citizen and subject of the "world." This will not be a "work," as such (an aspiration toward or coming to rest at, for example, a Henry Kissinger-style global "détente" and its coercive, counterrevolutionary implications [see Suri])—but rather an unworking of U.S. sovereignty: or, more precisely, a turning of sovereignty against itself in myriad ways. And such unworking, as we have said, depends upon whether "we" can count on "ourselves" to open "ourselves" to the recognition that what is and will always remain secret is, quite precisely, *nothing*.

Notes

[1] The word secret descends from the Latin *secretum*, meaning hidden or set-apart, the past-participle of *secernere*, to separate, to sift. See OED "secret," and cf. Bok, 6.

[2] We should note that we are discussing the theoretical implications only of that portion of the NSA program(s) taken up in the many lawsuits filed in the wake of the White House acknowledgement: the data mining and monitoring of telephone calls with "one foot" in the U.S. and the other in a foreign country. We thus do not even consider here the many other forms and media that can be used for data mining and surveillance operations, nor the very real possibility that the Administration also has authorized the warrantless monitoring of calls with both feet in the U.S.

[3] Godkin published two articles about privacy in 1890 that are commonly thought to have significantly influenced Warren and Brandeis, and hence the whole history of privacy law in the U.S. (Solove and Rotenberg 4–5).

[4] See Calabresi and Yoo (two articles); Yoo, Calabresi and Nee; and finally Yoo, Calabresi and Colangelo, all in the bibliography, for the most elaborate attempt by law professors to lay out the original claims of unitary executive theory. For some rebuttal, see Sunstein and Froomkin. For a reading of the Bush presidency in its relation to the unitary executive, see Kelley.

[5] We are following here Derrida's celebrated reading of Rousseau in *Of Grammatology* (1967).

[6] Alexander Hamilton remarks, "He who is to execute the laws must first judge for himself of their meaning," and the same, of course, goes for the Supreme Court (qtd. in Mansfield 277).

[7] And we note that this is a possible reading of Montesquieu. See Montesquieu (164).

[8] Gerhard Casper demonstrates that in the texts of the "founding fathers" a "'pure' doctrine of separation of powers can be no more than a political science or legal construct" (22; see also 37).

[9] On should note, however, that in this case, the court actually upheld the right of the police to subject a defendant to an involuntary blood test.

[10] As Weaver and Pallitto observe, the use of the state secrets privilege in courts has "grown significantly over the last twenty-five years," and has been used by the Bush administration in the last few years "with offhanded abandon." These writers also note President Bush's executive order 13233 that permits former presidents, and even their heirs in perpetuity, to assert a state secrets privilege for their papers.

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