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The State Secrets Privilege and the Abdication of Oversight

“In proportion as the nation’s statecraft is increasingly devoted to the gainful pursuit of international intrigue, . . . it will necessarily take on a more furtive character, and will conduct a larger proportion of its ordinary work by night and cloud.” . . . The people . . . would tend to accept this in a complaisant, even grateful, spirit on the growing conviction that night and cloud best provided for national security.¹

I. INTRODUCTION

On January 17, 2006, the American Civil Liberties Union (ACLU) filed a complaint for declaratory and injunctive relief against the National Security Agency (NSA), alleging constitutional violations resulting from a secret domestic surveillance program.² The *New York Times* published leaked information about this secret program the previous December,³ raising civil libertarians’ concerns about unsupervised surveillance of Americans.⁴ This suit recalls a series of actions brought 28 years earlier by Vietnam War protesters who also had been the subjects of NSA surveillance,⁵ and raises the same issues of secrecy, national security, and the constitutional rights of individuals. The federal judiciary has been presented with the opportunity to revisit and reconsider the state secrets privilege by this and other cases in which the government has recently claimed the privilege.⁶

1. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 337 (First Mariner Books 2004) (1973) (quoting THORSTEIN VEBLEN, *ABSENTEE OWNERSHIP* 444 (1954)).

2. Complaint at 2, *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-cv-10204), *available at* http://www.aclu.org/images/nsaspying/asset_upload_file137_23491.pdf; Press Release, American Civil Liberties Union, ACLU Sues to Stop Illegal Spying on Americans, Saying President Is Not Above the Law (Jan. 17, 2006), *available at* <http://www.aclu.org/safefree/nsaspying/23486prs20060117.html>.

3. James Risen & Eric Lichtblau, *Bush Let U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

4. *See, e.g.*, Press Release, American Civil Liberties Union, ACLU Demands Records About Warrantless Spying by National Security Agency (Dec. 20, 2005), *available at* <http://www.aclu.org/safefree/spying/23150prs20051220.html>.

5. *See Halkin v. Helms (Halkin I)*, 598 F.2d 1 (D.C. Cir. 1978); *and Halkin v. Helms (Halkin II)*, 690 F.2d 977 (D.C. Cir. 1982).

6. *See Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Ore. 2006) (suit by alleged subject of communications interceptions against President Bush for, *inter alia*, violation of the Foreign Intelligence Surveillance Act in monitoring telephone conversations through the

The state secrets privilege is a common law doctrine of evidence that allows a court to refuse to admit evidence in civil trials when the executive claims that disclosure would jeopardize national security.⁷ It was first crystallized during the Cold War and has since been invoked many times to obstruct discovery requests in a wide variety of tort actions against the government and between parties privy to sensitive government information.⁸

The Cold War indelibly altered the executive branch's attitude toward information to a stricter and more pervasive use of secrecy, and away from the candor and disclosure that characterized the government's use of information before World War II.⁹ The abuses of executive secrecy in the late 1960s and early 1970s that surrounded Vietnam policy and the Watergate scandal created a public furor, but ultimately did not change judicial doctrine concerning the state secrets privilege. Surprisingly, in the years that followed the Watergate scandal and other revelations of the abuse of secrecy, the judiciary interpreted its executive secrecy doctrine in a way that strengthened and expanded the ability of the government to deny information to litigants.¹⁰ The state secrets privilege has become so ingrained in the public consciousness and government practice that to question its legitimacy may seem

secret NSA program); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006) (suit by AT&T customers for violation of privacy rights pursuant to AT&T's participation in the secret NSA program); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (suit similar in its facts to *Terkel*); *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (suit by a German citizen against former CIA director George Tenet for, *inter alia*, alleged kidnapping, illegal detention, abusive interrogation, and "extraordinary rendition" to Afghanistan, resulting in extended imprisonment and torture); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (suit by an individual of dual Syrian/Canadian citizenship for alleged wrongful detention and "extraordinary rendition" to Syria, also resulting in extended imprisonment and torture); *Edmonds v. Dep't of Justice*, 323 F. Supp. 2d 65, 81–82 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 734 (2005) (suit by former FBI employee for alleged wrongful termination after "blowing the whistle" on FBI failures related to the terrorist attacks of September 11, 2001).

7. See generally James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966); MORTON H. HALPERIN & DANIEL HOFFMAN, *FREEDOM VS. NATIONAL SECURITY: SECRECY AND SURVEILLANCE* 98–115 (1977); PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 332–40 (Carolina Academic Press 2005); Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570 (1982) [hereinafter *Military & State Secrets Privilege*].

8. See J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 584 n.170–71 (1994) (indicating that the privilege was used in only five cases between 1951 and 1970, and had been used over 50 times between 1970 and 1994, the year of the article's publication).

9. See, e.g., SCHLESINGER, *supra* note 1, at 331–36 (concluding that before World War II the national government used secrecy only sporadically and in an extremely limited fashion); see also *id.* at 43–46 (showing that the general rule in the early republic, accepted by presidents of the founding generation, of all political persuasions, was that Congress and the public were entitled to all information requested from the executive with few and extremely narrow exceptions).

10. *Halkin II*, 690 F.2d at 977; *Halkin I*, 598 F.2d at 1.

anachronistic, especially, as now, in a time of perceived threat.

On the other hand, though the use of the state secrets privilege is not controversial, it should be *considered* as controversial for the purpose of reassessing its compatibility with constitutional principles.¹¹ Just as the constitutional role of the judiciary has become a lightning rod for public debate, so too should the executive's assertions of its secrecy prerogative. This is especially true in the War Against Terrorism. The confluence of a grave threat from international terrorism, public anger and fear resulting from high-profile terrorist attacks, and an ambitious presidency intent upon expanding executive power¹² have created strong incentives for the president to push for more latitude to operate in secrecy, and for Congress and the public to acquiesce to executive demands.

Thus the War Against Terrorism again presents the American republic with questions about the propriety of executive secrecy. In response to the terrorist threat, the Bush administration has taken extraordinary actions using secrecy as one of its main tools. It used misinformation based on classified intelligence to promote the Iraq War. It classifies American citizens as "enemy combatants" using undisclosed facts and then detains them indefinitely, denying their Sixth Amendment rights.¹³ It ordered the secret and probably illegal surveillance of American citizens by the NSA.¹⁴ And it secretly captures, imprisons, interrogates, and "renders" people to states known to torture.¹⁵ Such

11. For examples of current academic reassessment, see Anthony Rapa, Comment, *When Secrecy Threatens Security: Edmonds v. Dep't of Justice and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233 (2006), and Erin M. Stilp, Comment, *The Military and State Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831 (2006).

12. See, e.g., Peter Baker & Jim VandeHei, *Clash Is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A01 (identifying the warrantless counterterrorist wiretapping program secretly conducted by the NSA since September 2001 as merely a "slice of a broader struggle over the power of the presidency" directed, in large part, by Vice President Cheney).

13. See, e.g., *Padilla v. Rumsfeld*, 233 F. Supp. 2d 564, 570–75 (S.D.N.Y. 2002), *rev'd on other grounds*, 542 U.S. 426 (2004); U.S. CONST. amend. VI.

14. Compare Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> [hereinafter *White House Press Briefing*] (defending the NSA program), with Memorandum from the Congressional Research Service on Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information (Jan. 5, 2006) available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> [hereinafter *CRS Report*] (concluding that the executive's legal justification of the NSA program was not "well-grounded" and a court probably would not hold it to be valid). See also Carol D. Leonnig, *Report Rebuts Bush on Spying: Domestic Action's Legality Challenged*, WASH. POST, Jan. 7, 2006, at A01; Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. OF BOOKS, Feb. 9, 2006, available at <http://www.nybooks.com/articles/18650>.

15. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252–56 (E.D.N.Y. 2006); *El-Masri v. Tenet*, 437 F. Supp.

actions (and others we may not know about) make imperative a revived debate over the wisdom and desirability of the “expansive and malleable”¹⁶ state secrets privilege. As currently applied, it is a formidable obstacle to civil litigation against the government, an evisceration of the ability of a citizen injured by such executive acts to seek redress, oversee government actions, and hold officials accountable for bad policy or violations of the law.

This paper will first chart the development of the state secrets privilege as it is currently applied, identifying some of its common law foundations, its principle articulation in *United States v. Reynolds*,¹⁷ and its subsequent expansion in *Halkin v. Helms [Halkin I]*¹⁸ and *Halkin v. Helms [Halkin II]*.¹⁹ It will then analyze some of the issues created by modern application of the privilege, detecting problems it poses both to separation of powers doctrine and to effective oversight of the executive branch.

II. HISTORY OF THE STATE SECRETS PRIVILEGE

A. Foundations

In his dissent from the ruling in *Halkin I*, Judge Bazelon noted that the state secrets privilege is “weakly rooted in our jurisprudence.”²⁰ This is because before *United States v. Reynolds* in 1953 there was no pronouncement of such a privilege in any statute or case. It is also because *Reynolds* drew principally upon a contemporary English case in the formulation of its rule.²¹ Important principles regarding government secrecy were, however, developed in early American case law and presumably it was these principles that induced the *Reynolds* Court to assert that “principles which control the application of the privilege emerge quite clearly from the available precedents.”²²

The earliest American case cited by the Supreme Court in *Reynolds* to support the state secrets privilege is *United States v. Burr*, from

2d 530, 532–34 (E.D. Va. 2006). See also *Morning Edition: U.S. Acknowledges Existence of Secret CIA Prisons*, (NPR radio broadcast, Sept. 7, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5780585>.

16. *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

17. 345 U.S. 1 (1953).

18. 598 F.2d 1 (D.C. Cir. 1978).

19. 690 F.2d 977 (D.C. Cir. 1982).

20. *Halkin I*, 598 F.2d at 14.

21. See discussion *infra* Part II.B. See also Rapa, *supra* note 11, at 237–40 for further discussion of the English common law roots of an executive secrecy privilege.

22. *U.S. v. Reynolds*, 345 U.S. 1, 7 (1953).

1807.²³ Though not mentioned in *Reynolds*, one commentator also identified principles justifying government secrecy as early as 1803 in *Marbury v. Madison*.²⁴ Both of these cases involved claims by members of the Jefferson administration of an executive privilege to refuse evidence to the courts.

Marbury was a civil case in which the plaintiff, a Federalist appointed at the last minute by the outgoing Adams administration, sought to compel the new Democratic Republican officials to admit that his commission indeed existed and was in their possession. The new administration based their refusal on the confidentiality prerogative of executive branch offices. The Court soundly rejected this theory²⁵ because whether the commission existed or not was deemed not to be a fact that required the protection afforded by secrecy.²⁶ From this case Halperin and Hoffman identified two general principles regarding government secrecy: “that there exists, in principle, a category of privileged, ‘confidential’ executive communications; but that the Court, in a proper case, has power to review the propriety of a claim of privilege.”²⁷

Burr, on the other hand, was a criminal case²⁸ in which the defendant sought to compel production of letters written to President Jefferson both to impeach the main prosecution witness and embarrass the administration internationally. Again the government refused, this time because of the private nature of the communications between the president and his advisor.²⁹ John Marshall, sitting as justice on the circuit court, held that the defendant’s need for the evidence and the government’s need for secrecy must be weighed against each other, and that a defendant’s need would not always be overridden by the government’s privilege.³⁰ Justice Marshall ordered production of the letters requested and President Jefferson complied, with portions of the

23. See *id.* at 7 n.18 (citing *U.S. v. Burr*, 25 F. Cas. 30 (Cir. Ct. Va. 1807)).

24. 5 U.S. (1 Cranch) 137 (1803); see also HALPERIN & HOFFMAN, *supra* note 7, at 99–100 (discussing *Marbury v. Madison*).

25. *Marbury*, 5 U.S. at 141–42.

26. HALPERIN & HOFFMAN, *supra* note 7, at 100.

27. *Id.*

28. This distinction is important because it was used by the Court in *Reynolds* in refusing to apply by analogy the consequences of the government’s refusal to produce evidence in criminal cases (i.e., the accused goes free) to the civil forum. *U.S. v. Reynolds*, 345 U.S. 1, 12 (1953). Nevertheless, the *Reynolds* court did cite to *Burr* as precedent for executive secrecy. *Id.* at 7 n. 18.

29. *U.S. v. Burr*, 25 F. Cas. 30, 31 (Cir. Ct. Va. 1807).

30. *Id.* at 37 (“If [the letter] does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, *if it be not immediately and essentially applicable to the point*, will, of course, be suppressed.” (emphasis added)).

letters deleted.³¹ It is important to note that in making his order, Justice Marshall was aware of the content of the letters³² and, while still showing due respect to a coequal branch of government, did not accept the executive's assertions at face value.

During the nineteenth and early twentieth centuries, there were only very rare occasions on which the executive branch thought it necessary to use secrecy, though it treated many of these occasions as opportunities to carve out a small area of executive privilege.³³ All of these occasions involved foreign diplomacy or war, and the reaction of Congress and private citizens was always to deny executive claims of an inherent, unlimited prerogative to withhold information.³⁴ One important precedent to come from this period was *Totten v. United States*³⁵ in which the Court denied a suit for unpaid wages by the administrator of a Civil War spy's estate. The plaintiff alleged that the decedent had a secret contract with the late President Lincoln for espionage services. In denying the administrator's claim, the Court reasoned,

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. . . . Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.³⁶

Later courts would call on this general principle of secrecy to support their arguments against allowing into evidence secret information that "might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent"³⁷ if disclosed.

It was not until World War II, however, that this general principle was institutionalized in the form of a broad and pervasive secrecy

31. HALPERIN & HOFFMAN, *supra* note 7, at 100.

32. *Id.* at 101.

33. SCHLESINGER, *supra* note 1, at 43–50, 331–39 (discussing secrecy in the Jay Treaty controversy, the Sedition Act, the War of 1812, the Civil War, and President Wilson's negotiations at Versailles).

34. *Id.* See also HALPERIN & HOFFMAN, *supra* note 7, at 98–115. This is not to say that there were no other occasions in case law in which a governmental evidentiary privilege was recognized by American courts. *U.S. v. Reynolds*, 345 U.S. 1, 7 n.11 (1953). In each of these cases, however, the privilege was highly individualized and strictly limited by the courts.

35. 92 U.S. 105 (1876).

36. *Id.* at 107.

37. *Id.* at 106.

privilege. Secrecy was utilized more frequently in the context of a dire global war and, therefore, was progressively legitimized as a tool for regular instead of rare use.³⁸ After Germany and Japan surrendered, the Allied Nations split into communist and democratic blocks and the need for secrecy (or, at least, the perception of a need for secrecy) continued into peacetime.

B. The Growth of Secrecy and United States v. Reynolds

As the nation settled into its role as a global superpower and the principal adversary to the communist nations after World War II, the consistent sense of threat gave national security an enhanced and permanent importance and fueled the executive's newfound penchant for secrecy.³⁹ Presidents Truman and Eisenhower issued Executive Orders that extended the legitimacy of classifying information into peacetime, and expanded the authority to classify from the military into nearly all executive departments.⁴⁰ These orders accompanied the growth of the peacetime military and intelligence communities who harbored an innate belief in secrecy as necessity (and, arguably, the belief that no secrecy was excessive).⁴¹ In this context, the Supreme Court decided *United States v. Reynolds*⁴² in 1953 and thereby defined the parameters of the state secrets privilege.

In *Reynolds*, an Air Force research and development flight crashed in Georgia killing six of its nine passengers. Widows of the civilian victims brought suit against the government claiming negligence and, during discovery, moved for production of the official investigation reports and survivors' statements held by the Air Force. Alleging that disclosure of these documents threatened to reveal military technology secrets, and therefore threatened national security, the government moved to quash the plaintiffs' motion for discovery.⁴³ In support of its motion, the government cited only an internal Air Force regulation prohibiting dissemination of official reports "to persons outside the authorized chain

38. SCHLESINGER, *supra* note 1, at 117–19, 339.

39. *Id.* at 339–45.

40. *Id.* at 340. See also Note, *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1189–1207 (1972) [hereinafter *National Security & Civil Liberties*] (giving an overview of the information security system of the executive branch, including Executive Orders 10501 and 11652, neither of which had any statutory basis).

41. SCHLESINGER, *supra* note 1, at 340–41, 344; Zagel, *supra* note 7, at 898 (listing problematic national security classifications by the executive departments).

42. 345 U.S. 1 (1953). "In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense." *Id.* at 10.

43. *Id.* at 1–4.

of command without the specific approval of the Secretary of the Air Force.”⁴⁴

Later, the Secretary of the Air Force filed a formal “Claim of Privilege,” which stated that compulsion of the evidence sought by plaintiffs would be prejudicial to national security, and indicated, specifically yet without revealing the information he sought to protect, how disclosure would harm the security interest. This claim was accompanied by an affidavit from the Air Force Judge Advocate General reiterating the threat that production posed to the nation’s security and offering to produce the three survivors who could testify about anything that was not classified.⁴⁵

Both the district court⁴⁶ and the Third Circuit⁴⁷ held for the plaintiffs, finding that Federal Rule of Civil Procedure 34 required production of the requested documents.⁴⁸ The law seemed clear. The Federal Tort Claims Act divested the federal government of sovereign immunity and applied the Federal Rules of Civil Procedure against the government.⁴⁹ Air Force regulations creating a privilege to withhold could not trump such express congressional intent. There was no statute authorizing the Air Force’s claim of privilege,⁵⁰ neither was there judicial precedent clearly on point for such a claim.⁵¹ Consequently, the lower courts held that the government’s refusal to produce the evidence resulted in the establishment of the facts on the issue of negligence in the plaintiffs’ favor.⁵²

It also seemed clear, however, that strict compliance with the Federal

44. *Id.* at 4 n.4.

45. *Id.* at 4–5.

46. *Reynolds v. U.S.*, 10 F.R.D. 468 (E.D. Penn. 1951), *rev’d*, 345 U.S. 1 (1953).

47. *Reynolds v. U.S.*, 192 F.2d 987 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953).

48. *U.S. v. Reynolds*, 345 U.S. 1, 4 (1953).

49. *Reynolds v. U.S.*, 192 F.2d 987, 993 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953).

50. To be clear, the Air Force motion to quash and “Claim of Privilege” did cite to one statute—5 U.S.C. § 22—but this merely authorizes “[t]he head of each [executive] department to prescribe regulations, not inconsistent with law, for the government of his department.” *Reynolds*, 345 U.S. at 4 n.4. It says nothing about withholding information, but instead vitiates the Air Force regulation creating the privilege since that regulation was inconsistent with the Tort Claims Act and the Federal Rules of Civil Procedure. One historian to treat the matter concluded that the executive department’s entire classification system and information protection methods derived entirely from internal administrative policy for executive employees. SCHLESINGER, *supra* note 1, at 341. Another commentator called the Air Force’s citation an illustration of “the Government’s propensity to use inapposite authority to support policies justified on other grounds,” and noted that Congress amended the statute after *Reynolds*, adding: “This section does not authorize withholding information from the public or limiting the availability of records to the public.” Zagel, *supra* note 7, at 900–01.

51. See *U.S. v. Reynolds*, 345 U.S. 1, 7 (1953) (“Judicial experience with the privilege which protects military and state secrets has been limited in this country.”).

52. *Id.* at 5.

Tort Claims Act and the Federal Rules of Civil Procedure would introduce military secrets into the public record. Thus, the United States Supreme Court reversed the lower courts' decisions, reasoning that, although not directly treated by statute or case law, "the principles which control the application of the privilege emerge quite clearly from the available precedents."⁵³ These principles are: (1) the state secrets privilege is a public tool and can be asserted by the government only; (2) the privilege is not to be lightly invoked; (3) the government must follow proper procedure in invoking a claim to the privilege; (4) the courts retain limited judicial oversight of the privilege's use;⁵⁴ and (5) the privilege, once applied, is absolute.⁵⁵

The Court enumerated three procedural requirements: the complaint must be formal, "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."⁵⁶ There are two likely sources for these procedural requirements. One source is certainly English case law, specifically *Duncan v. Cammell, Laird & Co.*,⁵⁷ cited by the Supreme Court in its decision.⁵⁸ In addition to *Duncan*, the allusions to a secrecy privilege in early American case law such as *Marbury* and *Burr* may have inspired the modern-day procedural requirements, though this inspiration was not ostensibly recognized by the Court in *Reynolds*. In each of these early cases President Jefferson was personally involved in the decision to withhold information, as opposed to some mid- to low-level administrator making the decision.⁵⁹

An ostensibly important principle elucidated by *Reynolds* is judicial oversight of state secrets claims. The Court held that it "itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing disclosure of the very thing the privilege is designed to protect."⁶⁰ Recognizing the difficulty of this role,

53. *Id.* at 7.

54. *Id.* at 7–8.

55. "Where there is a strong showing of necessity [for the evidence], the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11.

56. *Reynolds*, 345 U.S. at 8.

57. (1942) 111 A.C. 624. (K.B.). See generally Zagel, *supra* note 7, at 888–91 (discussing the influence of *Duncan* on *Reynolds*).

58. *Reynolds*, 345 U.S. at 7 n.15, 20–22.

59. Subsequent to *Reynolds* this procedural requirement became the only part of the state secrets privilege rule to be strictly enforced against the government. See, e.g., *Nat'l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390 (S.D.N.Y. 1982) (holding that a formal claim of privilege is required for each item for which protection from discovery is sought, and that the FBI could not use a sampling technique in making its state secrets claim); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975) (holding that the court would not recognize a state secrets claim until it had been made by a responsible officer who had personally considered it).

60. *Reynolds*, 345 U.S. at 8.

the Court formulated what has come to be known as the “reasonable danger” standard: while judicial control over evidence must be maintained, where the executive can show that there is a reasonable danger that compelled disclosure of the evidence will expose sensitive information, the court should not insist upon examining the evidence in question, even *in camera*, and should determine that the privilege applies.⁶¹

The curtailed role of the courts in assessing the validity of a state secrets claim has been a target of criticism in litigation and commentary. According to Zagel, one of the earliest to examine the state secrets privilege, *Duncan* limited “the judge’s function in state secrets cases . . . to ascertaining whether the claim is made by the proper officer in the proper form,”⁶² that is, a judge must only consider whether the procedural requirement had been met. Zagel argued that *Reynolds* was an ultimately futile attempt at compromise between the lower courts’ permissive enforcement of Rule 34 of the Federal Rules of Civil Procedure and the English courts’ rubber-stamp approval of executive procedure.⁶³ Writing before the *Halkin* decisions, he prophetically concluded that

there is no middle ground and that the *Reynolds* compromise is illusory. In the final analysis, if the court does not examine the information, it must decide in the dark. Thus, the executive will almost always determine the legal question of privilege. For all practical purposes, the rules of *Reynolds* and *Duncan* are identical. . . . The issue of whether the court should make an independent examination of the material in question or simply accept the executive’s sworn assertion of the privilege, remains unresolved.⁶⁴

Thus, although *Reynolds* sought to balance the role of the judiciary in controlling the evidence in its courts with the executive’s need for secrecy, the rule it adopted was fated to favor executive claims of secrecy and encourage abdication of judicial oversight of such claims.

61. *Id.* at 10.

62. Zagel, *supra* note 7, at 888.

63. *Id.* at 891.

64. *Id.* (internal citations omitted).

C. *The Halkin Catch-22*.⁶⁵ *Abdication of Oversight by the Judiciary*

The influence of *Duncan* on American state secrets jurisprudence has been underestimated, considering the subsequent application of the *Reynolds* “reasonable danger” standard in *Halkin I*⁶⁶ and *Halkin II*.⁶⁷ In principle, “[j]udicial control over the evidence in a case [has not been] abdicated to the caprice of executive officers.”⁶⁸ In practice, however, the role of the courts has become merely to ensure that the executive has complied with the formalities of invoking the privilege.⁶⁹ This result was realized chiefly by the two District of Columbia Circuit Court of Appeals decisions that dispensed with the *Halkin* plaintiffs’ cases.

Along with the rise of the national security apparatus—intelligence agencies, classification systems, security bureaucracies, and a peacetime military establishment—came highly controversial national policies that engendered significant dissent in the American public, such as the Vietnam War. Additionally, technological advances have enabled increasingly furtive surveillance by the government. This approaching perfect storm needed one more element to break— an increasingly paranoid and secretive executive branch, which reached its zenith with the election of Richard Nixon to the presidency.

1. *Halkin I: The sophisticated intelligence analyst, inconsistent invocation, and absolutism*

Halkin was among various other protesters against the Vietnam War who were subjects of warrantless and, therefore, arguably illegal surveillance by the NSA.⁷⁰ Such surveillance was commonly requested by intelligence agencies such as the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA) during the late 1960s and early 1970s.⁷¹ The targeted protesters sued for declaratory and injunctive relief against two particular NSA programs: MINARET and SHAMROCK. The MINARET program used “watchlists” with the plaintiffs’ names on them to search for them in mountains of data collected from overseas electronic communications, while the

65. SHANE & BRUFF, *supra* note 7, at 340.

66. *Halkin I*, 598 F.2d 1, 9 (D.C. Cir. 1978).

67. *Halkin II*, 690 F.2d 977, 990 (D.C. Cir. 1982).

68. *U.S. v. Reynolds*, 345 U.S. 1, 9–10 (1953).

69. See HALPERIN & HOFFMAN, *supra* note 7, at 104.

70. 18 U.S.C. §§ 2510(1)–(22) (2002) (Title III of the Omnibus Safe Streets and Crime Control Act of 1968 prohibits interception and disclosure of wire, oral, or electronic communications without a warrant).

71. *Halkin I*, 598 F.2d at 4–5.

SHAMROCK program did likewise with plaintiffs' telegraphic communications.⁷² Details about SHAMROCK had been disclosed previously in congressional hearings and in the proceedings of *Jabara v. Kelley*.⁷³

The NSA responded with a motion for dismissal, arguing that discovery and merely filing a responsive pleading would require them to disclose secret information, which would severely jeopardize the agency's intelligence collection mission.⁷⁴ On the other hand, the danger of dismissal was obvious: perhaps the Nixon administration really had used the NSA to violate the plaintiffs' constitutional protections through illegal surveillance and the claim of national security was yet another cover-up attempt to avoid liability. Carefully weighing the needs of each side, the district court decided for the defendants with regard to MINARET, but held that prior disclosures about SHAMROCK negated the state secrets privilege and discovery of such evidence would be compelled.⁷⁵ Both parties appealed.

On appeal, the D.C. Circuit decided that both programs fell within the purview of the state secrets privilege. Three issues of particular import surfaced in coming to that conclusion: (1) whether the state secrets privilege could extend to something so minimal as plaintiffs' request for affirmation or denial that their communications had been intercepted; (2) whether prior disclosures about SHAMROCK barred application of the state secrets privilege; and (3) whether the plaintiffs were improperly denied an opportunity to test the defendant's claims because of their exclusion from *in camera* proceedings.⁷⁶ In resolving each of these issues, the court accomplished a piecemeal abdication of its judicial oversight responsibility.

a. *The sophisticated intelligence analyst.* Plaintiffs made a minimal request for a "yes-or-no" answer to the question of whether they had been monitored. In denying that request, the court opined that any answer could jeopardize national security. In its rationale, the court created the "sophisticated intelligence analyst" standard as a subset of the "reasonable danger" standard articulated in *Reynolds*.⁷⁷ Borrowing language from *United States v. Marchetti*,⁷⁸ a First Amendment prior

72. *Id.*

73. 75 F.R.D. 475 (E.D. Mich. 1977).

74. *Halkin I*, 598 F.2d at 4.

75. *Id.* at 5.

76. *Id.* at 5–9.

77. *Id.* at 9–10 ("There is a 'reasonable danger' that confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst." (internal citations omitted)).

78. 466 F.2d 1309 (4th Cir. 1972).

restraint dispute between the CIA and a former employee, the court justified its profound deference to executive assertions:

The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.⁷⁹

Almost anything could be deemed useful by a sophisticated intelligence analyst. With this liberal standard in place, the executive has an exceedingly wide scope of information that can claim to be within the protection of the state secrets privilege. Indeed, the liberality of this standard of review is one of the most frequent criticisms of the state secrets doctrine in particular, and government secrecy in general.⁸⁰ This broad standard is one of the steps the court took away from meaningful evaluation of the executive's claims for the need for secrecy, and toward the role of rubber-stamping fulfillment of the procedural requirements.

b. Inconsistent invocation of the privilege. The plaintiffs in *Halkin I* argued that the government's admission to having intercepted communications in the public record of *Jabara* was indistinguishable from the information they sought to obtain through their interrogatories about SHAMROCK. They argued, therefore, that the information should be removed from the domain of state secrets since it was no longer a secret at all. The D.C. Circuit summarily rejected this argument under the "sophisticated intelligence analyst" standard, holding that "[t]he government is not estopped from concluding in one case that disclosure is permissible while in another case it is not."⁸¹ This is a curious argument for the skeptic of government secrecy. It is difficult to imagine what an enemy analyst might deduce about the NSA's capabilities from disclosure of the fact that it intercepted Mr. Halkin's communications that such an analyst could not have already discovered with knowledge about the interception of Mr. Jabara's communications. Of course, the reply prescribed by the sophisticated intelligence analyst standard to this

79. *Halkin I*, 598 F.2d at 8–9 (citing *U.S. v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972)).

80. Christopher Brancart, *Rethinking the State Secrets Privilege*, 9 WHITTIER L. REV. 1, 9–13 (1987); Gardner, *supra* note 8, at 585–86; Zagel, *supra* note 7, at 878–80; *Military & State Secrets Privilege*, *supra* note 7, at 573–76; *National Security & Civil Liberties*, *supra* note 40, at 1134–89. See also *supra* note 34 and accompanying text as well as discussion *infra* Part III.B.2.

81. *Halkin I*, 598 F.2d at 9.

skepticism would be that only executive officials and foreign intelligence analysts could know the difference, and citizens and judges are simply incompetent to assess the executive's assertion. It seems more plausible, however, that this reasoning is a more complex way for the court to say, "We defer to the executive in everything on national security." The court's extensive use of the sophisticated intelligence analyst standard is tantamount to complete deference to the executive will in matters of secrecy.

c. *Absolutism*. Finally, the plaintiffs argued that their exclusion from the lower court's *in camera* review of classified executive affidavits showing the need for secrecy yielded too much control over the case to the NSA.⁸² As an example, they pointed to the district court's nearly verbatim inclusion of the defense counsel's findings of fact into its opinion. Plaintiffs claimed a right to be included, under protective order, in the *in camera* proceedings.⁸³ The court rejected this assertion holding that "[t]he state secrets privilege is absolute"⁸⁴ and overrides any other competing interest, no matter how compelling. Here plaintiffs were seeking the "benefit of criticism and illumination by [the] party with the actual interest in forcing disclosure," but the court concluded that not even well-informed and balanced advocacy can outweigh the value of protecting a state secret.⁸⁵

The court's logic is circular: The plaintiffs may not participate in the determination of whether the state secrets privilege applies because the privilege is absolute once applied. Accordingly, the court held that plaintiffs may not even participate under a protective order because of the mere potentiality that revealing sensitive information might be too advantageous to plaintiffs to resist violating the order. This reasoning reveals the imbalance of the court's deferential evaluation of claims of executive privilege. Whereas on one side the risk of disclosure of allegedly sensitive information is weighted so heavily as to prevent normal adjudicative proceedings fundamental to justice, on the other side the risk of abuse of the state secrets privilege to shield illegal actions, incompetence, waste, or negligence did not seem to weigh at all on the court's application of the *Reynolds* rule. Once again, it becomes clear that the underlying thrust of the court's reasoning is absolute deference to the executive. If an executive official merely invokes the state secrets privilege, a court must defer to executive judgment and allow secrecy, even before the court makes any independent determination that the

82. *Id.* at 7.

83. *Id.* at 8.

84. *Id.* at 7.

85. *Id.* at 6–7 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973)).

privilege is appropriate. Indeed, the D.C. Circuit was explicit in its opinion on the matter, stating, “[c]ourts should accord the ‘utmost deference’ to executive assertions of privilege upon grounds of military or diplomatic secrets.”⁸⁶

Because the state secrets privilege afforded some defendants, namely the NSA, an airtight lock around the evidence necessary to prove the plaintiffs’ case, the lower court dismissed the complaint as to those defendants on remand.⁸⁷

2. *Halkin II: Strengthening state secrets*

After dismissal of the complaint against the NSA on remand, the plaintiffs renewed their action against the other intelligence agencies that remained in *Halkin II*. They argued that although the state secrets privilege prevented discovery of the NSA programs at issue, it did not foreclose a case against the CIA for having submitted the watchlists to the NSA “on a presumption that the submission of a name resulted in interception of the named person’s communications.”⁸⁸ To show their injury, the plaintiffs required evidence that they were included on the CIA lists submitted to the NSA for surveillance. Discovery in the district court revealed that some of the CIA’s domestic surveillance programs, including Operation CHAOS, had targeted many of the plaintiffs. Through these programs, the CIA collaborated with other security agencies, including the FBI and the NSA, to produce a steady stream of reports on the plaintiffs and to infiltrate their organizations with undercover agents.⁸⁹ This revelation and other public disclosures about the intelligence programs led to still further discovery requests.⁹⁰ The CIA produced many of the documents requested, but asserted the state secrets privilege in withholding much of the evidence crucial to establishing the plaintiffs’ claims. When the district court upheld the claim of privilege and subsequently dismissed the case on summary judgment, the plaintiffs appealed.⁹¹

86. *Id.* at 9 (citing *U.S. v. Nixon*, 418 U.S. 683, 710 (1974)). It should be noted that the statement in *Nixon* on which the court relies is dicta which relies itself on dicta from an earlier case superseded by *Reynolds*. Gardner, *supra* note 8, at 588 (“The discussion in *Nixon* that the constitutional basis of the state secrets privilege derives from the President’s Article II powers, itself pure dicta, is based upon language in precedent which is also dicta, and which has been seriously questioned. . . .” (quoting Barry A. Stulberg, Comment, *State Secrets Privilege: The Executive Caprice Runs Rampant*, 9 LOY. L.A. INT’L & COMP. L. REV. 445, 471 (1987))).

87. *Halkin II*, 690 F.2d 977, 984 (D.C. Cir. 1982).

88. *Id.*

89. *Id.* at 981–83.

90. *Id.* at 984–85.

91. *Id.* at 988.

Once again, the D.C. Circuit decided in favor of the government and sustained its refusal to produce material evidence. The court's reasoning further entrenched its deference to the executive's assertion of privilege by severely limiting its consideration of plaintiff's interest in the crucial information the CIA withheld. Furthermore, it demonstrated the strength of its holding in *Halkin I* that the privilege is absolute by denying the plaintiffs standing because they could not show injury in fact without the evidence protected by the privilege.⁹²

a. *Limiting the influence of the party seeking disclosure.* The plaintiffs argued that the district court did not balance both parties' competing interests properly because it afforded great weight to the government's need for secrecy with comparatively little regard for the privilege's fatal repercussions on the plaintiffs' case.⁹³ The D.C. Circuit responded by reiterating the *Reynolds* rule that "invocation [of the privilege] must be carefully considered to assure that the proper balance is struck between the interest of the public and the litigant in vindicating private rights and the public's interest in safeguarding of the national security."⁹⁴ But then the court eviscerated this principle by declaring that "the need for the information demonstrated by the party seeking disclosure . . . is a factor *only in determining the extent of the court's inquiry into the appropriateness of the claim.*"⁹⁵ Thus,

the critical feature of the inquiry in evaluating the claim of privilege is not a balancing of ultimate interests at stake in the litigation. That balance has already been struck. Rather, the determination is whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case.⁹⁶

The issue was not whether the lower court compared the parties' interests fairly, but whether the government had made a sufficient showing of "reasonable danger."⁹⁷

Given the "sophisticated intelligence analyst" standard discussed above,⁹⁸ it was not difficult for the CIA to make a showing that harm might reasonably result from disclosure.⁹⁹ The plaintiffs had conceded

92. *Halkin II*, 690 F.2d 977, 977–1000 (D.C. Cir. 1982).

93. *Id.* at 990.

94. *Id.*

95. *Id.* (emphasis added).

96. *Id.*

97. *Halkin II*, 690 F.2d 977, 991 (D.C. Cir. 1982).

98. See discussion *supra* Part II.C.1.a.

99. *Halkin II*, 690 F.2d at 991–92.

that the procedural requirement had been met, so the court moved on to the question of whether the showing itself was adequate.¹⁰⁰ The court called upon the sophisticated intelligence analyst principle to illustrate that it was “self-evident” that disclosure here posed a reasonable danger.¹⁰¹ Because the public affidavit so easily met this low standard, the court did not find it necessary even to reach the plaintiffs’ objection at having been denied the opportunity to challenge the CIA’s *in camera* affidavit in the district court.¹⁰²

Finally, the court rejected the plaintiffs’ analogy to judicial interpretation of the Freedom of Information Act (FOIA) in *Vaughn v. Rosen*.¹⁰³ When refusing to disclose information requested under FOIA, the executive department claiming exemption must complete a detailed explanation of its refusal to disclose, often called a *Vaughn* index.¹⁰⁴ Plaintiffs here sought a compromise that would allow the government to protect information while affording minimal accountability to its constituents by justifying withholding of information.¹⁰⁵ The D.C. Circuit refused even this in an astonishing display of deference to the executive branch:

the claim of state secrets privilege is a decision of policy made at the highest level of the executive branch after consideration of the facts of the particular case. . . . [W]here *the only question is whether information has been deemed by the executive* to be so sensitive as to pose a risk to national security were it disclosed, a more detailed statement of the characteristics of the withheld information would serve no useful end.¹⁰⁶

The result was that the need of the party seeking disclosure became almost irrelevant, a straw man to be got around with a minimal showing of reasonable danger. The balancing envisioned by the Supreme Court in *Burr* and *Reynolds* was impossible because it

100. *Id.*

101. *Id.* at 993.

102. *Id.* at 995.

103. 484 F.2d 820 (D.C. Cir. 1973).

104. *Halkin II*, 690 F.2d at 995 (“. . . a ‘*Vaughn* index’ itemize[es] each instance of claimed exemption, describing the document involved, and stating the specific exemption(s) asserted to apply. The index may be supplemented with representative exhibits . . . and in some cases with in camera submissions which make evident the need for confidentiality.”).

105. *Id.* Arguably the plaintiffs hoped to force the point that the intelligence agencies could not justify refusal to disclose and that the surveillance was in fact part of the Johnson and Nixon administrations’ illegal covert actions against domestic political opponents.

106. *Id.* at 996 (emphasis added).

force[d] the judge to rule in a vacuum. He must determine necessity without knowing the contents of the requested document and their value to the requesting party. . . . Since the judge is adrift in a sea of unknowns, it is hard to imagine a case in which the Government cannot plausibly argue that military secrets are at stake.¹⁰⁷

In this way American state secrets jurisprudence arrived at the English *Duncan* rule of extreme deference to the executive. The court essentially reduced application of the state secrets privilege “to ascertaining whether the claim is made by the proper officer in the proper form.”¹⁰⁸

b. No discovery, no standing. Upon determining that the privilege applied, the D.C. Circuit dismissed the plaintiffs’ case for want of standing.¹⁰⁹ The plaintiffs were suing for declaratory and injunctive relief enforcing the protections of the Fourth Amendment. They argued that the government had not invoked the privilege to protect discovery of whether the CIA submitted their names to the NSA, and that submission of their names implied surveillance of their communications and sufficient risk of injury such that equitable relief was warranted.¹¹⁰

The court held that for a plaintiff to sustain an injury from surveillance by the government, the surveillance must be unlawful. Consequently, for submission itself of the plaintiffs’ names to the NSA to constitute an injury warranting equitable relief, the plaintiffs must show that submission might lead to an *unlawful* search, not merely the probability of surveillance alone. The problem with the plaintiffs’ position, reasoned the court, is that it was unknown whether the NSA’s surveillance was unlawful and, because of the state secrets privilege, it is also *unknowable*. Therefore, “appellants’ inability to adduce proof of actual acquisition of their communications now prevents them from stating a claim cognizable in federal courts. In particular, we find appellants incapable of making the showing necessary to establish their standing to seek relief.”¹¹¹

This is the *Halkin* Catch-22: plaintiffs are denied discovery of the very evidence that would save their case from the lack of standing for which it was dismissed. In other words, when the government is the defendant it may eviscerate the case against it, first, by invoking the state secrets privilege, thereby denying the plaintiff the evidence necessary to

107. *Zagel*, *supra* note 7, at 891.

108. *Id.* at 888 (referring to the English rule in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (K.B.)).

109. *Halkin II*, 690 F.2d at 997–1007.

110. *Id.* at 997.

111. *Id.* at 998.

shield from dismissal for lack of standing, failure to state a claim for which relief can be granted,¹¹² or from summary judgment, and then move to dismiss because the plaintiff lacks the very evidence the government is withholding. Herein we see the severity of the state secrets privilege. The plaintiffs' prayer for relief from possible Fourth Amendment violations was destroyed by an unproven, unreviewable, vague, and cursory assertion by the executive that disclosure *might* implicate national security.

III. ANALYSIS

The *Reynolds* rule, which has metamorphosed into something more appropriately called the *Duncan-Halkin* rule, is not compatible with American constitutional principles. The federal government is one of separated powers that should preclude the executive from determining the extent of its own privilege in a lawsuit to which it is a party. Effective judicial oversight is required to provide a forum in which an aggrieved citizen may seek redress peacefully. Furthermore, a healthy republic requires oversight of the government by an informed citizenry. Systematic secrecy in the government is an obstacle to these ends. For these reasons, the United States Government should return to the candor and openness that characterized its control of information before World War II. As a coequal branch of government, the courts should abandon the *Duncan-Halkin* rule for a method of protecting state secrets that is more amenable to public oversight and redress by reasserting the judicial oversight it has abandoned over the last 50 years of state secrets jurisprudence.

A. Separation of Powers

It is improper, indeed a miscarriage of justice, for a man to be a judge in his own case.¹¹³ In essence, this is what the *Duncan-Halkin* rule has made of the executive branch in state secrets cases. Arguably, *Reynolds* sought to avoid this, asserting, "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."¹¹⁴ The *Halkin* rulings, however, have made judicial oversight merely nominal, a certification that procedure was followed correctly.

Some have agreed that the *Halkin* cases are not true to the more

112. FED. R. CIV. P. 12(b)(6).

113. Dr. Bonham's Case, (1610) 77 Eng. Rep. 646 (K.B.). See generally JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY, 15–32 (2003).

114. U.S. v. Reynolds, 345 U.S. 1, 9–10 (1953).

moderate *Reynolds* rule. One commentator,¹¹⁵ writing between the *Halkin I* and *Halkin II* decisions, noted that lower courts were taking a mechanical approach to the procedure of *Reynolds* while ignoring the Supreme Court's mandate that "the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous'"¹¹⁶ in order to find that the claim of privilege is appropriate. Thus, in the *Halkin* cases, the D.C. Circuit failed to account for important distinctions between the claim of privilege there and the claim in *Reynolds*, distinctions that may have ameliorated the harsh outcome of those decisions.¹¹⁷

Another commentator noted that *Burr*, one of the precedents for secrecy upon which *Reynolds* relies, charges the court with responsibility to balance the ultimate interests of both parties.¹¹⁸ Justice Marshall identified the need for presidential discretion at times, but concluded that the requesting party's "occasion for demanding [privileged evidence] ought . . . be very strong, and to be fully shown to the court." He continued, though, stating that "[p]erhaps the court ought to consider the reasons, which would induce the president to refuse to exhibit [the evidence] as conclusive on it, *unless such [evidence] could be shown to be absolutely necessary in the defense [i.e., to the opponent party's case]*."¹¹⁹ It is clear that Justice Marshall considered a central, informed role for the court in balancing the "ultimate interests"¹²⁰ of the party not asserting the privilege (as opposed to its merely assessing a minimal showing of reasonable danger by the executive). Of course, *Burr* was a criminal case, but there has been no satisfactory rationale offered for the difference in how the claim of privilege is treated between civil and criminal cases. To the contrary, civil cases like *Reynolds* and *Halkin I* have cited often to criminal cases that have dealt with claims of executive privilege based on national security, like *Burr* and *United States v. Nixon*.¹²¹ It is clear from the precedents upon which the state

115. *Military & State Secrets Privilege*, *supra* note 7, at 573–78.

116. *Reynolds*, 345 U.S. at 9.

117. *Military & State Secrets Privilege*, *supra* note 7, at 577–78 ("In *Reynolds*, the executive was not suspected of intentionally invading the plaintiffs' rights or of using the privilege to defeat the plaintiffs' case. The Supreme Court upheld the privilege . . . after the Secretary [of the Air Force] provided an alternative source for the information sought by the plaintiffs.")

118. HALPERIN & HOFFMAN, *supra* note 7, at 100.

119. *Id.* (quoting *U.S. v. Burr*, 25 F. Cas. 30, 55 (Cir. Ct. Va. 1807)) (emphasis added).

120. See *supra* note 96 and accompanying text.

121. See, e.g., *Reynolds*, 345 U.S. at 7 n.18 (citing to "Marshall, C.J., in the Aaron Burr trial, 1 Robertson's Reports 186"); *Halkin I*, 598 F.2d 1, 9 (D.C. Cir. 1978) (citing to *U.S. v. Nixon*, 418 U.S. 683, 710 (1974)).

secrets privilege is founded that the courts are to assert more oversight of privilege claims.

We can see the challenges to the separation of powers posed by the state secrets privilege in four recent cases challenging the NSA's warrantless counterterrorism surveillance program.¹²² They illustrate the power of the executive over the admission of evidence, a right normally belonging to the courts. As noted in the introduction, the NSA has been monitoring American citizens without warrants for about five years now. This warrantless surveillance program has been acknowledged publicly by the president,¹²³ the U.S. Attorney General,¹²⁴ and the Department of Justice.¹²⁵ Contrary to the Attorney General's vague assertions about the program's legality, the Congressional Research Service concluded that the wiretapping was probably illegal.¹²⁶ The ACLU and the Al-Haramain Islamic Foundation initiated actions against the government for relief from the allegedly illegal surveillance, much like the plaintiffs in *Halkin I.*¹²⁷ Hepting and Terkel, on the other hand, sued their telecommunications provider for injuries that flowed from AT&T's alleged collaboration with the government in surrendering their records to the NSA.¹²⁸ In each case the government moved for dismissal because discovery and responsive pleadings would involve disclosures that bear the mere potential of jeopardizing national security.¹²⁹

In each case "[t]he courts upheld the privilege as to those alleged aspects of the program which were not made public, including alleged tracking of the phone records of millions of Americans, but denied it as to the aspect which the government publicly disclosed, monitoring

122. *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Ore. 2006); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 974 (N.D. Cal. 2006).

123. *President's Radio Address* (Dec. 17, 2005) available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>

124. *White House Press Briefing*, *supra* note 14.

125. U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, (Jan. 19, 2006) available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

126. Compare *White House Press Briefing*, *supra* note 14 (defending the NSA program), with *CRS Report*, *supra* note 14 at 44 (concluding that the executive's legal justification of the NSA program was not "well-grounded" and a court probably would not hold it to be valid). Indeed, the District Court for the Eastern District of Michigan so held in August, 2006. *Am. Civil Liberties Union*, 438 F. Supp. 2d at 773-759 (holding that the NSA's warrantless surveillance program violates the Fourth and First Amendments and the separation of powers).

127. *Am. Civil Liberties Union*, 438 F. Supp. 2d at 758; *Al-Haramain Islamic Found., Inc.*, 451 F. Supp. 2d at 1217.

128. *Terkel*, 441 F. Supp. 2d at 901; *Hepting* 439 F. Supp. 2d at 979.

129. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1224-25; *Am. Civil Liberties Union*, 438 F. Supp. 2d at 758-59; *Terkel*, 441 F. Supp. 2d at 904; *Hepting*, 439 F. Supp. 2d at 979-80.

communications between suspected al Qaeda members based in America and their cohorts abroad.”¹³⁰ To uphold the government’s assertion of the privilege over information that it had publicly acknowledged would be to make the courts complicit in argument that is “disingenuous and without merit.”¹³¹ The government failed in asserting the privilege only because of its repeated public disclosures of the program. The courts made it clear that if the government had kept silent after the NSA program was leaked the privilege would have upheld.¹³² Indeed, the standard set forth in *Hepting* is that “[i]n determining whether a factual statement is a secret for purposes of the state secrets privilege, the court should look only at publicly reported information that possesses substantial indicia of reliability”¹³³ Thus, in determining whether information about AT&T’s cooperation with the NSA was secret or not, the court held that it “considers only public admissions or denials by the government, AT&T and other telecommunications companies”¹³⁴ In other words, the admissibility of such evidence is still dependent upon the defendants’ discretion to disclose information. If, in the future, defendants in possession of sensitive information wish to keep it out of court, they simply need to refrain from making any public pronouncement about it. In this way, the executive can control the admissibility of evidence, even if it is indirectly.

Perhaps the most poignant illustration of this control is found in *Al-Haramain Islamic Foundation*.¹³⁵ Here, plaintiffs were seeking to admit evidence that they had been targets of the NSA’s surveillance.¹³⁶ Defense counsel inadvertently sent a classified document to plaintiffs’ counsel which stated that the plaintiffs were, indeed, subjects of surveillance.¹³⁷ The court held that the information known to all parties was nevertheless a privileged secret.¹³⁸ It reasoned,

because the government has not officially confirmed or denied whether plaintiffs were subject to surveillance, even if plaintiffs know they were, this information remains a secret. Furthermore, while plaintiffs

130. Rapa, *supra* note 11, at 260 n.213.

131. *Am. Civil Liberties Union*, 438 F. Supp. 2d at 766.

132. *See, e.g., id.* at 765 (holding that information which was publicly disclosed is no longer secret, but that any other information which the government did not choose to acknowledge was protected, resulting in the dismissal of this part of the ACLU’s claim).

133. 439 F. Supp. 2d at 990.

134. *Id.*

135. 451 F. Supp. 2d 1215 (D. Ore. 2006).

136. *Id.* at 1218.

137. *Id.*

138. *Id.* at 1223, 1228–29.

know the contents of the Sealed Document, it too remains secret. . . .
[T]he government did not waive its state secrets privilege by its
inadvertent disclosure of the document.”¹³⁹

That is, even though the NSA surveillance program had been acknowledged publicly by administration officials, and it had become common knowledge to all parties that the plaintiffs were subjects of this program (knowledge that was subsequently published to the world in a court reporter), it can still be excluded as a state secret! This is, again, the court allowing the government to “put the cat back in the bag” when it faces liability.¹⁴⁰

If the executive is engaged in illegal activity, it violates the principle of separation of powers to allow the executive to control what is admitted into evidence in the trial adjudicating that same activity. By refusing to admit evidence of such activity unless it is officially acknowledged by the very party with an interest in excluding it, the *Duncan-Halkin* rule gives the executive this undue control, albeit indirectly. Thus, a program widely believed to violate a federal statute and the Bill of Rights, has continued unabated and unsupervised, and its victims left without remedy for injuries already sustained, and without judicial recourse to protect their constitutional rights in the future. As the D.C. Circuit opined earlier in *Halkin II*, these plaintiffs will be left without judicial remedy and must look to Congress.¹⁴¹

B. Oversight Problems

1. Double abdication

Congress has only rarely been a reliable source for relief from government abuse of the individual or the minority. More often, Congress has either ignored an aggrieved individual or joined the executive in its abuse. The triumph of the individual treated unjustly over an oppressive majority has been more often the virtue of the courts than the legislatures. The language in *Halkin II*, however, denies this forum to the victims of executive secrecy, and requires them to rely on the

139. *Id.* at 1223.

140. See discussion *supra* Part II.C.1.b.

141. *Halkin II*, 690 F.2d 977, 1001 (D.C. Cir. 1982) (“As in the other cases in which the need to protect sensitive information affecting the national security clashes with fundamental constitutional rights of individuals, we believe that ‘(t)he responsibility must be where the power is.’ In the present context . . . this means that remedies for constitutional violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress.”) (alteration in original, internal citations omitted).

unreliable—the political will of the national legislature.¹⁴²

On March 9, 2006 the Senate Intelligence Committee voted, strictly along partisan lines, not to conduct an investigation into the NSA wiretapping program¹⁴³ that Congress's own legal research center concluded was probably illegal.¹⁴⁴ Its compromise with the White House condoned continued violations of the Foreign Intelligence Surveillance Act with enhanced congressional oversight.¹⁴⁵ There are good reasons to believe that this was the politically expedient course of action more than it was far-sighted, sound judgment, given the intense political pressure from the White House as well as from the public.¹⁴⁶ Congressional inaction certainly does nothing for those whose communications may have been unlawfully monitored.

An elected legislature will often abdicate its responsibility to protect the minority because of its political interest in the majority's approval. This was well understood by the Founders and a fundamental reason behind their creation of a strong and independent judiciary.¹⁴⁷ When the executive violates the constitutional rights of unpopular individuals, the injured cannot reasonably look to Congress for a remedy in most circumstances. Yet the *Duncan-Halkin* rule declares that to be their only recourse.¹⁴⁸ Thus, the wiretapping plaintiffs have the courts foreclosed to them (to the extent that the government is not willing to admit publicly to its surveillance) and, after the Senate Intelligence Committee's compromise, they have no recourse in Congress either. This inability of an individual to stop illegal actions by his government contravenes the principles of civil liberty prized by Americans.

The inability for the aggrieved to seek redress in the courts extends well beyond the interception of communications into much more serious territory. The allegations brought by Maher Arar and Khaled El-Masri involve kidnapping, illegal detention, and torture by federal government officials—the nightmare scenario feared by those wary of a police state.¹⁴⁹ Each was detained, secretly and without warrant, while

142. *See id.*

143. *See, e.g.,* Scott Shane & David D. Kirkpatrick, *G.O.P. Plan Would Allow Spying Without Warrants*, N.Y. TIMES, Mar. 9, 2006, at A20.

144. *CRS Report, supra* note 14, at 42–44.

145. Shane & Kirkpatrick, *supra* note 143, at A20.

146. *See, e.g.,* Gail R. Chaddock, *Behind the Deal on NSA Wiretaps*, CHRISTIAN SCI. MONITOR, Mar. 9, 2006, at 1 (ascribing the shift of congressional attention from investigating the NSA program to challenging the controversial Dubai ports deal to political desire to appear strong on national security and to avoid the appearance of weakening counterterrorism measures taken by President Bush).

147. *See, e.g.,* THE FEDERALIST NO. 10 (James Madison).

148. *See supra* note 141.

149. *See supra* note 6.

traveling.¹⁵⁰ They allege that they were held against their wills by American agents, brutally interrogated, and then “rendered” to locales within foreign nations, where they were detained without charge or trial for several months and tortured routinely.¹⁵¹ After their captors (and presumably the intelligence agencies responsible for their renditions) were satisfied that they were not threats and did not possess relevant information, each was released without apology or compensation.¹⁵²

They brought claims for their injuries against the U.S. government, which, in a motion to dismiss, invoked the state secrets privilege claiming that the facts needed to prove their cases are too sensitive to be disclosed.¹⁵³ In all likelihood, there are genuine intelligence methods and potentially embarrassing diplomatic arrangements that require protection from disclosure in this case. On the other hand, there are also strong indications of serious executive error and illegal intelligence activity for which protection is sought in secrecy.¹⁵⁴ With strong indications that “extraordinary renditions” like Mr. Arar’s and Mr. El-Masri’s are fairly common practice by American intelligence agencies,¹⁵⁵ there is a powerful oversight rationale for these cases to proceed. Congress is unlikely to be the champion of the cause of suspected terrorists (even though it is now clear that label is not applicable to Mr. Arar nor, most likely, to Mr. El-Masri). When political considerations make it unlikely that the political branches will help the injured, the judiciary is the recourse that must remain available. Regrettably, the *Duncan-Halkin* rule appears to close the doors of the courts as well.¹⁵⁶ The *Duncan-Halkin*

150. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252–54 (E.D.N.Y. 2006); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532–33 (E.D. Va. 2006).

151. *Arar*, 414 F. Supp. 2d at 253–57; *El-Masri*, 437 F. Supp. 2d at 533–35.

152. *Arar*, 414 F. Supp. 2d at 255; *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006).

153. *Arar*, 414 F. Supp. 2d at 287; *El-Masri*, 437 F. Supp. 2d at 535. See also David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1459 (2005).

154. Mr. Arar has been cleared of all suspicion of links to terrorism and the Canadian government has been unable to find any factual basis for his detention, rendition to Syria, imprisonment, and torture. REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS & RECOMMENDATIONS, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, (Sept. 18, 2006), available at http://www.ararcommission.ca/eng/AR_English.pdf. See also Scott Shane, *Torture Victim Had No Terror Link, Canada Told U.S.*, N.Y. TIMES, Sept. 25, 2006, at A10; *Canadian Inquiry Finds Torture Survivor Maher Arar Completely Innocent, Criticizes U.S. For ‘Rendition’ to Syria*, DEMOCRACY NOW!, Sept. 19, 2006, <http://www.democracynow.org/article.pl?sid=06/09/19/1348206&mode=thread&tid=25>.

155. See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set up After 9/11*, WASH. POST, Nov. 2, 2005, at A01; *All Things Considered: Bush Concedes CIA Ran Secret Prisons Abroad* (NPR radio broadcast, Sept. 6, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5776968>; HUMAN RIGHTS WATCH, “Outsourcing” Torture, (2004).

156. See, e.g., *Arar*, 414 F. Supp. 2d at 287–88 (dismissing on national security grounds other than the state secrets privilege); *El-Masri*, 437 F. Supp. 2d at 541 (commenting that “it is worth

rule allows constitutional liberties to be surrendered too readily to a privilege for secrecy that is too easily abused.

2. *The Secrecy System*¹⁵⁷

By sacrificing judicial checks on executive power, the *Duncan-Halkin* rule protects government secrecy, whether secrecy is warranted or not. Ostensibly, we have traded the oversight that acts as guarantor of our civil liberties for a strong national security. But in practice we have traded oversight for the ability of the executive to conceal enormous amounts of public information, often of dubious relevance to national security, at its own discretion. There are even indications that the *Duncan-Halkin* rule's barrier to effective oversight may actually *harm* national security by hiding incompetence or gross error from public scrutiny, accountability, and correction.¹⁵⁸

Secrecy is of limited value to a democratic republic. One commentator observed in 1966, when it had become apparent that an American peacetime military would be permanent, that such an establishment would create new demands for secrecy and encourage its expansion.¹⁵⁹ Concluding that limited secrecy was necessary, he also identified "limits on its value."¹⁶⁰ One of the limitations to the value of secrecy was the public's inability to exercise effective oversight: "Congress' ability to supervise the military establishment is a function of information. An uninformed Congress must either abdicate its power to the knowledgeable or exercise that power blindly."¹⁶¹ It hardly needs mentioning that an ambitious executive would understand and exploit the opportunities presented by Congress's ignorance of matters concealed behind the executive veil of Top Secret classifications. The uninformed public finds itself in a position similar to that of Congress and, suspecting government abuse, must be able to enlist the power of the

noting that putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.").

157. SCHLESINGER, *supra* note 1, at 331–76.

158. See, e.g., *Edmonds v. Dep't of Justice*, 323 F. Supp. 2d 65, 81–82 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 734 (2005) (suit by former FBI employee for alleged wrongful termination after "blowing the whistle" on FBI failures related to the terrorist attacks of September 11, 2001 dismissed after the government invoked the state secrets privilege); and *Rapa*, *supra* note 11.

159. Zagel, *supra* note 7, at 878–80.

160. *Id.* at 78.

161. *Id.*

courts to inform itself. The *Duncan-Halkin* rule provides for just the opposite: the concerned citizen may not inform himself even in the most trivial matters.¹⁶²

The value of secrecy in a democratic republic is severely limited by the inseparably-connected lack of oversight that creates substantial hazards for good government. Secrecy and oversight are opposite points on a sliding scale: when the law allows a greater portion of secrecy, oversight is decreased proportionally. The Third Circuit recognized this in its opinion sustaining the district court's compulsion of the evidence in *Reynolds*:

The present cases themselves indicate the breadth of the claim of immunity from disclosure which one government department head has already made. It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.

We need to recall in this connection the words of Edward Livingston: "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured." And it was Patrick Henry who said that "to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country."¹⁶³

True to the Third Circuit's misgivings, the executive branch's notions of what falls under the national security label have steadily expanded since World War II. During the 1950s, the era of *Reynolds*, the executive departments' classification system grew exponentially. Although spawned by legitimate needs, it soon grew into "an extravagant and indefensible system of denial."¹⁶⁴ The executive alone monitored its uncontrolled descent into official secrecy, and "[b]ecause the secrecy system was controlled by those on whom it bestowed prestige and

162. See *supra* note 85 and accompanying text.

163. *Reynolds v. U.S.*, 192 F.2d 987, 995 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953) (internal citations omitted).

164. SCHLESINGER, *supra* note 1, at 341.

protection, it had long since overridden its legitimate objectives.”¹⁶⁵ By 1972, there were 20 million classified documents, of which “less than one-half of 1 percent . . . actually contain[ed] information qualifying even for the lowest defense classification”¹⁶⁶ This culture of secrecy bred ridiculous and disturbing offspring. Zagel reported that:

The executive has refused . . . to disclose (a) the number and use of administrative aircraft to a member of Congress; (b) the picture of the interior of a plush transport plane to a member of Congress; (c) information on monkey research to the press . . . ; (d) photographs of the B-58 and the Titan missile to the press even though both were in public view; (e) a report on a bow and arrow weapon developed during World War II to the scientist who developed the weapon . . . ; (f) a report on pollution of ground supply water adjoining an arsenal . . . to a member of Congress; [and] (g) reports dating back to 1907 of attacks by sharks on seamen to a group of scientists.¹⁶⁷

According to Schlesinger, “when one member of the Joint Chiefs of Staff wrote another saying that too many undeserving papers were being stamped Top Secret, his note itself was stamped Top Secret.”¹⁶⁸

Gardner observed the implications of over-classification on the state secrets privilege:

One frequent criticism of the *Reynolds* standard is that the government can protect almost any type of information from discovery with an assertion of the state secret privilege. Current standards do not require that information be classified as secret; nor do the standards require that the information not be in the public domain. Knowledge regarding nearly any aspect of our country is valuable to an enemy. Obviously, information such as the location of missile silos, training methodology for special forces, satellite locations, and weapon designs would assist an enemy and should receive protection from public disclosure. However, information such as the distance between Charlotte and Washington, the dates and locations of Air Force shows, the locations of banks, the type of food the President enjoys also would be useful information to an enemy and could “potentially prejudice” the nation’s security.¹⁶⁹

Although his comparison may seem absurd, stranger protections have

165. *Id.* at 344.

166. *Id.* (quoting testimony of a former Pentagon security officer).

167. Zagel, *supra* note 7, at 898.

168. SCHLESINGER, *supra* note 1, at 344.

169. Gardner, *supra* note 8, at 585–86 (internal citations omitted).

occurred. To be sure, the D.C. Circuit ratified such behavior by the executive when it upheld the NSA's claim of privilege for information that already had been "let out of the bag."¹⁷⁰

The problem with excessive secrecy goes deeper than its silliness or even its costs. It lies in the fact that "almost any information can qualify as privileged"¹⁷¹ because of the expansive scope of the information that arguably could pose a reasonable danger to the national security. It need not *actually* present a security risk, but must bear merely the *potentiality* of risk. This minimal standard, which does not provide a method for distinguishing information that truly merits protection from information that is trivial or that demonstrates wrongdoing or incompetence, transforms the executive's *claim* of privilege into a practically irrebuttable *presumption* of privilege. This standard "renders review of such claims perfunctory."¹⁷²

Why take secrecy to such an extreme level? The presidential historian Arthur Schlesinger saw three advantages accruing to the executive: the power to withhold, the power to leak, and the power to lie.¹⁷³ By withholding "knowledge that would make possible an independent judgment on executive policy" the executive can "defend [its] national security monopoly and prevent democratic control of foreign policy."¹⁷⁴

The power to leak allows the executive "to tell the people what it serve[s] the government's purpose that they should know."¹⁷⁵ This principle was amply demonstrated in the current Bush administration's arguments for the war in Iraq. Its convenient selection of questionable evidence that supported its claims and retention of more reliable evidence that contradicted them is the archetype of this power to leak. The executive's hypocrisy on the protection of national security information is the great elephant in the courtroom during state secrets cases. The Carter administration leaked information about the secret Stealth bomber reportedly to rebut political opponents who claimed that the nation's defenses had deteriorated during his presidency,¹⁷⁶ and then claimed secrecy was essential to protect the Vietnam-era domestic spying in the *Halkin* cases. The current Bush administration leaked the identity of an undercover CIA agent reportedly to punish her husband, a

170. See discussion *supra* Part II.C.1.b and *supra* note 140 and accompanying text.

171. *Military & State Secrets Privilege*, *supra* note 7, at 579.

172. *Id.*

173. SCHLESINGER, *supra* note 1, at 354–57.

174. *Id.* at 354.

175. *Id.* at 355.

176. *Military & State Secrets Privilege*, *supra* note 7, at 580 n.61.

diplomat who published an essay refuting the administration's allegations about Iraqi weaponry.¹⁷⁷ One may assert, almost without any doubt, that if such information had been the subject of a plaintiff's discovery, the state secrets privilege would have been invoked successfully and the information would have remained secret. This shows that the executive will use secrecy arbitrarily and inconsistently to serve its own purposes. Indeed, without any objective and external standard to act as a check, there is nothing to stop it from so doing.

The third advantage is the power to lie. Uncontrolled secrecy allows the executive to falsify and dissemble whenever doing so is easier and more expedient than taking responsibility or conforming to the rule of law. It also "instill[s] in the executive branch the idea that foreign policy [and, I would add, national security] [are] no one's business save its own"¹⁷⁸ The diplomatic and military establishments then become free to engage in the business of securing their own interests regardless of the consequences to the public.

These advantages gained from secrecy can be seen in the state secrets context. Returning to the *Halkin* and *ACLU* cases, if we assume that the NSA surveillance was illegal for the sake of argument, the secrecy and the deferential standards applied to the state secrets privilege would provide a safe harbor from prosecution and liability for wrongdoing. What is worse, they would encourage further wrongdoing because of the practical immunity from responsibility afforded by the privilege.

The Constitution, though ironically conceived in secrecy itself, created a government that would rely on a well-informed public for support. Extensive, routine, institutionalized secrecy that gives the government undue control over public information is not compatible with that requirement for good government.

IV. CONCLUSION

The War Against Terrorism presents special needs for secrecy and special problems with its use. The executive branch during the War Against Terrorism has strong incentives, as in the Cold War, to withhold information. Some incentives are legitimate, but some stem from the desire to operate in areas of doubtful constitutionality and legality with impunity and without oversight. The tendency in times of fear is to accept legal measures that are immediately expedient. But,

177. See, e.g., CNN, *Bush Acknowledges Declassifying Intelligence*, Apr. 11, 2006, <http://www.cnn.com/2006/POLITICS/04/10/whitehouse.leak/index.html>.

178. SCHLESINGER, *supra* note 1, at 356.

paradoxically, the present security crisis introduces an ideal opportunity to reassess the state secrets privilege, to recalibrate the application of *Reynolds* to claims of privilege. Many viable alternatives have been suggested.¹⁷⁹ Furthermore, contrary to the D.C. Circuit's dicta in *Halkin II*,¹⁸⁰ the *Reynolds* decision is not a constitutional mandate, but is based in evidentiary and procedural principles.¹⁸¹ Neither is it founded in the federal statutes. Therefore it is open to change by the courts, and change is certainly needed. The courts or Congress should strike a balance that gives more weight to disclosure of public information, and that denies government secrecy as the rule. The *Duncan-Halkin* formulation should be rejected and the state secrets privilege should not obtain until it has been shown that a dire, substantial, and actual threat to national security will arise from disclosure.

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179. See, e.g., Zagel, *supra* note 7, at 900–10 (arguing that judges are both competent to assess the importance of the evidence in question to national security, and trustworthy of disclosure as government officers); *Military & State Secrets Privilege*, *supra* note 7, at 578–86 (advocating a return to the more comprehensive judicial inquiry that can be read from *Reynolds*, and for a more varied response to legitimate executive needs for secrecy than simple exclusion of the evidence and dismissal of plaintiff's action); Brancart, *supra* note 80, at 14–25 (exploring five alternatives to current state secrets jurisprudence: abolition of the privilege, protective orders, estoppel and waiver by the government upon invocation of the privilege, adoption of Freedom of Information Act procedures, and special masters); Gardner, *supra* note 8, at 591–609 (proposing statutory alternatives); Mark J. Rozell, *Restoring Balance to the Debate Over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541, 576–77 (identifying the strong precedents for judicial review of sensitive information in other executive privileges).

180. *Halkin II*, 690 F.2d 977, 1001 (D.C. Cir. 1982) (“In the present context, where the Constitution compels the subordination of the appellants’ interest in the pursuit of their claims to the executive’s duty to preserve our national security, this means that remedies for constitutional violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress.”).

181. *U.S. v. Reynolds*, 345 U.S. 1, 6 (1953) (“Both [plaintiffs’ and defendant’s] positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision.”).

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