United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1922

ADELE HALKIN, ET AL., APPELLANTS

v.

RICHARD HELMS, Department of State, ET AL.

No. 77-1923

ADELE HALKIN, ET AL.

v.

RICHARD HELMS, Department of State, ET AL.
HAROLD BROWN, Secretary, Department of Defense
in his official capacity, APPELLANT

On Suggestion for Rehearing En Banc

(D.C. Civil 75-1773)

Filed January 16, 1979

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WRIGHT, *Chief Judge*, BAZELON, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

ORDER

The suggestion of appellants' Adele Halkin, et al., for rehearing en banc having been transmitted to the full court and there not being a majority of the judges in regular active service in favor of having this case reheard en banc, it is

ORDERED by the court, *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

Chief Judge WRIGHT, and *Circuit Judges* BAZELON and ROBINSON would grant rehearing en banc.

Statement of BAZELON, *Circuit Judge, with whom* WRIGHT, *Chief Judge, joins, as to why he voted for rehearing en banc.*

I.

Appellants in this case, individuals who were active and vocal opponents of the Vietnam War, challenge the constitutionality of certain warrantless surveillance activities allegedly conducted by the National Security Agency (NSA).[1] The government, invoking an evidentiary "privi-

[1] Appellants challenge two particular surveillance operations conducted by NSA, SHAMROCK and MINARET. Both of these projects have been described in some detail in *Foreign and Military Intelligence: Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S.REP. No. 94-755, 94th Cong., 2d Sess. (hereinafter *Senate Select Committee Report* or the *Report*). According to the *Report*, operation SHAMROCK provided the NSA with copies of virtually all telegraphic traffic sent to, from or transitting the United States from

lege" based on "state secrets" declined to answer certain portions of appellants' complaint. A panel of this court has now upheld this claim of privilege in a decision that

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1945 to 1975. It was the largest government interception program affecting Americans, dwarfing CIA's mail opening program by comparison. *Report*, Bk. III at 740. The second surveillance project, MINARET, involved the interception and dissemination of "the international communications of selected American citizens and groups on the basis of lists of names ['watchlists'] supplied by other government agencies." *Id.* at 739. "The program applied not only to alleged foreign influence on domestic dissent, but also to American groups and individuals, whose activities 'may result in civil disturbances . . . .'" *Id.*, quoting MINARET charter, 7/1/69.

Shortly after this suit was filed, the Secretary of Defense interposed a claim of privilege, arguing that simply admitting or denying the plaintiffs' allegations that NSA had intercepted their communications would disclose "state secrets." After further attempts to elucidate the claim of privilege, including the presentation of *in camera* affidavits and at least one *in camera* witness, the district court sustained the claim of privilege "except as it might extend to communications originated within the United States by the plaintiffs and acquired by NSA through its operation and SHAMROCK", Order of June 30, 1977 at 1 (App. 108), because the court concluded "that, in view of matters which have to date been made public about the SHAMROCK source, the claim of privilege cannot be extended to preclude the federal defendants from admitting or denying the fact vel non of acquisition of a plaintiff's communications originated in the United States for transmission abroad, where it conclusively can be determined from records and materials now retained by NSA that such communication was obtained through the SHAMROCK source." Order of June 30, 1977 at 5-6 (App. 112-113). Appellants appealed from that portion of the order dismissing with prejudice parts of their suit; the government obtained certification for an interlocutory appeal of those matters decided adversely to the claim of privilege. On appeal, the panel concluded that the government's claim of privilege should be sustained in its entirety, which in effect, put an end to plaintiffs' suit.

is dangerously close to an open-ended warrant to intrude on liberties guaranteed by the Fourth Amendment. Because I feel that the panel has clearly misconceived the nature of the so-called "state secrets privilege" and the standard of review applicable to the assertion of that privilege, I voted to rehear this case *en banc*.

The panel's analysis contains two fundamental flaws. First, the panel fails to assess the compelling countervailing interest in disclosure before upholding the claim of privilege, contrary to the teaching of *Reynolds v. United States*, 345 U.S. 1 (1953). Second, the panel defers to the executive invocation of the privilege without making the *de novo* assessment of the propriety of the privilege required by this court's decisions in such cases as *Ray v. Turner*, No. 77-1401 (D.C.Cir. August 24, 1978).

II.

In *United States v. Reynolds*, the Supreme Court made clear that any claim of privilege must be measured against the need for the information that the government seeks to suppress. "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted. . . ." [2] It is difficult to imagine a stronger instance of need than this case. Unlike *Reynolds*, where the "state secret" was only coincidental to the plaintiffs' tort suit, and did not preclude litigation of the case, upholding the privilege in this case precludes all judicial scrutiny of the signals intelligence operations of NSA, regardless of the degree to which such activity invades the protections of the Fourth Amendment.[3] The necessity to which *Reynolds*

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[2] 345 U.S. at 11.

[3] In this Statement, I refer primarily to the Fourth Amendment claim. However, plaintiffs' statutory claim under § 605 of the Federal Communications Act of 1934 is also substantial. See *Senate Select Committee Report*, Bk. II at 139 (concluding SHAMROCK was a violation of § 605). Furthermore,

directs us to look is, in this case, twofold: (1) The information is necessary if plaintiffs' suit is to continue and (2) it is necessary to assure that simply because private communications become entangled with sophisticated intelligence gathering methods, the constitutional protections for those communications are not unlawfully and cavalierly tossed aside. The panel opinion notes in passing the first element of necessity;[4] the vital second element—the core of plaintiffs' suit—is nowhere considered.

Only a total disregard for the importance of the Fourth Amendment interest could lead the panel to decide this case without first considering the significance of the Supreme Court's decision in *United States v. United States District Court (Keith)*,[5] and this court's *en banc* decision in *Zweibon v. Mitchell.*[6] These two decisions erect firm limits on the authority of the Executive to conduct warrantless surveillance, even in the name of national

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significant First Amendment interests are implicated by a surveillance operation targeted at those opposed to government policies.

The close interplay of Fourth and First Amendment protections was noted by Justice Powell in United States v. United States District Court (Keith), 407 U.S. 297, 314 (1972), where the Court expressly limited the power of the government to intercept communications for the purpose of "national security."

> History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

[4] Halkin v. Helms, Nos. 77-1922, 77-1923 (D.C.Cir., June 16, 1978) at 15.

[5] 407 U.S. 297 (1972).

[6] 516 F.2d 594 (D.C.Cir. 1975) (en banc).

security.[7] Yet in this case, the panel uses the evidentiary privilege to immunize conduct that appears to be pro-

[7] In *Keith* the Supreme Court held that judicial warrants were required before the government could undertake surveillance of domestic dissidents in internal security matters, where neither the source nor the focus of the dissent was a foreign power. *Zweibon* extended the same Fourth Amendment protection to a group of domestic dissidents, the Jewish Defense League, where the focus of dissent was the activities of a foreign power, the Soviet Union, and where the government claimed that the dissidents' activities had an adverse effect on national security. *Zweibon's* narrow holding was stated succinctly: "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if the surveillance is installed under presidential directive in the name of foreign intelligence gathering for protection of the national security." 516 F.2d at 614. Thus, a key issue in *Halkin* has been left open by *Keith* and *Zweibon*—whether there is an exemption from the warrant requirement when the government intercepts communications with at least one terminal outside the United States. To say that the question is open, however, is not to deny its importance nor to sanction an analysis of the "state secrets" privilege which forecloses any inquiry into the constitutional rights implicated by unfettered government surveillance of Americans' international communications.

However, the MINARET charter by its very terms appears to offend the thrust of the Supreme Court's decision in *Keith*. The *Senate Select Committee Report* noted: "[MINARET] applied not only to alleged foreign influence on domestic dissent but also on American groups and individuals whose activities 'may result in civil disturbances or otherwise subvert the national security of the U.S.' " Bk. III at 739.

At its height, the watchlist contained the names of 600 Americans (1,200 names of Americans during the life of the program) and produced 2,000 reports disseminated to other agencies during the period 1967-1973. "NSA estimates 10 percent of these reports were derived from communications between two American citizens." Bk. III at 747. Among the communications intercepted and disseminated to government agencies were, according to the *Senate Select Committee Re-*

scribed by the Fourth Amendment.[8] As elaborated by the panel, the privilege becomes a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens who are the target of the government's surveillance.

The state secrets privilege, weakly rooted in our jurisprudence,[9] cannot and should not be a device for the

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port: "discussion of a peace concert; the interest of the wife of a U.S. Senator in peace causes; a correspondent's report from Southeast Asia to his magazine in New York; an anti-war activist's request for a speaker in New York." Bk. II at 108.

[8] Although the precise question posed in this case on the merits has not fully been answered, *see* note 7 *supra*, we have previously indicated in *Zweibon*, 516 F.2d at 613-14 (dictum): "[A]n analysis of the policies implicated by foreign security surveillance indicates that, absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional. . . ." (footnote omitted)

[9] Although the existence of the state secrets privilege "has never been doubted," 8 WIGMORE, EVIDENCE § 2378 at 794 (McNaughten Rev. 1961), it has surfaced only rarely in the United States. Most cases have concerned commercial litigation, particularly patent cases. *See, e.g.*, In re Grove, 180 F. 62 (3d Cir. 1910); Pollen v. Ford Instrument, 26 F.Supp. 583 (E.D.N.Y. 1939); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D.Pa. 1912); Pollen v. United States, 85 Ct. Cl. 673 (1937). *See also* Totten v. United States, 92 U.S. 105 (1875) (contractual claim for espionage services); Republic of China v. National Union Fire Ins., 142 F.Supp. 551 (D.Md. 1956) (claim by United States on an insurance policy).

Only one court has heretofore confronted the clash between two substantial public interests—national security and the civil liberties guaranteed by the Bill of Rights—in ruling on a claim of "state secrets" privilege. In Jabara v. Kelly, 75 F.R.D. 475 (E.D. Mich. 1977), the court faced a challenge to certain electronic surveillance activities which in part overlap with the surveillance challenged in this case. In that case

government to escape the strictures of the Fourth Amendment. "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law." [10] The panel employs an evidentiary privilege to carve out an exception to this basic principle of constitutional limitations on government.

III.

The panel's failure to consider the weighty Fourth Amendment interests at stake in this litigation is exacerbated by its abdication of responsibility for scrutinizing searchingly the government's claim of privilege. The teaching of *Reynolds* is clear: "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." [11] The "utmost deference" which the panel has given the government's *ex parte, in camera* assertions [12] is not justified in precedent, conflicts with

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the court upheld the privilege. Significantly the privilege was upheld only *after* the government admitted intercepting Jabara's messages (the very information NSA refuses to divulge here). *Id.* at 490. Moreover, upholding the privilege in response to Jabara's request for discovery did not have the effect of foreclosing the plaintiff's suit. *See also* Kinoy v. Mitchell, 67 F.R.D. 1 (S.D.N.Y. 1975) (claim for damages arising out of alleged unauthorized electronic surveillance; during discovery government's claim of state secrets denied because the privilege was not properly invoked).

The constitutional basis of the state secrets privilege is unclear. In *Reynolds* the Court suggested that the privilege was rooted in the separation of powers. 345 U.S. at 6 n.9. In United States v. Nixon, however, the Court appears to have derived the privilege from the President's Article II duties as Commander in Chief and his responsibility for the conduct of foreign affairs. 418 U.S. 683, 710 (1974).

[10] Butz v. Economou, 98 S.Ct. 2894, 2910 (1978).

[11] 345 U.S. at 8.

[12] Halkin v. Helms, slip op. at 14. This standard is derived from the dictum in United States v. Nixon, 418 U.S. at 710.

other decisions of this court as well as Congress' clear mandate for review of national security claims under FOIA, and slights the role of the court in protecting the civil liberties guaranteed by the Fourth Amendment.

Courts have a particularly important role in mediating between Fourth Amendment protections and the need of the executive to conduct surveillance for legitimate national security purposes. Even assuming that, in the extreme case, "the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake," [13] the court itself must make the ultimate determination. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." [14]

While judges "should acknowledge their limitation in areas where they lack expertise," [15] the difficult task of assessing a claim of "state secrets" privilege calls for a particularly judicial expertise—balancing the government's need for secrecy against the rights of individuals.[16] As the Supreme Court observed in *Keith*:

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[13] *Reynolds*, 345 U.S. at 11.

[14] *Id.* at 9-10.

[15] *Zweibon*, 516 F.2d at 657 n.207.

[16] When the privilege relates to official papers and information sought by the citizen as a means of proof in the assertion of his claims, and the disclosure is opposed as harmful to general security, the question is one of balancing conflicting policies. The head of an executive department can appraise the public interest of secrecy as well (or perhaps in some cases better) than the judge, but his official habit and leaning tend to sway him toward a minimizing of the interest of the individual. . . . The determination of questions of fact and the applications of legal standards thereto in passing upon the admissibility of evidence and the validity of claims of evidential privilege are traditionally the responsibility of the judge. As

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. *There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.*[17]

The role Congress has assigned the courts in assessing claims of "national security" under the Freedom of Information Act gives further support to the need for an independent, *de novo* assessment of the government's claim of privilege. In amending FOIA in 1974, Congress explicitly rejected both the Supreme Court's decision in *EPA v. Mink*,[18] (limiting the courts' role in assessing security classifications under FOIA) and President Ford's argument in opposition to the amendments ("the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas

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> a public functionary he has respect for the executive's scruples against disclosure and at the same time his duties require him constantly to appraise private interests and to reconcile them with conflicting public policies; he may thus seem better qualified than the executive to weigh both interests understandingly and to strike a wise balance.

McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE (2d ed. 1972) at 235.

[17] 407 U.S. at 320 (emphasis added). The Court's observation is applicable to the foreign security context as well:

> Although the judicial competence factor arguably has more force when made in the foreign rather than the domestic security context, the response of *Keith* to the analogous argument is nevertheless pertinent to any claim that foreign security involves decisions and information beyond the scope of judicial expertise and experience.

Zweibon, 516 F.2d at 641.

[18] 410 U.S. 73 (1973).

where they have no particular expertise." [19]) The 1974 Amendments explicitly empower courts to make a *de novo* determination of the propriety of a security classification.[20]

This court has recently affirmed in the independent role of the court under FOIA in *Ray v. Turner*. We observed:

> The legislative history underscores that the intent of Congress regarding de novo review stood in contrast to, and was a rejection of, the alternative suggestion proposed by the Administration and supported by some Senators: that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision by the appropriate official to withhold the document.[21]

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[19] Message from President Gerald R. Ford Vetoing H.R. 12471, H. Doc. No. 93-383, 93d Cong., 2d Sess. (1974).

[20] 5 U.S.C. § 552(b)(1) (1976):

> (b) This section does not apply to matters that are—
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> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order. . . .

On the legislative history of the 1974 Amendments, which make clear Congress' intention for the courts to conduct a *de novo* review of an agency's decision to withhold documents on national security grounds, *see* Ray v. Turner, No. 77-1401 (D.C. Cir. August 24, 1978) 5-14; *id.* (Wright, C.J., concurring) at 15-23.

[21] *Ray* at 12. The panel in the instant case remarks on the "substantial weight" which the Conference Committee indicated should be accorded the agency's affidavit in determining the propriety of withholding documents under Exemption 1. As Chief Judge Wright cogently explained in *Ray*, the requirement that the affidavit be given substantial weight in no way undercuts the need for *de novo* review, nor justifies the "utmost deference" which the panel would accord the government's assertion of privilege. *See id.* (Wright, C.J., concurring) at 31-33.

The standard applied by the panel in this case ("utmost deference") directly conflicts with our decision in *Ray*, and produces the anomalous result that a FOIA requester, who may have no special need for the requested information,[22] is given broader access to government information than a plaintiff who requires the information in order to pursue remedies for violation of constitutional rights. Thus, far from taking into account the plaintiffs' need for information, as required by *Reynolds*, the panel has stood *Reynolds* on its head and penalized the plaintiffs precisely because their need differs from that of the public at large. Not only does this result defy common sense, but ultimately it will simply lead to a waste of judicial resources. Henceforth, plaintiffs seeking information in a civil suit will simply file a simultaneous FOIA request to reap the advantage of the broader inquiry under FOIA. Nothing will be gained except duplication and delay.[23]

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[22] "The Freedom of Information Act does not depend on a showing of need or interest by the particular applicant for the records. Any showing of need or interest is irrelevant." Forsham v. Califano, No. 76-1308 (D.C.Cir., July 11, 1978) at 10; *accord* Sterling Drug Inc. v. FTC, 450 F.2d 698, 705 (D.C.Cir. 1971).

[23] In discussing Supreme Court Standard 509—Secrets of State and Other Official Information (the proposed Federal Rule of Evidence 509 which was not adopted), one commentator explained the relationship between the evidentiary privilege and the Freedom of Information Act:

> Anything that would be available to a member of the public under the Act should be exempt from the privilege in Standard 509, since a litigant is entitled to relevant information at least as much as a member of the public merits materials for which he need not demonstrate any particular need. Cases ordering disclosures under the Act are therefore pertinent in delineating the kind of information which should be immune to Standard 509 claims of privilege.

2 WEINSTEIN'S EVIDENCE ¶ 509[06] (1977) at 509-42.

IV.

The failure to assess *de novo* the claim of privilege has led the panel to disregard completely the significance of the widespread public disclosures concerning operation SHAMROCK. These disclosures undermine the government's *ex parte* assertion that simply admitting acquisition of some of plaintiffs' messages will pose a danger to national security.

The disclosures concerning SHAMROCK are extensive. SHAMROCK was the subject of extensive hearings before the Senate Select Committee, and is discussed at length in that Committee's *Report*.[24] Even more pertinent are NSA's disclosures in *Jabara v. Kelly*,[25] where the government not only admitted that NSA had acquired six of Jabara's messages, but went on to disclose the place from which the intercepted messages originated.[26] In several FOIA cases NSA has further expanded the store of public knowledge concerning SHAMROCK,[27] although in those cases the NSA has not revealed "whether the material . . . was derived from the interception of the [FOIA plaintiffs] own messages or the interception of messages between other parties which included reference to plaintiffs'

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[24] *See Report, supra* note 1, at Bk. III, pp. 740-41, 765-776.

[25] 75 F.R.D. 475 (E.D.Mich. 1977). *See* note 9 *supra*.

[26] Appendix (App.) 124. It is noteworthy that NSA did not appeal or otherwise seek reconsideration of the order to disclose the identity of the agency that intercepted Jabara's messages. Nor has NSA offered to demonstrate how the disclosures in *Jabara* differ in their potential harm to national security from the limited disclosures plaintiffs seek here.

[27] *See, e.g.*, Hayden and Fonda v. NSA, Nos. 76-0286, 76-0287 (D.D.C.); Founding Church of Scientology v. NSA, No. 76-1494 (D.D.C. July 21, 1977), appeal pending, No. 77-1975 (D.C.Cir.).

names." [28] Most recently, a district judge in the District of Columbia has again allowed access to SHAMROCK derived material under FOIA.[29] Nor should it be forgotten that the district judge in this case, who had the benefit of NSA's *in camera, ex parte* testimony was also unconvinced that admitting acquisition of the SHAMROCK material would pose any reasonable danger to national security sufficient to uphold the government's claim of privilege.[30]

Taken together, these developments demonstrate that the panel could have reached its decision only by taking

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[28] Petition for rehearing at 5 n.7. The NSA's disclosures in *Hayden and Fonda* and *Founding Church of Scientology* are contained in affidavits filed in those cases by Norman Boardman, Information Officer of the National Security Agency, attached as Addendum to the Petition for Rehearing.

[29] Baez v. NSA, No. 76-1921 (D.D.C. Nov. 2, 1978). In *Baez*, Chief Judge Bryant noted that "N.S.A. has already chosen to reveal to plaintiff that some of her communications were intercepted and recorded." Slip op. at 3. The court there ordered the NSA to make public all but two paragraphs of the *in camera* affidavit filed in that case. *See* note 31 *infra*.

[30] Halkin v. Helms, No. 75-1773 (D.D.C. June 30, 1977) at 5-6:

> With respect to NSA communications interception activities pertaining to wire or telegraphic communications appearing to have been originated by certain of the plaintiffs within the United States and to have been acquired by NSA through the SHAMROCK source, however, the Court finds and concludes that, in view of matters which have to date been made public about the SHAMROCK source, the claim of privilege cannot be extended to preclude the federal defendants from admitting or denying the fact *vel non* of acquisition of a plaintiff's communication originated in the United States for transmission abroad, where it conclusively can be determined from records and materials now retained by NSA that such communication was obtained through the SHAMROCK source.

the government's *ex parte* affidavits at face value and refusing to assess their credibility in light of reason and the information already made public, the minimal elements of *de novo* review. My own examination of the *in camera* affidavits reinforces this conclusion.[31] To my mind,

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[31] In its *in camera* affidavits to the district court, particularly NSA Deputy Director Drake's *in camera* affidavit of June 17, 1977, NSA seeks to justify its conclusion that admitting or denying acquisition of plaintiffs' messages would pose a danger to national security. Because these affidavits were filed *in camera*, and in light of the disposition of this case by the panel, and the court en banc, I am precluded from demonstrating in detail why I believe those arguments are insufficient as a matter of law to justify upholding the privilege in this case. However, it is instructive to consider the observations of Judge Bryant in his opinion in *Baez*, slip op. at 1-2, in a related context:

> The Agency has presented basically three arguments why the disclosure of any information about these documents would threaten the national security or reveal the structure or activities of N.S.A. First of all, foreign governments do not know which international common carrier facilities the N.S.A. is capable of monitoring. Secondly, foreign governments do not know the actual intelligence targets of the N.S.A. And, thirdly, foreign governments do not know the particular communications circuits which the N.S.A. is now monitoring or has in the past monitored.[1]
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> [1] These arguments have been made by the agency at oral argument in another F.O.I.A. case involving the National Security Agency, Founding Church of Scientology of Washington, D.C. v. National Security Agency, No. 77-1975 (D.C.Cir. argued March 27, 1978).
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> The Court finds all three arguments unconvincing. From news articles and congressional investigations the American public, and consequently any aware foreign government, knows that N.S.A. can and does collect most messages to or from the United States transmitted by international common carrier facilities, both private and

the panel engaged in the "willing suspension of disbelief." The Constitution simply does not permit the courts such a luxury.[32]

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commercial. This includes messages passed by radio, satellite or other electromagnetic means. Therefore, N.S.A.'s capability to perform this sort of function is public knowledge.

Similarly, as plaintiff points out, Congress has publicized the fact that N.S.A. is capable of targeting certain persons. It can select, by computer, information about these people from the massive number of collected messages. The N.S.A. did target certain antiwar activists in the past, and so the fact that Joan Baez may have been targeted is not a national security secret.

Furthermore, the agency is known publicly to be capable of monitoring all messages carried by electromagnetic means, to and from the United States. Even if plaintiff knows on which particular circuit the message was sent, she would know no more than at that particular time the N.S.A. intercepted that circuit. She already knows that the N.S.A. is capable of monitoring any such circuit which originates or ends in the United States.

Therefore, the Court orders to be made public all but two paragraphs of the *in camera* affidavit submitted by defendants.

I also note that the panel never explains why it ignores the distinction between material derived from SHAMROCK and material derived from other sources, which the district judge found to be controlling.

[32] Congress has already limited some of the pernicious consequences of the panel's opinion in the Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783. The Act limits electronic surveillance of U.S. citizens and permanent resident aliens in the United States (including international cable communications) to situations where there is probable cause to believe that the target of the communication is a foreign power or an agent of a foreign power, and requires that such surveillance be conducted pursuant to a warrant issued by any of the special judges appointed by the Chief Justice to issue such warrants. Violators of the Act are subject to civil and criminal liability. The purpose of this legis-

lation was "to permit the Government to gather necessary foreign intelligence information by means of electronic surveillance but under limitations and according to procedural guidelines which will better safeguard the rights of individuals. S.REP. No. 96-604 (part I) 95th Cong., 2d Sses. (1978) at 9. Congress thus saw the two competing needs and struck a balance between them, resolving a tension which the panel in this case has totally failed to recognize or grapple with. I intimate no views on the effect of the Foreign Intelligence Surveillance Act on the instant case, except to observe that its enactment does not dissuade me that this important case should be reheard *en banc*.