The original documents are located in Box C45, folder "Presidential Handwriting, 7/21/1976 (3)" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

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Digitized from Box C45 of The Presidential Handwriting File
at the Gerald R. Ford Presidential Library

THE WHITE HOUSE
WASHINGTON

Eva is checking on status of this matter.

8/20/76

Mr Buchen advised this matter resolved. No need for decision
8/20/76

~~TOP SECRET~~/
WHEN CLASSIFIED DOCUMENTS ARE ATTACHED

THE WHITE HOUSE

WASHINGTON

UNCLASSIFIED UPON REMOVAL OF CLASSIFIED ATTACHMENTS

July 21, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN P.

SUBJECT: Assertion of Executive Privilege by You and Authorization to Bring Action to Stop Enforcement of Subpoena Issued to the American Telephone and Telegraph (AT&T) Company

BACKGROUND

Attached at TAB A is a copy of a subpoena issued on June 22 to the AT&T Company for documents described in the subpoena which are in the possession of that Company and its various subsidiaries. The subpoena is issued by Chairman Staggers of the House Interstate and Foreign Commerce Committee in behalf of the Subcommittee on Oversight and Investigations of which John E. Moss is Chairman.

Attached at TAB B is a draft "Memorandum of Understanding" prepared as a result of extended negotiations by representatives of the Department of Justice and representatives of the Subcommittee. These negotiations were conducted with the knowledge and concurrence of the intelligence community in an effort to avoid enforcement of the above subpoena. The purpose was to avoid disclosure by AT&T to the Subcommittee of sensitive national security information consisting of addresses, line numbers or telephone numbers related to the subjects of warrantless electronic surveillance by the F.B.I. Except for paragraphs 5-7, the draft "Memorandum of Understanding" has that effect, and those paragraphs, while reducing the risk, would still allow access by the Subcommittee to sensitive sources and methods and as a result of paragraphs 12 and 13, would expose this information to all Members of the House of Representatives.

You have also raised the point that it seems inappropriate for a formal written agreement to be entered between an Executive branch department and a Subcommittee of the Congress, pointing out that in the past, the Executive branch has merely stated in a letter the conditions under which it would furnish information to a Committee or Subcommittee of the Congress.

CURRENT STATUS OF MATTER

At the meeting of the National Security Council this morning, it was recommended that unless the effect of paragraphs 5-7 of the draft "Memorandum of Understanding" was altered in a satisfactory manner and undertakings by the Executive branch could be evidenced in some other manner, consistent with prior practices, you should take actions and give directions for protecting the subpoenaed documents from disclosure by AT&T to the Congress insofar as they relate to foreign intelligence sources and methods.

You are also planning to meet this afternoon with the Attorney General, the Chairman and some other Members of the President's Foreign Intelligence Advisory Board to seek their advice and counsel. At that time, George Bush will have met with Chairman Moss to see if a basis still exists for arriving at satisfactory arrangements which would make it unnecessary for AT&T to comply with the subpoena.

RECOMMENDATION

If after your meeting this afternoon, and your report from George Bush you decide to take alternative steps concerning the subpoenaed documents, the actions discussed below are recommended:

As a condition to bringing a court action to prevent compliance with the subpoena to AT&T, it will be necessary for you to follow the procedure set forth in the Attorney General's memorandum to you at TAB C. (For the purpose of

assisting you in determining whether you should assert Executive privilege as recommended by the Attorney General, there are attached at TAB D affidavits of George Bush as Director of Central Intelligence, Lew Allen, Jr. as Director of National Security Agency, Robert L. Keuch as Deputy Assistant to the Attorney General and James B. Adams as Special Agent of the Federal Bureau of Investigation. These affidavits are prepared in a form that permits them to be used in connection with such law suits as may be necessary to protect the documents in question.)

To carry out the Attorney General's recommendation, you should sign the letter at TAB E which is addressed to Chairman Staggers of the Committee on Interstate and Foreign Commerce, the letter at TAB F addressed to W. L. Lindholm as President of AT&T and the attached Memorandum to the Attorney General at TAB G.

Attachments

MOSS MATTER

No.	Description
1	Copy of subpoena to Robert D. Lilley, Present, AT&T, requiring him to appear on Monday, June 28 in Room 2323 at 10:00 a.m. or produce documents by noon on June 25.

COPY

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Stephen Sims

You are hereby commanded to summon Mr. Robert D. Lilley, President, American Telephone and Telegraph Company, 195 Broadway, New York, New York 10007

to be and appear before the Subcommittee on Oversight and Investigations (under the authority of Rules X and XI of the Rules of the House of Representatives, 94th Congress) of the Interstate and Foreign Commerce Committee of the House of Representatives of the United States, of which the Hon. John E. Moss is chairman, and to bring with him the documents described in the Attachment to this subpoena (personal appearance is not required if the described documents are made available in the Subcommittee offices on or before 12:00 noon on June 25, 1976) in their chamber in the city of Washington, on Monday, June 28, 1976, in Room 2323, Rayburn House Office Building, at the hour of 10:00 a.m. then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 22nd day of June, 1976.

/s/ HARLEY O. STAGGERS
Chairman.

Attest:

Clerk.

COPY

Subpena for _____

_____

_____

_____

before the Committee on the _____

_____

_____

_____

Served _____

_____

_____

_____

_____

_____

_____ House of Representatives

U.S. GOVERNMENT PRINTING OFFICE 29-037-h

BELL SYSTEM COMPANIES

American Telephone and Telegraph Company

The Bell Telephone Company of Pennsylvania

The Diamond State Telephone Company

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

Cincinnati Bell, Inc.

Illinois Bell Telephone Company

Indiana Bell Telephone Company, Incorporated

Michigan Bell Telephone Company

The Mountain States Telephone and Telegraph Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

Northwestern Bell Telephone Company

The Ohio Bell Telephone Company

Pacific Northwest Bell Telephone Company

The Pacific Telephone and Telegraph Company

Bell Telephone Company of Nevada

South Central Bell Telephone Company

Southern Bell Telephone and Telegraph Company

The Southern New England Telephone Company

Southwestern Bell Telephone Company

Wisconsin Telephone Company

ATTACHMENT TO SUBPOENA NO. 94-2-3

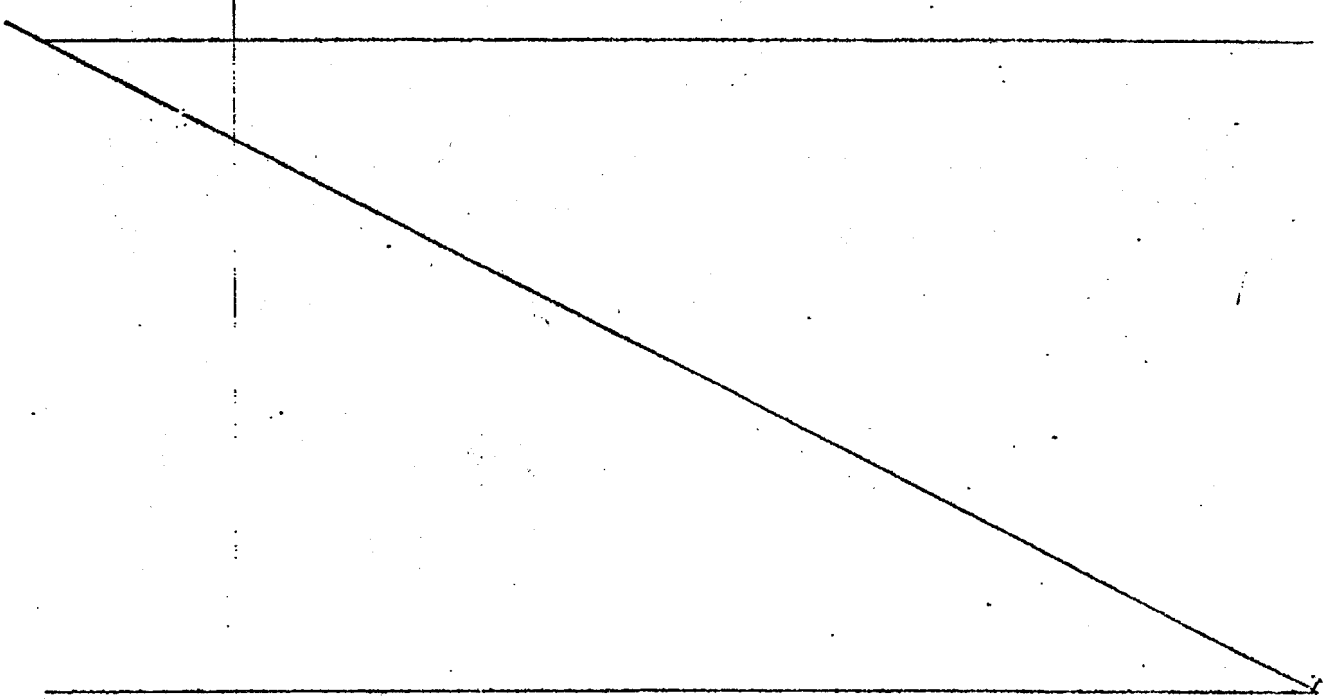
1. Full and complete copies of Federal Bureau of Investigation (FBI) national security request letters, in the possession or control of American Telephone and Telegraph (AT&T) and its 24 operating companies listed below*, for access to phone lines handling either verbal or non-verbal communications.

2. Copies of any and all records in the possession or control of AT&T or its operating companies prior to 1969 when written FBI requests were not routinely requested by AT&T and its operating companies.

3. Copies of any and all applicable Bell System Practices (BSP's) describing company policy regarding national security "taps" or "provision of facilities" to law enforcement or intelligence agencies. This should include both current BSP's and any BSP's on the subject which have since been revised or discontinued.

4. Copies of internal memorandum, correspondence, board minutes, or other records relative to AT&T, and/or any AT&T operating company, practice or policy with respect to national security "taps" or "provision of facilities" to law enforcement or intelligence agencies, covering the last 10 years.

*Bell System Companies (see attached list)



B

MEMORANDUM OF UNDERSTANDING

The purpose of this memorandum is to set forth the procedures and understandings reached between the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce and the Executive Branch acting through the Department of Justice for the furnishing of information and documents to the Subcommittee in connection with its current investigation of electronic surveillance without warrant or court order in or affecting interstate commerce. These understandings relate to the outstanding subpoena of the Subcommittee dated June 22, 1976, issued to AT&T for documents concerning electronic surveillances requested by the FBI and the representations of the Department of Justice that these surveillances may involve foreign as well as domestic security.

(1) AT&T has been requested to prepare and provide to the Subcommittee an inventory of the documents which emanated from the FBI requests for interception of the communications, listing only the dates. The Department of Justice will be furnished a copy of the inventory by the Subcommittee. The FBI will divide the inventoried items into two groups--domestic surveillances and foreign intelligence surveillances--using the following definition for the purpose of this agreement only:

> Foreign intelligence surveillances are surveillances of the communications of foreign governments, established or generally recognized political parties or significant factions, military forces presumed to pose a threat to the security of the United States, agencies or enterprises controlled by such entities or organizations composed of such entities whether or not recognized by the United States, or foreign-based terrorist groups or persons knowingly collaborating with any of the foregoing; domestic surveillances include all other surveillances.

(2) The Subcommittee, at the request of the Department of Justice, has selected two years, 1972 and 1975, to be examined for initial research and the gathering of information. The Subcommittee reserves the right to examine documents from the remaining years covered by the subpoena in the same manner as will be accomplished for the years 1972 and 1975.

(3) As to any surveillances which are designated by the FBI as domestic as distinguished from foreign, the Subcommittee will be furnished with the memoranda upon which the Attorney General based authorization for the surveillance, including any renewal thereof, which were prepared by the FBI or other federal agencies explaining the basis upon which the surveillances were sought. The Subcommittee may require, in selected instances, the initiation and termination dates of designated surveillances. These memoranda will be furnished to the Subcommittee without any changes, deletions or additions other than certain mutually agreed upon minor deletions.[1] The

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[1] It is understood by the parties that "minor deletions" refers only to those deletions made necessary because of an ongoing investigation of particular sensitivity.

Subcommittee agrees to maintain security arrangements over the material so furnished and handle it in accordance with Rule XI of the House of Representatives. The documents will be returned to the FBI upon completion of the Subcommittee's investigation and issuance of a report by the Subcommittee. This procedure, however, will in no way restrict the privileges of the House of Representatives or the Members thereof under Rule XI.

(4) The Subcommittee will select sample items from those identified by the FBI as relating to foreign intelligence surveillances. Representatives of the Subcommittee will be given access at the FBI to copies of the memoranda upon which the Attorney General based authorization for the surveillance, including any renewal thereof, which were prepared by the FBI or other federal agencies and which explain the basis upon which the foreign surveillance was sought. This material will be edited only by deleting names, addresses, and telephone numbers of individuals who were targets and sources of information or deleting information which would disclose such targets or sources. Where such editing occurs, generic identification with a reasonable degree of specificity will be provided, including indication of whether the individual was a United States citizen. The Subcommittee may require, in selected instances, the initiation and termination dates of designated surveillances.

(5) From this sample group of memoranda relating to foreign intelligence surveillances, the Subcommittee will select a reasonable number as a sub-sample for verfication purposes.

(6) The Subcommittee designates Stephen Sims, J. Thomas Greene, and Benjamin Smethurst to conduct the verification procedure referred to in paragraph (5). They will examine a reasonable number of unexpurgated memoranda to determine the authenticity of the sample and appropriate classification as foreign or domestic. They will report their findings to the Subcommittee Chairman. Subcommittee staff so designated agree not to disclose the names of targets or sources of foreign intelligence surveillance falling within the definition specified in paragraph (1) of this memorandum to any person other than the Subcommittee Chairman.

(7) Subcommittee staff participating in the verfication procedure specified in paragraph (6) and in the sample procedure specified in paragraphs (4) and (5) may take and retain notes during such procedures. The FBI may confer with Subcommittee staff on those notes and may give appropriate advice to the Subcommittee Chairman concerning the sensitivity of information contained in those notes.

(8) The Subcommittee will give the Department of Justice advance notice as to the name of the person or persons who are to be given access to the documents at the FBI described in paragraphs (4) and (5), and appropriate access authorization will be issued by the Department of Justice, based on the designation of the Subcommittee Chairman./ It is the contemplation of the parties that any background checks on the person or persons named will not delay the Subcommittee's investigation and will not in any case lengthen the time periods specified. The complete background investigation will be made available to the Subcommittee Chairman.

(9) The search, gathering, and preparation for access to the necessary materials will commence immediately, based upon FBI records and supplemented by the AT&T inventory. The Subcommittee will be furnished the memoranda pertaining to the domestic surveillances, and given access to the foreign memoranda on a month-by-month basis as they are collected, but commencing no later than July 22, 1976, and concluding on or before August 3, 1976.

(10) During the process of furnishing information to the Subcommittee, the return date on the outstanding subpoena will be extended to August 4, 1976, with respect to the FBI request letters and the subpoena remains in full force and effect.

/ With regard to the verification procedures under paragraph 5, the only persons designated to conduct those procedures are the three individuals specified in paragraph 6.

(11) Notwithstanding any of the foregoing, the Department of Justice agrees to immediately furnish to the Subcommittee, regardless of any designation as foreign or domestic surveillance, all memoranda, without deletion, pertaining to any individual with respect to whom a surveillance was authorized--

(a) within the time period covered by the subpoena,

(b) for which no warrant or other court order was issued, and

(c) who was, at the time the surveillance was authorized, either a candidate or nominee for elective office, or an elected official, of the United States or a political subdivision thereof,

except that if the memoranda submitted to the Attorney General upon which the authorization was based contain no indication that the individual was seeking or held elected office and such information is not known by persons at the FBI having custody of the documents or ascertainble by reasonable inquiry, such surveillance is not subject to this paragraph.

(12) The Subcommittee Chairman and the Ranking Minority Member of the Subcommittee shall have access to all information made available to the Subcommittee at the FBI premises. Information in the possession of the Subcommittee will be subject to Rule XI of the Rules of the House of Representatives.

(13) All information acquired by the Subcommittee pursuant to this memorandum will be received in Executive Session and subject to Rule XI of the Rules of the House of Representatives. All interpretations of this agreement shall be consistent with such Rule and with the statutes and Constitution of the United States.

This Agreement is without prejudice to the rights of the Subcommittee to enforce the subpoena through appropriate means or of the Executive Branch to protect its interests in connection with the outstanding subpoena.

DEPARTMENT OF JUSTICE

CHAIRMAN,
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS

DATE: July 20, 1976

C

c

Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM

Re: Assertion of Executive Privilege With Respect to a House Committee Subpoena to American Telephone and Telegraph Company.

Attached are a draft letter to the House Committee on Interstate and Foreign Commerce asserting a claim of Executive Privilege with respect to information subpoenaed from the American Telephone and Telegraph Company (AT&T), a draft letter to that Company reaffirming its obligation not to disclose the information subpoenaed, and a memorandum to the Attorney General instructing him to take such action as is necessary to prevent unauthorized disclosure of the information. I am submitting these to you pursuant to the procedures established in former President Nixon's Memorandum Establishing a Procedure to Govern Compliance with Congressional Demands for Information, dated March 24, 1969.

Beginning in World War II the United States arranged with AT&T to provide facilities and services necessary to conduct electronic surveillances in national security cases. Due to the unique position of that Company with respect to telephone and other communications lines in the United States, it is necessary to rely on its services to identify precisely the lines servicing the targets of surveillance. Accordingly, the Government has been obliged to secure the assistance of AT&T in conducting these surveillances and to supply that Company with extremely sensitive national security information in order to obtain these services. Arrangements were made orally until 1969. Since then, the Federal Bureau of Investigation has provided AT&T with written requests for services, including special lease lines. These requests obligate the government to pay AT&T the going commercial rate for the lease lines. The letters provide information which would identify the target of the surveillance and the location

of the facility in which monitoring will be done. The letter specifically advises AT&T: "You are not to disclose the existence of this request. Any such disclosure could obstruct and impede the investigation."

On June 22, 1976 the Committee on Interstate and Foreign Commerce of the House of Representatives subpoenaed records of AT&T relating to its assistance to the government in national security electronic surveillances, specifically requesting copies of all lease line letters. As detailed in the attached materials, compliance with this subpoena by AT&T would compromise existing national security electronic surveillances, disclose sensitive intelligence sources and methods, disclose the government's foreign intelligence capabilities, and jeopardize the foreign relations of the United States. It is clear that such a disclosure would be contrary to the public interest.

I recommend that the President assert Executive Privilege as to these records and instruct AT&T, as a contract agent of the Executive Branch of the Federal Government, to decline to comply with the subpoena.

Edward H. Levi
Attorney General

D

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 01027

Collection/Series/Folder ID No.	:	004700527
Reason for Withdrawal	:	NS,National security restriction
Type of Material	:	TRA,Transcript(s)
Creator's Name	:	George Bush
Description	:	affidavit in the U.S. District Court
Creation Date	:	07/1976
Volume (pages)	:	5
Date Withdrawn	:	05/25/1988

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 01028

Collection/Series/Folder ID No.	:	004700527
Reason for Withdrawal	:	NS,National security restriction
Type of Material	:	TRA,Transcript(s)
Creator's Name	:	Lew Allen
Creator's Title	:	Director
Description	:	affidavit re intelligence matters
Creation Date	:	06/09/1976
Volume (pages)	:	6
Date Withdrawn	:	05/25/1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
AMERICAN TELEPHONE AND TELEGRAPH CORP., et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF ROBERT L. KEUCH

City of Washington)
) ss.
District of Columbia)

ROBERT L. KEUCH, being duly sworn, deposes and says:

1. I am Deputy Assistant Attorney General for the Criminal Division of the Department of Justice. As part of my official duties, I am responsible for reviewing all applications for authorizations to conduct electronic surveillances involving the national security, and, following such review, to submit my views as to whether such applications should be approved.

2. As a result of these responsibilities, I am familiar with the procedure followed for the authorization by the Attorney General, acting for the President, of electronic surveillance for foreign intelligence purposes and the information produced pursuant to such procedures.

An intelligence agency recommending to the Attorney General the use of electronic surveillance to protect the national security against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information

deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities must submit a memorandum to the Director of the Federal Bureau of Investigation (FBI) explaining the need for, and scope of, the proposed surveillance. If the Director of the FBI approves the request, it is then forwarded to the Attorney General. As noted above, all applications must be approved personally by the Director of the FBI, regardless of whether that agency is the initiator of the application.

3. Upon receipt, the Attorney General refers all applications to me for review. I advise the Attorney General whether in my view the application satisfies the current criteria of the President and the Department of Justice for approval. The application and my views are returned to the Attorney General, who is personally responsible for acting for the President and either approving or rejecting the application. Upon occasion the Attorney General also refers the applications to a Committee comprised of 4 Assistant Attorneys General for their views. I also sit as an ex officio member of that group.

4. If the application is approved by the Attorney General, the FBI institutes the requested surveillance. Since information intercepted is moved from the point of interception to the point of monitoring via leased telephone lines, a "leased line" or "national security request" letter (a sample of which is appended as Attachment I) is provided to the local American Telephone and Telegraph (AT&T) affiliate, identifying by phone number, address, or other numeric indication the location from which the leased line runs to the location at which the intercept is collected -- usually the local FBI field office. The aid of the AT&T affiliate is enlisted for the limited purpose of identifying the exact location of the line to be surveilled, in order to permit interception at a secure point.

These leased line letters have been used for all requests directed to AT&T for leased intercept lines since 1969; prior to that time, requests were routinely handled verbally between established contacts within the government and the Bell System.

5. Any dissemination of the information relating to the national defense following the word "from" in the second paragraph of the national security request letter would immediately reveal the location of the target line and, in virtually all cases, the identity of the object of the surveillance. Such disclosure would terminate various intelligence and counter-intelligence programs, would identify and endanger informants and double-agents currently supplying information, and would reveal the technical capabilities of the United States in capturing such information. Such disclosure would close off valuable sources of information important to our national defense and national security. It would also severely hamper the conduct of our relations and affairs with foreign powers. In short, disclosure of the targets and nature of all foreign intelligence national security electronic surveillances over the past eight years would do irreparable and inestimable damage to the foreign relations and foreign intelligence systems of the United States. Similarly, disclosure of earlier records or internal Bell memoranda containing such identifying information would cause irreparable and grave damage to the national security.

6. Specifically, disclosure of the demanded documents would reveal the identity of every foreign power, agent of a foreign power or foreign entity, which is, or has been,

the subject of our intelligence interests. While many people may suspect that such surveillances are conducted as part of our intelligence and counter-intelligence activities, a public confirmation of this fact would seriously impact upon our foreign relations and would provide those governments whose interests are inimical to ours with propaganda and negotiating resources that would be very harmful to our national security.

Disclosure of these documents would also identify those individuals who are, or have been, the subject of such surveillances. Under the Executive Branch's clearly announced policy, we conduct such surveillances only when we have reason to believe that an individual is an agent of a foreign power. Therefore, identification of those individuals who have been surveilled would point out not only the agents about whom we know, but also those agents whom we have not identified. Thus, such disclosure would provide counter-intelligence information to foreign powers whose policies or actions are inimical to our national interest. It should also be noted that the individual being surveilled as a foreign agent is often a deep-cover agent whose identity could only come from a very small or select group of sources; disclosure of our knowledge of the agent's existence or identity would seriously jeopardize extremely important agents or sources. At the same time, it might disclose our knowledge of locations being utilized by foreign powers to conduct business. And conversely, disclosure of some locations would identity those of which we are not aware.

7. In view of the considerations set forth above, and based on my knowledge of our procedures and my participation in conferences with senior representatives of the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the National Security Council, and with the Attorney General, it is my considered judgment that any disclosure of the subjects of our foreign intelligency electronic surveillance efforts would cause irreparable damage to the conduct of our foreign affairs and to our national security.

8. I am informed by H.W. William Caming, Counsel for AT&T with overall responsibility for security matters relating to the Bell System and including all national security matters, that AT&T is of the opinion that it must comply with the Congressional subpoena served upon it. Thus, absent any legal action initiated by the United States, AT&T intends to turn over the demanded documents.

Robert L. Keuch

ROBERT L. KEUCH
Deputy Assistant Attorney General
Criminal Division
Department of Justice

Subscribed and sworn to before me this ___ day of _____, 1976.

_____
NOTARY PUBLIC

My Commission Expires:

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff

v. Civil Action No.

AMERICAN TELEPHONE AND TELEGRAPH CORPORATION, et al.

Defendant

AFFIDAVIT

I, James B. Adams, being duly sworn, depose and say as follows:

(1) I have been a Special Agent of the Federal Bureau of Investigation (FBI) for 25 years. I am now and for the past two years have been the Assistant to the Director (Investigation). In my present position I have supervisory responsibility for all FBI investigative matters.

(2) A leased line letter is a request from the Director of the FBI to a telephone company requesting private line service between two given points for the purpose of implementing an electronic surveillance. It is addressed to an official of the local telephone company which controls the necessary facilities and is delivered personally to the addressee by a Special Agent in the FBI field office in whose territory the telephone company is located. At present the text of the letter states that the request is in connection with an investigation being conducted by the FBI within its lawful jurisdiction. It also states that the request is made based on the written authorization of the Attorney General of the United States as a necessary investigative technique under the powers of the President to protect the national security against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the

United States, or to protect national security information against foreign intelligence activities, in connection with an investigation of organizations or individuals suspected to be agents of or acting in collaboration with a foreign power. The letter indicates the specific point of connection such as the address of the target of the surveillance, or a point such as a telephone pole or line number associated with the target's communications system, or some other specific point to facilitate the transmission of the intercepted communication and a termination point, usually an FBI office where the monitoring is accomplished. The letter requests the telephone company not to disclose the existence of the request for service. The current text of the letter has been agreed upon by Legal Counsel of American Telephone and Telegraph Corporation, the Department of Justice, and the FBI. Although the language of leased line letters has been refined since 1966, they have always stated the request was made upon the written authorization of the Attorney General and was for national security purposes.

(3) The damage assessment related to the disclosure of the individual leased line letters is based upon three elements. The letter identifies or makes possible for identification the location of a target of interest to the United States intelligence community. It indicates a time frame of interest toward the target by the intelligence community. It provides information concerning the technical capabilities possessed by the intelligence community for obtaining intelligence information covertly.

(4) If the foreign intelligence and diplomatic communities obtain this information, there will be both counterintelligence and positive intelligence ramifications. As to the former, the disclosure would expose the extent of the knowledge

of the United States intelligence community to foreign intelligence services. Those countries, which are generally thought to be hostile, would be given an indication as to whether their intelligence personnel, both legal and illegal, had been compromised based upon whether a location associable with their personnel had been the target of an electronic surveillance. It would allow them to assess specific intelligence operations carried on by them in this country based upon the time frame of our efforts directed against locations either overtly or covertly maintained by them. It would allow the foreign intelligence services, in those instances in which we have conducted surveillances of their agents, to assess the possible methods or sources which led to the identification of the specific agent. Identification of sources could lead to the death of live sources and impact adversely upon our ability to recruit new or additional sources of information.

(5) As to the positive intelligence collection, disclosure would greatly diminish the exposed target as a productive source of information. It would also cause increased security by all similar targets not identified. Disclosure of targeted countries could result in foreign nations, their officials, employees, and other individuals refusing to furnish information to the FBI in criminal and intelligence matters.

(6) Furthermore, allowing the foreign intelligence services to learn which of their agents or operations had been neutralized, permits them to deduce which agents and operations have not been compromised and thereby allows increased operational use by them. Also the disclosure of leased line letters would give to foreign intelligence services an indication of the extent of the technical capabilities of the United States intelligence community for accomplishing electronic surveillances.

This would permit foreign intelligence services to direct more precisely their efforts toward thwarting these capabilities and allow them to adopt methods of operation not susceptible to our capabilities.

(7) A review of FBI records concerning leased line letters disclosed that from January 1, 1966, to July 1, 1976, 748 leased line letters requesting private line facilities were prepared for transmittal to telephone companies. A yearly breakdown is as follows:

1966 - 26

1967 - 15

1968 - 16

1969 - 39

1970 - 64

1971 - 77

1972 - 76

1973 - 95

1974 - 141

1975 - 141

1976 - 58 (July 1, 1976)

James B. Adams

JAMES B. ADAMS
Assistant to the Director (Investigation)
Federal Bureau of Investigation
Washington, D. C. 20530

Subscribed and sworn to before me this 19th day of July, 1976, in Washington, D. C.

Notary Public

My commission expires 12/14/77.

E

THE WHITE HOUSE

WASHINGTON

July 21, 1976

Dear Mr. Chairman:

Your Committee's subpoena of June 22, 1976, addressed to the President of the American Telephone and Telegraph Company, requests the production of documents concerning activities which that Company undertook, under contract with the Executive Branch of the United States Government, in the interest of the national security. Acting upon request of the Executive Branch, under the authority of the President of the United States, the American Telephone and Telegraph Company, contracted to provide services essential to securing information vital to the protection of the national security and foreign policy of the United States. Due to the unique position of that Company with respect to telephone and other communications lines in the United States, it has been necessary for the Executive Branch to rely on its services to assist in acquiring certain information necessary to the national defense and foreign policy of the United States. To secure these services, the Executive Branch has supplied to the American Telephone and Telegraph Company sensitive national security information with the understanding that such information would not be disclosed except to the extent necessary to provide the required services.

In receiving, acting upon and retaining this information, the American Telephone and Telegraph Company was and is an agent of the United States acting under contract with the Executive Branch. The Committee's subpoena to the Company is therefore directed in substance and effect, to agents acting on my behalf. I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of

the United States. Compliance with the Committee's subpoena would, therefore, be contrary to the public interest. Accordingly, I have instructed the American Telephone and Telegraph Company, as an agent of the United States, to respectfully decline to comply with the Committee's subpoena.

Sincerely,

The Honorable Harley O. Staggers
Chairman
Committee on Interstate and Foreign
Commerce
U. S. House of Representatives
Washington, D. C. 20515

F

Mr. W.L. Lindholm
President, American Telephone and
Telegraph Company
195 Broadway
New York, N.Y. 10007

Dear Mr. Lindholm:

Pursuant to agreement reached with the American Telephone and Telegraph Company, the Executive Branch of the United States Government has, from time to time, contracted for facilities and services necessary to secure information vital to the national defense and foreign policy of the United States. Given the unique position of the Company with respect to telephone and other communications lines in the United States, it has been necessary to use its services and to provide extremely sensitive information, in connection with each request for assistance. This information has been provided by the Executive Branch on condition that the Company is "not to disclose the existence of this request."

I have been advised that the Committee on Interstate and Foreign Commerce of the U.S. House of Representatives has subpoenaed records of the American Telephone and Telegraph Company containing information furnished to the Company by the Executive Branch of the Federal Government to carry out the services for which the Government has contracted with the Company. I have determined that compliance with this subpoena would not be in the public interest because of the sensitivity of this information to the national defense and foreign policy of the United States. Accordingly, you are not authorized, under your agreement with the Executive Branch of the United States Government, to provide this information to the Committee.

Sincerely,

Gerald R. Ford

MEMORANDUM FOR THE ATTORNEY GENERAL

I have today determined that the public interest requires that certain information supplied by the Executive Branch to the American Telephone and Telegraph Company in order to secure its assistance in the conduct of electronic surveillances necessary to the national defense and foreign policy of the United States not be disclosed and have instructed the Company not to furnish this information to the Committee on Interstate and Foreign Commerce of the House of Representatives, notwithstanding that Committee's subpoena of June 22, 1976. I have also advised the Chairman of the Committee of this decision.

You are hereby authorized and directed, on my behalf, to undertake such action in the courts or by further discussion with the Committee and the American Telephone and Telegraph Company as may be appropriate to prevent the disclosure of this sensitive information.

Gerald R. Ford

THE PRESIDENT HAS SEEN.

TALKING POINTS

1) This meeting arises out of the Moss Subcommittee subpoena of certain sensitive material in the possession of AT&T; the surrender of which would be detrimental to United States national security interests.

2) Although you have your own views on the matter, it has been reviewed by the NSC, but you wanted to obtain the views and suggestions of PFIAB as to how they viewed the request and how you should proceed.

3) To expedite discussion the following agenda is suggested:

AGENDA

a) Factual summary -- Jack Marsh, Chairman, Intelligence Coordinating Group (3 min.).

b) Current legal situation -- Phil Buchen (3 min.).

c) Executive comments -- (Brief)

Ed Levi
George Bush
Brent Scowcroft

d) Others called on by the President.

d) Discussion and views from PFIAB -- Leo Cherne, Chairman.

July 21, 1976

1. Full and complete copies of Federal Bureau of Investigation (FBI) national security request letters, in the possession or control of American Telephone and Telegraph (AT & T) and its 24 operating companies listed below, for access to phone lines handling either verbal or non-verbal communications.

2. Copies of any and all records in the possession or control of AT & T or its operating companies prior to 1969 when written FBI requests were not routinely requested by AT & T and its operating companies.

3. Copies of any and all applicable Bell System Practices (BSP's) describing company policy regarding national security "taps" or "provision of facilities" to law enforcement or intelligence agencies. This should include both current BSP's and any BSP's on the subject which have since been revised or discontinued.

4. Copies of internal memorandum correspondence, board minutes, or other records relative to AT & T, and/or any AT & T operating company, practice or policy with respect to national security "taps" or "provision of facilities" to law enforcement or intelligence agencies, covering the last 10 years.

The subpoena is directed to AT & T and its chief operating officer. The materials demanded were originally scheduled to be turned over to the Subcommittee on June 28, 1976. Because of ongoing negotiations, the compliance date was extended to July 23, 1976. On July 22, 1976, this suit was filed with the plaintiff seeking a temporary restraining order enjoining AT & T's planned compliance with the subpoena. The parties appeared in open Court. The Chairman of the Subcommittee, Representative Moss, filed a motion to intervene as a party-defendant, which was granted. Counsel were heard including counsel for the intervenor. A temporary restraining order was entered that afternoon by the Court in order to maintain the status quo pending hearing on the motion

for preliminary injunction, which was set for July 28, 1976. The Court with the consent of counsel further ordered that the action on the merits be advanced and consolidated with the hearing on preliminary injunction. The plaintiff has moved for summary judgment. The intervenor filed a motion to dismiss or in the alternative for summary judgment.

On the basis of the entire record before the Court and for the reasons to be detailed in this Memorandum, the Court concludes that the plaintiff is entitled to summary judgment and that AT & T should be permanently enjoined from complying with the Subcommittee's subpoena. The following constitute the Court's findings of fact and conclusions of law.

The Executive Branch has in the past and continues to conduct electronic surveillance based upon national security without judicial warrant. The legality of such procedures is not presently before this Court. It is necessary, however, to understand the procedures by which such surveillance is instituted. The affidavit of Robert L. Keuch, Deputy Assistant Attorney General for the Criminal Division of the Department of Justice, details these procedures which are designed to limit the use of such surveillances to appropriate cases. These procedures are as follows: An intelligence agency requesting such electronic surveillance must submit a memorandum to the Director of the Federal Bureau of Investigation, explaining the need for the proposed surveillance. In order to obtain approval, its intent must be either 1) to prevent an actual attack or hostile act of a foreign power; 2) to protect foreign intelligence information deemed essential to the security of the United States; or 3) to

protect the national security information against foreign intelligence activities. The Director, if he approves of the request, forwards the request to the Attorney General. The Attorney General then confers with two Assistant Attorneys General and determines whether the electronic surveillance should be approved.

If approved, the FBI institutes the requested surveillance by hand-delivering, in a secure fashion, to the local office of the telephone company, subsidiaries of defendant AT & T, a "national security request letter" which includes the phone number, the address, or some other indication identifying the object of the electronic surveillance. Such a request is necessary because the information intercepted is moved from the point of interception (i.e., the telephone line leading to the object structure) to the point of monitoring (which may be the local FBI office) by way of a leased telephone line, which can be installed only by AT & T and its subsidiaries. It is such "national security request letters" which are sought in paragraph 1 of the subpoena at issue in this case.

Until the late 1960's, records of requests to, or cooperation by, AT & T in national security electronic surveillances were not maintained. However, in the late 1960's, AT & T and the Department of Justice entered into negotiations resulting in a form letter, called the national security request letter, which served to reduce to writing and refine the existing policy. Thereafter, beginning in the late 1960's, each time a national security request for leased lines between the points of interception and the point of monitoring was requested from AT & T or its subsidiaries, a national security request letter was forwarded, which included

(1) a request that a leased line be provided at the usual commercial rate, (2) a statement that the request was made upon a specific authorization of the Attorney General for purposes of national security, (3) the phone number, location or other information relating to the lines to be intercepted, and (4) the statement that AT & T was not to disclose the existence of the request because such disclosure could obstruct and impede the investigation.

It is the release of these post-1969 letters that the plaintiff finds most inappropriate, because of the highly sensitive information contained therein. One portion of the letter (called the "To" portion) refers to the local FBI monitoring station which, if it were to become public knowledge, would require the relocation of those stations. However, it is the "From" portion of the request letter which is of crucial importance. An analysis of what is included after the word "From" could identify the subject of the national security surveillance in one of three ways. First, the target of the surveillance may be identified by the listing of the specific telephone number to be intercepted; second, the target of the surveillance may also be identified by the listing of the specific addresses that are to be covered in the surveillance; and third, the target of the surveillance may be identified by the use of technical terms referring to AT & T lines or junction points.

The plaintiff has asserted that the disclosure of these letters or the information contained in them would have extremely serious national security and foreign policy repercussions. First, the information in these letters would disclose the identity of

every foreign power, or agent of a foreign power or entity, which is, or which has been, a subject of intelligence interest to the United States. While it may be understood that, as part of its intelligence and counterintelligence activities, the United States conducts such surveillances, public confirmation of this fact would be seriously detrimental to the foreign relations of the United States and would provide those governments whose interests are inimical to the interests of this nation with propaganda and negotiating resources which would be very harmful to our national security.

Second, plaintiff has asserted, publication and disclosure of the telephone numbers included in the request letters would disclose the identities of all those individuals who are, or who have been, the subject of national security electronic surveillance. Under the Executive Branch's announced policy, such electronic surveillances for national security purposes are conducted only when there is reason to believe that an individual is an agent of a foreign power engaged in clandestine activities, including espionage, sabotage, or terrorism. Identification of those individuals who have been subject to surveillance will point out not only the foreign agents that are known, but would be counterintelligence information useful to unfriendly countries or powers because it would indicate those agents who have not been identified by United States intelligence agencies.

Moreover, in some instances the individual who is the subject of surveillance is a deep-cover foreign agent whose identity could only come from a very small or select group of sources, and disclosure of the United States' knowledge of the agent's existence

or identity would seriously jeopardize the well-being of important agents or the integrity of intelligence sources. In some instances, the lives of source personnel could be jeopardized.

Finally, plaintiff asserts, disclosure of locations which foreign powers are known to be utilizing to conduct business in a secure manner will serve to notify the foreign agents of those unfriendly nations which of their "safe" houses may or may not be used, because it will identify both the "safe" houses of which the United States is aware and those of which it is not aware.

Considering this sensitive nature of the information sought, the Executive Branch proposed an alternative means of providing the Subcommittee with the information it considered relevant. Under this proposal, following AT & T's preparation of an "inventory" of the request letters held by AT & T, the FBI would identify by date those which were "foreign intelligence surveillances" and those which were "domestic surveillances." In regard to the past domestic surveillances, the FBI would furnish to the Subcommittee the memoranda on which the Attorney General based his authorization for such surveillances, with only minor deletions necessary to protect ongoing investigations. From the "foreign intelligence surveillances," the Subcommittee could select sample items for any two years, and representatives of the Subcommittee would be given access to the memoranda on which the Attorney General based his authorization of those surveillances with names, addresses or other information identifying targets and sources deleted. The President also proposed a procedure whereby verification, and resolution of any questions, would be accomplished by the direct participation of the Attorney

General and if necessary by the President himself. This proposal was rejected by Subcommittee Chairman Moss. On July 22, 1976, the President wrote to Representative Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, stating:

> I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States and damaging to the national security. Compliance with the Committee' subpoena would, therefore, be contrary to the public interest. Accordingly, I have instructed the American Telephone and Telegraph Company, as an agent of the United States, to respectfully decline to comply with the Committee's subpoena.

Later that day, when it became clear that AT & T would not comply with the President's demand, this action was instituted.

The intervenor, Chairman Moss, ostensibly participating in this action on behalf of the Subcommittee, has taken the position that the Speech or Debate Clause of the Constitution is an absolute bar to judicial interference with a Congressional subpoena issued pursuant to a legitimate legislative investigation. The Speech or Debate Clause in Art I, Section 6 of the Constitution provides "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

The plaintiff has taken the position that this action should be considered one seeking solely to restrain a private entity, AT & T, from releasing documents in its possession. In this way, plaintiff argues, the Court need not consider the applicability of the Speech or Debate Clause, since the immunity of that constitutional provision runs only to members of Congress

and their close aides when defending against a lawsuit, and does not afford any protection to a private entity such as AT & T. This argument is advanced so that the Court can avoid dealing with a constitutional confrontation between two of the three branches of our Government. But to take this avenue would be to place form over substance. The effect of any injunction entered by this Court enjoining the release of materials by AT & T to the Subcommittee would have the same effect as if this Court were to quash the Subcommittee's subpoena. In this sense the action is one against the power of the Subcommittee and should be treated as such, assuming that Representative Moss has authority to speak for the Subcommittee.

The Court is thus faced with a conflict between two substantial and fundamental components of our Constitutional system. On the one hand is the power of the Congress to investigate in aid of the legislative function. See Barenblatt v. United States, 360 U.S. 109, 111 (1959); Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 174-175 (1927). Moreover, the Supreme Court has written that the policies expressed in the Speech or Debate Clause are designed "to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 511 (1975).

On the other hand is the authority of the Executive to invoke the claim of privilege concerning matters of national security, foreign affairs or national defense, where the Executive determines disclosure would be inimical to those interests. The courts have accorded great deference to the Executive's judgment

in this area. In United States v. Reynolds, 345 U.S. 1 (1953), dealing with a private claimant's request for evidence in a Tort Claims Act case against the federal government, the Supreme Court stated:

> It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in Chambers.

345 U.S. at 10. See also United States v. Nixon, 418 U.S. 683, 710-711 (1974); C & S Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

The Court accepts the position of the intervenor that the subpoenaed materials are sought pursuant to a legitimate legislative investigation. Contrary to the intervenor's argument, however, the Court's inquiry cannot conclude at this point. The legislative authority to investigate is not absolute. In our system of government the Constitution is supreme, but no one portion of the Constitution is sacrosanct. Here, the nature, the extent and the relative importance of the power of one coordinate branch of government must be balanced against that of the other. Neither can be considered in a vacuum.

This balancing of the powers and needs of the constituent branches of government has been considered by the courts in somewhat similar circumstances. See United States v. Reynolds, 345 U.S. 1, 11 (1953); United States v. Nixon, 418 U.S. 683 (1974). Such balancing is not precluded by the decision in Eastland v. United

States Servicemen's Fund, 421 U.S. 491 (1975). In Servicemen's Fund there was no countervailing interest at stake of the magnitude of that involved here. The absolute language used by the Court in Servicemen's Fund should be considered in the light of the facts of that case: a private party challenging the Congressional investigatory power. Mr. Justice Marshall in his concurrence in Servicemen's Fund (in which he was joined by two other Justices) elaborated on the scope of the Servicemen's Fund decision:

> I write today only to emphasize that the Speech or Debate Clause does not entirely immunize a congressional subpoena from challenge by a party not in a position to assert his constitutional rights by refusing to comply with it.
>
> * * * * *
>
> The Speech or Debate Clause cannot be used to avoid meaningful review of constitutional objections to a subpoena simply because the subpoena is served on a third party. Our prior cases arising under the Speech or Debate Clause indicate only that a Member of Congress or his aide may not be called upon to defend a subpoena against constitutional objection, and not that the objection will not be heard at all.

421 U.S. at 513, 516. In the context of this case, the assertion of Executive privilege is properly before the Court, as this is the only juncture at which it can be considered. It must therefore be weighed against the Legislature's assertion of investigative power.

In balancing the competing interests of the Legislature and the Executive, the Court will examine a number of factors. The Court must consider whether the information requested is essential to "the responsible fulfillment of the Committee's functions." Senate Select Committee v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (concerning a congressional subpoena of Executive documents not related to national security). The Court must consider

whether there is "an available alternative" which might provide the required information "without forcing a showdown on the claim of privilege." United States v. Reynolds, 345 U.S. 1, 11 (1953). Finally the Court must consider the circumstances surrounding and the basis for the Presidential assertion of privilege. Id.; United States v. Nixon, 418 U.S. 683, 710-711 (1974). Thus the necessity for compelling production must be balanced against the circumstances and grounds for the assertion of the privilege.

In the context of this case, and the Court emphasizes that this decision is limited to the circumstances of this case, the Court determines that there are alternative means available for obtaining the information required by the Subcommittee, that the particular form in which that information is sought is not absolutely essential to the legislative function, and that the President's determination that release of this material would present an unacceptable risk of disclosure of matters concerning the national defense, foreign policy and national security outweighs the Subcommittee's showing of necessity.

The primary purpose for which the Subcommittee is seeking this information is to investigate the possibility that federal agencies are conducting domestic warrantless wiretaps. The President has offered to provide to the Subcommittee the background material used by the Attorney General in making his determination whether a warrantless wiretap is necessary 1) to prevent an actual attack or hostile act of a foreign power; 2) to protect foreign intelligence information deemed essential to the security of the United States; or 3) to protect the national security information against foreign intelligence activities. Such material would have deletions

for disclosure of this highly sensitive information, if put into the hands of so many individuals, has been determined by the President to be an unacceptable risk. Such a determination is entitled to great weight.

The Court is not implying that the members of the Subcommittee, or of the House of Representatives, will act negligently or in bad faith if they have access to these documents. But it does appear to the Court that if a final determination as to the need to maintain the secrecy of this material, or as to what constitutes an acceptable risk of disclosure, must be made, it should be made by the constituent branch of government to which the primary role in these areas is entrusted. In the areas of national security and foreign policy, that role is given to the Executive.

Judge

Date: July 30 1976

FILED

JUL 30 1976

JAMES E. DAVEY, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL., Defendants, JOHN E. MOSS, Member, United States House of Representatives, Intervenor-Defendant.	)	Civil Action No. 76-1372

ORDER

Upon consideration of the Court's Memorandum entered this day, and the entire record herein, it is by the Court this 30th day of July, 1976,

ORDERED that plaintiff's motion for summary judgment be, and it hereby is, granted; and it is further

ORDERED that intervenor-defendant's motion to dismiss or for summary judgment be, and it hereby is, denied; and it is further

ORDERED that compliance by defendant American Telephone & Telegraph Company, its officers, agents, employees, or anyone acting in active concert or participation with them, and defendants Fox and Sharrett, with the subpoena issued on June 22, 1976 (hereinafter "subpoena") by the Committee on Interstate and Foreign Commerce on behalf of its Subcommittee on Oversight and Investigations, or disclosure of any materials coming within the scope of that subpoena, is, in the facts and circumstances of this case, unlawful and unauthorized without the prior authorization of the

Executive Branch of the United States Government; and it is further

ORDERED that the defendants, their officers, agents, and employees, and all those in active concert or participation with them, be and hereby are permanently enjoined from the date hereof from transmitting or otherwise providing to the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, United States House of Representatives, or any other person, group, or entity, any documents or materials which are or may be determined to come within the scope of the subpoena issued to the defendants on June 22, 1976, without the prior authorization of the Executive Branch of the United States Government.

Judge

Jack Marsh

FILED

JUL 30 1976

JAMES E. DAVEY, CLERK

THE PRESIDENT HAS SEEN...

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,

Defendants,

JOHN E. MOSS, Member, United States House of Representatives,

Intervenor-Defendant.

Civil Action

No. 76-1372

MEMORANDUM

This is an action brought on behalf of the Executive Branch of the United States seeking to restrain the American Telephone & Telegraph Company (hereinafter AT & T) from disclosing to the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, pursuant to a subpoena of that Subcommittee, certain documents, the delivery of which the President has determined "would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States."

On June 22, 1976, the Subcommittee on Oversight and Investigations (hereinafter Subcommittee) voted to issue a subpoena to AT & T. This subpoena was issued by the Chairman of the Interstate and Foreign Commerce Committee on the same date. The subpoena seeks all documents falling within the following categories: