United States Senate
Republican Policy Committee
Jon Kyl, Chairman
347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

September 9, 2004

Updating the Law to Confront New Challenges

Should Postal Inspectors Have More Power Than Federal Terrorism Investigators?

Executive Summary

- Administrative subpoena authority enables federal investigators quickly and efficiently to gather information held by third parties about possible criminal activity without necessarily alerting the criminal suspects.
- Federal terrorism investigators need this administrative subpoena authority to better unravel and stop terrorist plots, yet Congress has failed to update the laws to provide this subpoena authority to them.
- Administrative subpoenas are not new. Congress has granted this subpoena authority to federal officials investigating a wide assortment of federal crimes — including U.S. mail, tax, and labor-law violations, and even financial violations investigated by the Small Business Administration. All told, Congress has granted administrative subpoena authority in 335 different contexts to most government agencies.
- Nor is the authority dormant. For example, the Department of Justice reports that federal investigators in 2001 issued more than 2,100 administrative subpoenas in connection with investigations of health care fraud, and more than 1,800 administrative subpoenas in child-exploitation investigations.
- Administrative subpoena authority — like all subpoena authority — contains critical, built-in protections for civil liberties, and ensures that the executive and judicial branches work together to achieve effective but constitutionally limited law enforcement.
- Federal terrorism investigators should not have weaker investigative tools than Small Business Administration agents or postal inspectors. Congress should provide all of our warfighters the tools they need to protect our nation.
- The Judicially Enforceable Terrorism Subpoenas (JETS) Act, S. 2555, would update the law so that the FBI has the authority to issue administrative subpoenas to investigate suspected terrorism, thus allowing the government to better protect the lives of innocent Americans.

Introduction

Congress is undermining federal terrorism investigations by failing to provide terrorism investigators the tools that are commonly available to others who enforce the law. In particular, in the three years after September 11th, Congress has not updated the law to provide terrorism investigators with administrative subpoena authority. Such authority is a perfectly constitutional and efficient means to gather information about terrorist suspects and their activities from third parties without necessarily alerting the suspects to the investigation. Congress has granted this authority to government investigators in hundreds of other contexts, few of which are as compelling or life-threatening as the war on terror. These include investigations relating to everything from tax or Medicare fraud to labor-law violations to Small Business Administration inquiries into financial crimes. Indeed, Congress has even granted administrative subpoena authority *to postal inspectors, but not to terrorism investigators.*

This deficiency in the law must be corrected immediately. Postal inspectors and bank loan auditors should not have stronger tools to investigate the criminal acts in their jurisdictions than do those who investigate terrorist acts. The Senate can remedy this deficiency by passing legislation like the Judicially Enforceable Terrorism Subpoenas (JETS) Act, S. 2555. The JETS Act would update the law so that the FBI has the authority to issue administrative subpoenas to investigate possible terrorist cells before they attack the innocent. The Act would ensure more efficient and speedy investigations, while also guaranteeing that criminal suspects will have the same civil liberties protections that they do under current law.

Terrorism Investigators' Subpoena Authority is Too Limited

Federal investigators routinely need third-party information when attempting to unravel a criminal enterprise. In the context of a terrorism investigation, that information could include: financial transaction records that show the flow of terrorist financing; telephone records that could identify other terrorist conspirators; or retail sales receipts or credit card statements that could help investigators uncover the plot at hand and capture the suspects. When third parties holding that information decline to cooperate, some form of subpoena demanding the information be conveyed must be issued. The Supreme Court unanimously has approved the use of subpoenas to gather information, recognizing that they are necessary and wholly constitutional tools in law enforcement investigations that do not offend any protected civil liberties.[1]

There are different kinds of subpoenas, however, and under current law, the only way that a terrorism investigator (typically, the FBI) can obtain that third-party information is through a "grand jury subpoena." If a grand jury has been convened, investigators can usually obtain a grand jury subpoena and get the information they need, but that process takes time and is dependent on a number of factors. First, investigators themselves cannot issue grand jury subpoenas; instead, they must involve an assistant U.S. Attorney so that he or she can issue the subpoena. This process can be cumbersome, however, because assistant U.S. Attorneys are burdened with their prosecutorial caseloads and are not always immediately available when the investigators need the subpoena. Second, a grand jury subpoena is limited by the schedule of a grand jury itself, because the grand jury must be "sitting" on the day that the subpoena demands

[1] See unanimous decision written by Justice Thurgood Marshall in *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984).

that the items or documents be returned. Grand juries do not sit at all times; indeed, in smaller jurisdictions, the only impaneled grand jury may meet as little as "one to five consecutive days per month."[2]

The following hypothetical illustrates the deficiency of current law. Take the fact that Timothy McVeigh built the bomb that destroyed the Oklahoma City Federal Building while he was in Kansas; and take the fact that under current practices, grand juries often are *not* sitting for 10-day stretches in that state. If FBI agents had been tracking McVeigh at that time and wanted information from non-cooperative third parties — perhaps the supplier of materials used in the bomb — those agents would have been unable to move quickly if forced to rely on grand jury subpoenas. McVeigh could have continued his bomb-building activities, and the FBI would have been powerless to gather that third-party information until the grand jury returned — as many as 10 days later.[3]

The current dependence on the availability of an assistant U.S. Attorney and the schedule of a grand jury means that if time is of the essence — as is often the case in terrorism investigations — federal investigators, lacking the necessary authority, could see a trail turn cold.

The Better Alternative: Administrative Subpoena Authority

The deficiency of grand jury subpoenas described above can be remedied if Congress provides "administrative subpoena" authority for specific terrorism-related contexts. Congress has authorized administrative subpoenas in no fewer than 335 different areas of federal law, as discussed on pp. 6-7, below.[4] Where administrative subpoena authority already exists, government officials can make an independent determination that the records are needed to aid a pending investigation and then issue and serve the third party with the subpoena. This authority allows the federal investigator to obtain information quickly without being forced to conform to the timing of grand jury sittings and without requiring the help of an assistant U.S. Attorney. And, as simply another type of subpoena, the Supreme Court has made clear that it is wholly constitutional.[5]

The advantages of updating this authority are substantial. The most important advantage is speed: terrorism investigations can be fast-moving, and terrorist suspects are trained to move quickly when the FBI is on their trail. The FBI needs the ability to request third-party information and obtain it *immediately*, not when a grand jury convenes. Moreover, this

---

[2] See United States Dep't of Justice, *Federal Grand Jury Practice*, at § 1.6 (2000 ed.). For example, in Madison, Wisc., the federal grand jury only meets a few days every three weeks. See Clerk of the Court for the Western District of Wisconsin, "Grand Jury Service," revised April 15, 2004, available at http://www.wiwd.uscourts.gov/jury/.

[3] Information on Kansas federal grand jury schedules provided to Senate Republican Policy Committee by Department of Justice. In addition, Department of Justice officials have testified to another scenario: even where grand juries meet more often (such as in New York City), an investigator realizing she urgently needs third-party information on Friday afternoon still could not get that information until Monday, because the grand jury would have gone home for the weekend. See Testimony of Principal Deputy Assistant Attorney General Rachel Brand before the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security on June 22, 2004.

[4] See U.S. Department of Justice, Office of Legal Policy, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, May 13, 2002, at p. 5, available at www.usdoj.gov/olp (hereinafter "DOJ Report").

[5] See *SEC v. Jerry T. O'Brien*, 467 U.S. at 747-50.

subpoena power will help with third-party compliance. As Assistant Attorney General Christopher Wray stated in testimony before the Senate Judiciary Committee, "Granting [the] FBI the use of [administrative subpoena authority] would speed those terrorism investigations in which subpoena recipients are not inclined to contest the subpoena in court and are willing to comply. Avoiding delays in these situations would allow agents to track and disrupt terrorist activity more effectively."[6] Thus, Congress will provide protection for a legitimate business owner who is more than willing to comply with law enforcement, but who would prefer to do so pursuant to a subpoena rather than through an informal FBI request.

Constitutional Protections

It is important to note that nothing in the administrative subpoena process offends constitutionally protected civil liberties, as has been repeatedly recognized by the federal courts.

First, the government cannot seek an administrative subpoena unless the authorized federal investigator has found the information relevant to an ongoing investigation.[7] The executive branch – whether Republican or Democrat – carefully monitors its agents to ensure that civil liberties are being protected and that authorities are not being abused.[8]

Second, the administrative subpoena is not self-enforcing. There is no fine or penalty to the recipient if he refuses to comply. Thus, if the recipient of an administrative subpoena believes that the documents or items should not be turned over, he can file a petition in federal court to quash the subpoena, or he can simply refuse to comply with the subpoena and force the government to seek a court order enforcing the subpoena. And, as one federal court has emphasized, the district court's "role is not that of a mere rubber stamp."[9] Just as a grand jury subpoena cannot be unreasonable or oppressive in scope,[10] an administrative subpoena must not overreach by asking for irrelevant or otherwise-protected information.

The Supreme Court has addressed the standards for enforcing administrative subpoenas. In *United States v. Powell*, the Supreme Court held that an administrative subpoena will be enforced where (1) the investigation is "conducted pursuant to a legitimate purpose," (2) the subpoenaed information "may be relevant to that purpose," (3) the information sought is not already in the government's possession, and (4) the requesting agency's internal procedures have been followed.[11] In addition, the Supreme Court has stated that the recipient may challenge the subpoena on "any appropriate ground,"[12] which could include a privilege against self-incrimination, religious freedom, freedom of association, attorney-client privilege, or other

---

[6] Assistant Attorney General Christopher Wray, in testimony before the Senate Judiciary Committee, October 21, 2003.

[7] See S. 2555, § 2(a) (proposed 18 U.S.C. § 2332g(a)(1)). The Attorney General has the authority to delegate this power to subordinates within the Department of Justice. See 28 U.S.C. § 510.

[8] See, for example, Executive Order Establishing the President's Board on Safeguarding Americans' Civil Liberties (August 27, 2004), detailing extensive interagency oversight of civil liberties protections for Americans.

[9] *Wearly v. Federal Trade Comm'n*, 616 F.2d 662, 665 (3rd Cir. 1980).

[10] *Federal Grand Jury Practice*, at § 5.40.

[11] *United States v. Powell*, 379 U.S. 48, 57-58 (1964); see also *EEOC v. Shell Oil*, 466 U.S. 54, 73 n.26 (1984) (citing *Powell* in EEOC context and adding that the request for information cannot be "too indefinite" or made for an "illegitimate purpose"); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. at 747-48 (reaffirming *Powell* in context of SEC administrative subpoena).

[12] *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

grounds for resisting subpoenas in the grand jury context.[13] This "bifurcation of power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power."[14]

Third, where the authorized agent has not specifically ordered the administrative subpoena recipient *not* to disclose the existence of the subpoena to a third party, the recipient can notify the relevant individual and that individual may have the right to block enforcement of the subpoena himself.[15] In many cases the "target" (as opposed to the recipient) will have full knowledge of the subpoena.

However, this is not always the case; sometimes the administrative subpoena authority includes a provision prohibiting the recipient from discussing the subpoena with anyone other than his or her attorney. Some critics have argued that federal investigators should not be able to gather information related to an individual without notifying that individual, and that every person has an inherent right to know about those investigations.[16] But, as the Supreme Court has held, there is no constitutional requirement that the subject of an investigation receive notice that the administrative subpoena has been served on a third party. Justice Thurgood Marshall wrote for a unanimous Court that a blanket rule requiring notification to all individuals would set an unwise standard.[17] He explained that investigators use administrative subpoenas to investigate suspicious activities without any prior government knowledge of who the wrongdoers are, so requiring notice often would be impossible.[18] Moreover, granting notice to individuals being investigated would "have the effect of laying bare the state of the [government's] knowledge and intentions midway through investigations" and would "significantly hamper" law enforcement.[19] Providing notice to the potential target would "enable an unscrupulous target to destroy or alter documents, intimidate witnesses," or otherwise obstruct the investigation.[20] The Court further emphasized that where "speed in locating and halting violations of the law is so important," it would be foolhardy to provide notice of the government's administrative subpoenas.[21]

Most Government Agencies Have Administrative Subpoena Authority

Given these extensive constitutional protections, it is unsurprising that Congress has extended administrative subpoena authority so widely. Current provisions of federal law grant this authority to most government departments and agencies.[22] These authorities are not

---

[13] See cases collected in Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Civil and Compulsory Process*, 47 VAND. L. REV. 573, 589 (1994), cited in DOJ Report, at p. 9 n.19.

[14] *United States v. Security Bank and Trust*, 473 F.2d 638, 641 (5th Cir. 1973).

[15] In *Jerry T. O'Brien*, the Supreme Court noted that a "target may seek permissive intervention in an enforcement action brought by the [Securities & Exchange] Commission against the subpoena recipient" or may seek to restrain enforcement of the administrative subpoena. 467 U.S. at 748.

[16] See generally *Jerry T. O'Brien*, 467 U.S. at 749-50 (rejecting demand that SEC must notify any potential defendant of existence of pending administrative subpoena).

[17] *Jerry T. O'Brien*, 467 U.S. 735, 749-51. The issue in that case was the nondisclosure provisions of the administrative subpoena authority used by the SEC when investigating securities fraud.

[18] *Jerry T. O'Brien*, 467 U.S. at 749.

[19] *Jerry T. O'Brien*, 467 U.S. at 750 n.23.

[20] *Jerry T. O'Brien*, 467 U.S. at 750.

[21] *Jerry T. O'Brien*, 467 U.S. at 751.

[22] DOJ Report, at p. 5. See appendices A-C to DOJ Report that describe and provide the legal authorization for each of these administrative subpoena powers.

restricted to high-profile agencies conducting life-or-death investigations. To the contrary, Congress has granted administrative subpoena authority in far less important contexts. For example, 18 U.S.C. § 3061 authorizes *postal inspectors* to issue administrative subpoenas when investigating any "criminal matters related to the Postal Service and the mails." One can hardly contend that federal investigators should be able to issue administrative subpoenas to investigate Mohammed Atta if they suspect he broke into a mailbox but should not have the same authority if they suspect he is plotting to fly airplanes into buildings.

It is not just postal inspectors who have more powerful investigative tools than terrorism investigators. Congress has granted administrative subpoena authorities for a wide variety of other criminal investigations. A partial list follows:

- *Small Business Administration* investigations of criminal activities under the Small Business Investment Act, such as embezzlement and fraud.[23]
- *Internal Revenue Service* investigations of such crimes as tax evasion.[24]
- The *Bureau of Immigration and Customs Enforcement* investigations of violations of immigration law.[25]
- *Federal Communications Commission* investigations of criminal activities, including obscene, harassing, and wrongful use of telecommunications facilities.[26]
- *Nuclear Regulatory Commission* investigations of criminal activities under the Atomic Energy Act.[27]
- *Department of Labor* investigations of criminal activities under the Employee Retirement Income Security Act (ERISA).[28]
- Criminal investigations under the *Export Administration Act*, such as the dissemination or discussion of export-controlled information to foreign nationals or representatives of a foreign entity, without first obtaining approval or license.[29]

---

[23] Congress granted administrative subpoena authority to the Small Business Administration through section 310 of the Small Business Investment Act of 1958. Delegation to investigators and other officials is authorized by 15 U.S.C. § 634(b). Relevant criminal provisions also include the offer of loan or gratuity to bank examiner (18 U.S.C. § 212), acceptance of a loan or gratuity by bank examiner (18 U.S.C. § 213), and receipt of commissions or gifts for procuring loans (18 U.S.C. § 215).

[24] See 26 U.S.C. § 7602 (granting administrative subpoena authority).

[25] See 8 U.S.C. § 1225(d)(4) (granting administrative subpoena power to "any immigration officer" seeking to enforce the Immigration and Naturalization Act).

[26] See 47 U.S.C. 409(e) (granting subpoena authority to FCC); 47 U.S.C. § 155(c)(1) (granting broad delegation power so that investigators and other officials can issue administrative subpoenas); 47 U.S.C. § 223 (identifying criminal provision for use of telecommunications system to harass).

[27] See 42 U.S.C. § 2201(c) (providing subpoena authority to Nuclear Regulatory Commission); 42 U.S.C. § 2201(n) (empowering the Commission to delegate authority to General Manager or "other officers" of the Commission).

[28] See 29 U.S.C. § 1134(c) (authorizing administrative subpoenas); Labor Secretary's Order 1-87 (April 13, 1987) (allowing for delegation of administrative subpoena authority to regional directors).

[29] See 50 App. U.S.C. § 2411 (granting administrative subpoena authority for criminal investigations).

- *Corporation of Foreign Security Holders* investigations of criminal activities relating to securities laws.[30]
- *Department of Justice* investigations into health care fraud[31] and any offense involving the sexual exploitation or abuse of children.[32]

Moreover, Congress has authorized the use of administrative subpoenas in a great number of *purely civil and regulatory contexts* — where the stakes to the public are even lower than in the criminal contexts above.[33] Those include enforcement in major regulatory areas such as securities and antitrust, but also enforcement for laws such as the Farm Credit Act, the Shore Protection Act, the Land Remote Sensing Policy Act, and the Federal Credit Union Act.[34]

Nor are these authorities dormant. The Department of Justice reports, for example, that federal investigators in 2001 issued more than 2,100 administrative subpoenas in connection with investigations to combat health care fraud, and more than 1,800 administrative subpoenas in child exploitation investigations.[35] These authorities are common and pervasive in government — just not where it arguably counts most, in terrorism investigations.

S. 2555 Would Update the Administrative Subpoena Authority

S. 2555, the Judicially Enforceable Terrorism Subpoenas Act of 2004 (the "JETS Act"), would enable terrorism investigators to subpoena documents and records in any investigation concerning a federal crime of terrorism — whether before or after an incident. As is customary with administrative subpoena authorities, the recipient of a JET subpoena could petition a federal district court to modify or quash the subpoena. Conversely, if the JET subpoena recipient simply refused to comply, the Department of Justice would have to petition a federal district court to enforce the subpoena. In each case, civil liberties would be respected, just as they are in the typical administrative subpoena process discussed above (pp. 4-5).

The JETS Act also would allow the Department of Justice to temporarily bar the recipient of an administrative subpoena from disclosing to anyone other than his lawyer that he has received it, therefore protecting the integrity of the investigation. However, the bill imposes certain safeguards on this non-disclosure provision: disclosure would be prohibited only if the Attorney General certifies that "there may result a danger to the national security of the United States" if any other person were told of the subpoena's existence.[36] Moreover, the JET subpoena recipient would have the right to go to court to challenge the nondisclosure order, and the Act would protect the recipient from any civil liability that might otherwise result from his good-faith compliance with such a subpoena.

[30] See 15 U.S.C. § 77t(b) (granting administrative subpoena authority in pursuit of criminal investigations).
[31] See 18 U.S.C. § 3486(a)(1)(A)(i)(I) (granting administrative subpoena authority).
[32] See 18 U.S.C. § 3486(a) (granting administrative subpoena authority).
[33] Even where the information is being subpoenaed for civil and regulatory purposes, the government official typically must report any evidence of criminality to federal prosecutors.
[34] DOJ Report, App. A1 & A2.
[35] DOJ Report, at p. 41.
[36] S. 2555, § 2(a) (proposed 18 U.S.C. § 2332g(c)).

Given the protections for civil liberties built into the authority and its widespread availability in other contexts, there is little excuse for failing to extend it to the FBI agents who are tracking down terrorists among us.

Conclusion

Congress is hamstringing law enforcement in the war on terror in failing to provide a proven tool — administrative subpoena authority — for immediate use for the common good. Federal investigators should have the same tools available to fight terrorism as do investigators of mail theft, Small Business Administration loan fraud, income-tax evasion, and employee-pension violations. S. 2555 provides a means to update the law and accomplish that worthy goal.