

**Administrative Subpoenas for the FBI:
A Grab for Unchecked Executive Power**
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The Administration recently renewed its effort to obtain “administrative subpoena” authority for the FBI in criminal terrorism cases. The President called for it in his speech marking the second anniversary of 9/11. Rep. Tom Feeney (R-FL) has introduced H.R. 3037, which would grant the FBI administrative subpoena power. The draft of the Justice Department’s Domestic Security Enhancement Act, or “PATRIOT II,” which was leaked last February, also contained broad administrative subpoena authority for the FBI. And recent drafts of Senator Hatch’s so-called “VICTORY Act,” which has not yet been introduced, contain provisions that would also grant the FBI the ability to issue administrative subpoenas.

In CDT’s view, these administrative subpoena proposals represent a grab for unchecked executive power. The FBI does not need this authority to combat terrorism effectively.

What is an “administrative subpoena?”

An administrative subpoena is essentially a piece of paper signed by an FBI agent that requires any recipient to disclose any documents (or any other “tangible things”). The proposed administrative subpoena would also compel a person to give testimony, essentially forcing anyone to talk to the FBI. Administrative subpoenas are issued with no prior judicial, prosecutorial or grand jury approval. Under the current proposals, failure to comply with an administrative subpoena could result in civil and criminal penalties, and the subpoenas would be executed in complete secrecy. In fact, under one of the proposals, anyone who disclosed the existence of an administrative subpoena could be subject to up to five years in prison.

Technically, a person getting an administrative subpoena could ask for judicial review. But, in the case of subpoenas for documents, why would they? Most – if not all – administrative subpoenas for records would be issued to third-party businesses to get information about their customers. The business has immunity for complying with the subpoena and little incentive to spend its money challenging a subpoena for records that pertain to someone else. And since the business is prohibited from notifying its customer of the existence of the subpoena, the customer can never exercise his right to challenge the subpoena.

Is it needed?

Under current law, the FBI already has far-reaching compulsory powers to obtain documents and witness' testimony when it is investigating terrorism, under both its criminal and intelligence authority.

- Search Warrants. In any criminal investigation, the FBI can obtain a search warrant for documents or other tangible things if there is a judicial finding of probable cause that a crime has been, is being or will be committed. Search warrants can be issued not only to search a suspect's home, but also to obtain documents from any other third party if they constitute evidence of a crime.
- Grand Jury Subpoenas. The FBI also can use grand jury subpoenas in any criminal investigation to obtain any documents, other "tangible things," or witness' testimony relevant to the investigation. "Relevance" is a low legal standard, but at least the grand jury subpoena is issued under the supervision of a judge and a U.S. Attorney overseeing a specific investigation, and both the court and the prosecutor provide a check on overbroad or unnecessary document demands, ensuring that investigations are coordinated and that subpoenas are focused.
- FISA Orders. In international terrorism cases, the FBI has sweeping authority to obtain business records and any other "tangible things" under the Foreign Intelligence Surveillance Act. Although the FBI must go to a judge to obtain an order under this provision, the application only needs to "specify that the records concerned are *sought for* an authorized investigation." (The DOJ has recently said it has never used this authority.)

Given these broad existing powers, and given the fact that some of them have never even been used yet, there is no reason to go even further down the path of unchecked, essentially unreviewable authority to issue demands for documents and testimony. Retaining checks and balances – including some external review – on FBI investigations is not only good for civil liberties, but it also ensures that the FBI does not waste its resources on unnecessary fishing expeditions.

What about crooked doctors?

Many federal agencies already have administrative subpoena authority. Almost all of these are in the context of administrative, regulatory programs – OSHA, mine safety, SEC, etc. They are subject to various checks and balances. They often issue directly to the subjects of investigations. They are generally not subject to secrecy rules.

In this context, the FBI also has administrative subpoena authority, in two areas. When the FBI in 1982 was given joint jurisdiction with the DEA over drug enforcement, it got for drug cases the administrative subpoena authority that went with the enforcement of the regulatory system for controlled substances. The subpoenas are served, for example, on pharmacies and doctors suspected of engaging in the diversion of controlled substances to the black market. And

in a little-noticed provision in HIPAA, the massive medical insurance law of 1996, the FBI was given administrative subpoena authority for investigation of Medicare and Medicaid fraud. Both of these situations involve highly regulated industries, subject to a great deal of federal regulation. Medicare and Medicaid involve federal tax dollars. Generally, in these cases, the FBI serves the subpoena on the entity it is investigating, not some third party. Thus, when the FBI demands records from a hospital or insurance company as part of a health care fraud investigation, it is investigating that hospital or insurance company – not the customers of those entities. That creates some built-in checks on the administrative subpoena process. The entity whose records are sought is notified that the government is seeking that information, allowing it to seek to narrow the subpoena if it thinks the government is overreaching. Individuals' health information contained in those records can be depersonalized.

By contrast, the current administrative subpoena proposals are designed to allow the FBI to obtain information, in secret, from entities that are not under investigation themselves but have customers whose records the FBI is seeking. The person under investigation never knows that the FBI has sought or obtained those records. With no other external check like a court or grand jury, the FBI would have almost limitless power to collect sensitive personal information.

Expanded National Security Letter in Intelligence Authorization bills would give FBI the same unchecked subpoena authority

While the Administration is publicly calling for broad administrative subpoena power, it has been working behind the scenes to obtain something similar by broadening its authority to issue what are called National Security Letters (NSLs). NSLs are like administrative subpoenas, in that they are pieces of paper signed by FBI agents with no judicial review, compelling disclosure of documents. They are issued in intelligence investigations, which can be broader than criminal investigations. The FBI has for some time been able to issue NSLs for three kinds of records: credit reports, bank records, and telephone/Internet billing and transactional records. In the PATRIOT Act, the NSLs were expanded by removing the requirement that the government had to have specific facts giving reason to believe that the records being sought pertained to a suspected spy or possible terrorist. Post-PATRIOT, the records can be compelled on the ground that they are “sought for” foreign counter intelligence purposes, and as we read the language the FBI doesn't even have to specify whose records they want.

Both Section 334 of the House-passed Intelligence Authorization bill for FY 2004 (H.R. 2417) and Section 354 of the companion bill passed by the Senate (S. 1025) would significantly expand the reach of the NSLs that the FBI can issue for financial records pursuant to 12 U.S.C. § 3414. Under the proposed Intelligence Authorization language, the definition of “financial institution” would be expanded to include travel agencies, Western Union, real estate agents, the Postal Service, insurance companies, casinos, and car dealers.

The NSL for financial records would be expanded by adopting the definition of “financial institution” used in the money laundering law, which includes this very wide range of entities. Specifically, the new definition of “financial institution” for NSL purposes would add, *inter alia*:

- a broker or dealer in securities or commodities;

- a currency exchange;
- an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;
- an insurance company;
- a dealer in precious metals, stones, or jewels;
- a pawnbroker;
- a travel agency;
- a telegraph company;
- a business engaged in vehicle sales, including automobile, airplane, and boat sales;
- persons involved in real estate closings and settlements;
- the United States Postal Service;
- a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than \$ 1,000,000;
- any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.¹

The way the definitions work, the records to be disclosed would not be limited to typical "financial" records. Under the new definitions, "financial records" are defined as "any record held by a financial institution pertaining to a customer's relationship with the financial institution." If a travel agent or car dealer is considered a financial institution, the new authority covers any record held by the travel agent or car dealer, even if it doesn't relate to financial matters.

Conclusion

The debate over whether the FBI should have administrative subpoena authority dates back decades. The FBI has long sought general administrative subpoena authority, and Congress has long resisted providing it, for reasons that are clear: Without prior judicial review, there would be no effective bar on the reach of the authority. It would be left entirely to the discretion of FBI agents. The FBI already has overbroad authority to obtain documents and other information; there is no need to expand it further.

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¹ See 31 U.S.C. § 5312(a)(2) (the money laundering law). The current definition of "financial institution" for NSL purposes includes only banks, savings banks, card issuers as defined in 15 U.S.C. § 1602(n), industrial loan companies, trust companies, savings associations, building and loans, homestead associations, credit unions, and consumer finance institutions. See 12 U.S.C. § 3401(1).