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Administrative Subpoenas and National Security Letters in Criminal and Intelligence Investigations: A Sketch

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Summary

Administrative subpoena authority, including closely related national security letter authority, is the power vested in various administrative agencies to compel testimony or the production of documents or both in aid of the agencies' performance of their duties. Both the President and Members of Congress have called for statutory adjustments relating to the use of administrative subpoenas and national security letters in criminal and foreign intelligence investigations. One lower federal court has found the sweeping gag orders and lack of judicial review that mark one of the national security letter practices constitutionally defective. Proponents of expanded use emphasize the effectiveness of administrative subpoenas as an investigative tool and question the logic of its availability in drug and health care fraud cases but not in terrorism cases. Critics suggest that it is little more than a constitutionally suspect "trophy" power, easily abused and of little legitimate use. This is an abridged version — without footnotes, appendices, quotation marks and most citations to authority — of *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments*, CRS Report RL32880.

Background: Administrative subpoenas are not a traditional tool of criminal law investigation, but neither are they unknown. Administrative subpoenas and criminal law overlap in at least four areas. First, under some administrative regimes it is a crime to fail to comply with an agency subpoena or with a court order secured to enforce it. Second, most administrative schemes are subject to criminal prohibitions for program-related misconduct of one kind or another, such as bribery or false statements, or for flagrant recalcitrance of those subject to regulatory direction. In this mix, agency subpoenas usually produce the grist for the administrative mill, but occasionally unearth evidence that forms the basis for a referral to the Department of Justice for criminal prosecution. Third, in an increasing number of situations, administrative subpoenas may be used for purposes of conducting a criminal investigation. Finally, particularly in the context of

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subpoenas used for criminal investigative purposes involving intelligence matters, disclosure of the existence of a subpoena may be a criminal offense.

Several statutes at least arguably authorize the use of administrative subpoenas primarily or exclusive for use in a criminal investigation in cases involving health care fraud, child abuse, Secret Service protection, controlled substance cases, and Inspector General investigations. In addition, five statutory provisions vest government officials responsible for certain foreign intelligence investigations with authority comparable to administrative subpoena access to various types of records.

Administrative Subpoenas Generally: Administrative agencies have long held the power to issue subpoenas and subpoenas duces tecum in aid of the agency's adjudicative and investigative functions. There are now over 300 instances where federal agencies have been granted administrative subpoena power in form or another. The statute granting the power ordinarily describes the circumstances under which it may be exercised: the scope of the authority, enforcement procedures, and sometimes limitations on dissemination of the information subpoenaed. In some instances, the statute may grant the power to issue subpoena duces tecum, but explicitly or implicitly deny the agency authority to compel testimony. The statute may authorize use of the subpoena power in conjunction with an agency's investigations or its administrative hearings or both. Authority is usually conferred upon a tribunal or upon the head of the agency. Although some statutes preclude or limit delegation, agency heads are usually free to delegate such authority and to authorize its redelegation thereafter within the agency. Failure to comply with an administrative subpoena may pave the way for denial of a license or permit or some similar adverse administrative decision in the matter to which the issuance of the subpoena was originally related. In most instances, however, administrative agencies ultimately rely upon the courts to enforce their subpoenas. Generally, the statute that grants the subpoena power will spell out the procedure for its enforcement.

Objections to the enforcement of administrative subpoenas must be derived from one of three sources: a constitutional provision; an understanding on the part of Congress; or the general standards governing judicial enforcement of administrative subpoenas. Constitutional challenges arise most often under the Fourth Amendment's condemnation of unreasonable searches and seizures, the Fifth Amendment's privilege against self-incrimination, or the claim that in a criminal context the administrative subpoena process is an intrusion into the power of the grand jury and its concomitant Fifth Amendment right to grand jury indictment.

In an early examination of the questions, the Supreme Court held that the Fourth Amendment did not preclude enforcement of an administrative subpoena issued by the Wage and Hour Administration notwithstanding the want of probable cause. Neither the Fourth Amendment nor the unclaimed Fifth Amendment privilege against self-incrimination were thought to pose any substantial obstacle to subpoena enforcement. Soon thereafter a second case echoed the same message — the Fourth Amendment does not demand a great deal of administrative subpoenas addressed to corporate entities, a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. But it is sufficient if the inquiry is within the authority of agency, the demand is not too indefinite and the information sought is reasonably relevant. The gist of the protection is in the requirement that the disclosure sought shall not be unreasonable. A statute or

judicial tolerance, however, may require what the Constitution does not. Nevertheless when asked if the Internal Revenue Service (IRS) must have probable cause before issuing a summons for the production of documents, the Court intoned the standard often repeated in response to an administrative subpoena challenge, the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons. He must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required by the Code have been followed This does not mean that under no circumstances may the court inquire into the underlying reason for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.

Criminal Administrative Subpoenas — Controlled Substance Act: The earliest of the three federal statutes (21 U.S.C. 876) used extensively for criminal investigative purposes appeared with little fanfare as part of the 1970 Controlled Substances Act, and empowers the Attorney General to issue subpoenas "in any investigation relating to his functions" under the act. In spite of its spacious language, the legislative history of section 876, emphasizes the value of the subpoena power for administrative purposes — its utility in assigning and reassigning substances to the act's various schedules and in regulating the activities of physicians, pharmacists, and the pharmaceutical industry — rather than as a criminal law enforcement tool. Nevertheless, the Attorney General has delegated the authority to issue subpoenas under section 876 to both administrative and criminal law enforcement personnel, and the courts have approved its use in inquiries conducted exclusively for purposes of criminal investigation. Section 876 authorizes both testimonial subpoenas and subpoenas duces tecum. It provides for judicial enforcement; failure to comply with the court's order to obey the subpoena is punishable as contempt of court; it contains no explicit prohibition on disclosure.

Inspectors General: The language of the Inspector General Act of 1978 provision is just as general as its controlled substance counterpart: each Inspector General, in carrying out the provisions of this act, is authorized to require by subpoena the production of all information necessary in the performance of the functions assigned by this act. Its legislative history supplies somewhat clearer evidence of an investigative tool intended for use in both administrative and criminal investigations. The Justice Department reports that the Inspector General's administrative subpoena authority is mainly used in criminal investigations, and the courts have held that the act gives the Inspectors General both civil and criminal investigative authority and subpoena powers coextensive with that authority. The act contains no explicit prohibition on disclosure of the existence or specifics of a subpoena issued under this authority.

Health Care, Child Abuse & Presidential Protection: Unlike its companions, there can be little doubt that 18 U.S.C. 3486 is intended for use primarily in connection with criminal investigations. It is an amalgam of three relatively recent statutory provisions — one, the original, dealing with health care fraud; one with child abuse offenses; and one with threats against the President and others who fall under Secret Service protection. Section 3486 is both more explicit and more explicitly protective than either of its controlled substance or IG statutory counterparts. In addition to a judicial enforcement provision, it specifically authorizes motions to quash and ex parte nondisclosure court orders. It affords those served a reasonable period of time to assemble subpoenaed

material and respond and in the case of health care investigations the subpoena may call for delivery no more than 500 miles away. In child abuse and presidential investigation cases, however, it imposes no such geographical limitation and it may contemplate the use of “forthwith” subpoenas. It includes a “safe harbor” subsection that shields those who comply in good faith from civil liability; and in health care investigations limits further dissemination of the information secured.

Although the authority of section 3486 has been used fairly extensively, reported case law has been relatively sparse and limited to health care investigation subpoenas. The first of these simply held that the subject of a record subpoenaed from a third party custodian has no standing to move that the administrative subpoena be quashed. The others addressed constitutional challenges, and with one relatively narrow exception agreed that subpoenas in question complied with the demands of the Fourth Amendment. They cite *Oklahoma Press*, *Powell* and *Morton Salt* for the view that administrative subpoenas under section 3486 need not satisfy a probable cause standard. The Fourth Amendment only demands that the subpoena be reasonable, a standard that requires that 1) it satisfies the terms of its authorizing statute, 2) the documents requested were relevant to the Department of Justice’s investigation, 3) the information sought is not already in the Department of Justice’s possession, and 4) enforcing the subpoena will not constitute an abuse of the court’s process.

Of the three statutes that most clearly anticipate use of administrative subpoenas during a criminal investigation, section 3486 is the most detailed. Neither of the others has a nondisclosure feature nor a restriction on further dissemination; neither has an explicit safe harbor provision nor an express procedure for a motion to quash. All three, however, provide for judicial enforcement reinforced by the contempt power of the court.

Only the controlled substance authority of 21 U.S.C. 876 clearly extends beyond the power to subpoena records and other documents to encompass testimonial subpoena authority as well. The Inspector General Act speaks only of subpoenas for records, documents, and the like, and has been held to not include testimonial subpoenas. Section 3486 strikes a position somewhere in between; the custodian of subpoenaed records or documents may be compelled to testify concerning them, but there is no indication that the section otherwise conveys the power to issue testimonial subpoenas.

National Security Letters: Five statutory provisions vest government officials responsible for certain foreign intelligence investigations with authority comparable to administrative subpoena powers. With the post-9/11 lifting of the veil of separation that once divided criminal and foreign intelligence investigations when foreign terrorists may be involved, it is reasonable to expect that information gleaned from the use of this national security letter authority may be shared with criminal investigators — subject to statutory restrictions.

The oldest of the national security letter provisions began as an exception to privacy protections afforded by the Right to Financial Privacy Act, and remains in force in its original form. Its history is not particularly instructive and consists primarily of a determination that the exception in its original form should not be too broadly construed. But the exception was just that, an exception. It was neither an affirmative grant of authority nor a command to financial institutions. It removed the restrictions imposed on financial institutions by the Right to Financial Privacy Act, but it left them free to decline.

Congress responded with an intelligence authorization act amendment affirmatively giving the FBI access to financial institution records in certain foreign intelligence cases, and at the same time in the Electronic Communications Privacy Act afforded it comparable access to the telephone company and other communications service provider records. A more recent intelligence authorization act expanded the number of financial institutions covered by the national security letter authority under the Right to Financial Privacy Act. Both the communications provider section and the Right to Financial Privacy Act section contain a nondisclosure provision and a limitation on further dissemination except pursuant to guidelines promulgated by the Attorney General. Neither has an express enforcement mechanism nor identifies penalties for failure to comply with either the subpoena or the nondisclosure instruction.

In the mid-90's, Congress passed a pair of intelligence authorization acts adding two more national security letter provisions — one permits their use in connection with the investigation of government employment leaks of classified information under the National Security Act, 50 U.S.C. 436; and the other grants the FBI access to credit agency records pursuant to the Fair Credit Reporting Act, under much the same conditions as apply to the records of financial institutions, 15 U.S.C. 1681u. The FBI asked for the Fair Credit Reporting Act amendment as a threshold mechanism to enable them to make more effective use of its bank record access authority. Both the Fair Credit Reporting Act section and the National Security Act section contain dissemination restrictions, as well as safe harbor (immunity) and nondisclosure provisions. Neither has a mechanism for judicial enforcement nor an explicit penalty for improper disclosure of the request.

Section 505 of the USA PATRIOT Act amended the FBI's national security letter authority over communications records, and the records of financial institutions and credit agencies. In each instance, the amendment (1) makes it clear that demands can be issued by the agents in charge of the various FBI field offices, (2) substitutes a relevancy standard for the earlier "reason to believe" standard, (3) drops the requirement that the records are those of a foreign power or its agent, and (4) asserts that access may not be sought in connection with an investigation based solely on an American's exercise of his First Amendment rights. Subsection 358(g) of the USA PATRIOT Act added a new national security letter section within the Fair Credit Reporting Act available to any government agency investigating international terrorism, 15 U.S.C. 1681v. Although the subsection's legislative history treats it as a matter of first impression, Congress' obvious intent was to provide other agencies with the national security letter authority comparable to that enjoyed by the FBI under the Fair Credit Reporting Act, as it did in subsection 358(f) with respect to the national security letter authority in the Right to Financial Privacy Act. The section has a nondisclosure and a safe harbor subsection, but no express means of judicial enforcement or penalties for improper disclosure of a request under the section.

Proposals for Change — Reenforcing National Security Letters: A federal district court in New York recently held that the exercise of national security letter authority under 18 U.S.C. 2709 (communications service provider information) unconstitutional under the Fourth Amendment (unreasonable searches and seizures) and that the section's nondisclosure provisions rendered the section constitutionally invalid under the First Amendment (free speech and association), *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004). The Justice Department has announced that it will appeal the decision which is arguably at odds with more general case law in the area of administrative subpoenas.

Several bills in the 109th Congress address the dual issues raised in *Doe v. Ashcroft*: (a) judicial review and enforcement, and (b) nondisclosure. S. 693 (Senator Cornyn) amends 18 U.S.C. 2709 to (1) permit a recipient to disclose the matter to his attorney or those whose assistance is necessary in order to comply with the request, (2) authorize federal courts to enforce a national security letter, or to modify or set aside such a request or a related nondisclosure order; and (3) allow disclosure in such judicial proceedings consistent with the requirements of the Classified Information Procedures Act (CIPA).

S. 737 features similar amendments but with some significant distinctions. It permits disclosure to a recipient's attorney and those assisting him to comply. It authorizes motions to amend or to quash a national security letter request and to ease the restrictions of a related gag order. And it allows for disclosures consistent with CIPA. However, it imposes a 90 day limit on the nondisclosure requirements, subject to court authorized 180 day extensions based on exigent circumstances; S. 693 imposes no such time limits. S. 737 authorizes a court to modify or set aside a request for failure to comply with the procedural requirements of 18 U.S.C. 2709 or on the basis of "any constitutional or other legal right or privilege." S. 693 (Cornyn), however, authorizes the federal courts to modify or set aside a request when "compliance would be unreasonable or oppressive," a standard which is facially different but might be construed as the practical equivalent of that found in S. 737. The bills are more obviously distinct in their treatment of the standards for preservation of nondisclosure requirements. Those found in S. 693 appear more secretive and thus more protective than those in S. 737. Yet the bills may differ most with respect to those matters that S. 737 address and S. 693 is silent.

S. 737 (Senator Craig) narrows the circumstances under which a national security letter may be issued under 18 U.S.C. 2709; it returns from the present relevancy standard to the pre-USA PATRIOT Act standard of "specific and articulable facts giving reason to believe." It also establishes a suppression procedure for judicial review when evidence generated under section 2709 is offered in a subsequent federal proceeding, proposed 18 U.S.C. 2709(f). Moreover, for each of the amendments that S. 737 makes to 18 U.S.C. 2709, it makes a comparable change in national security letter provisions found in the Right to Financial Privacy Act (12 U.S.C. 3414) and the Fair Credit Report Act (15 U.S.C. 1681u and 1681v).

The companion proposals contained in S. 317 (Senator Feingold) and H.R. 1526 (Representative Otter) are at once more restricted and more sweeping than those in either S. 693 or S. 737. The Feingold bill amends 18 U.S.C. 2709 to create a "specific and articulable facts" standard when the request relates to library or bookseller records, proposed 18 U.S.C. 2709(e); the Otter bill amends 18 U.S.C. 2709 to exempt library records from the reach of the section altogether, proposed 18 U.S.C. 2709(a)(2). Both bills add section 505 of the USA PATRIOT Act to the list of sections that sunset on December 31, 2005. Section 505 amended the national security letter provisions of 18 U.S.C. 2709 and 15 U.S.C. 1681u to permit issuance by the heads of FBI field offices and to replace the "specific and articulable facts" standard. It also amended the Right to Financial Privacy Act to permit the heads of FBI field offices to issue national security letters under the provisions of that act. Those amendments would expire under H.R. 1526 (Otter) and S. 317 (Feingold). Although more extensive proposals were offered in the 108th Congress, the only law enforcement related administrative subpoena proposal in the 109th Congress appears in S. 600 relating to the Secretary of State's responsibilities to protect U.S. foreign missions and foreign dignitaries visiting this country.