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Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments

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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. Administrative subpoenas are not a traditional tool of criminal law investigation, but neither are they unknown. Several statutes at least arguably authorize the use of administrative subpoenas primarily or exclusively 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.

As a constitutional matter, the Fourth Amendment only demands that administrative subpoenas be reasonable, a standard that requires that 1) they satisfy the terms of the authorizing statute, 2) the documents requested are relevant to the investigation, 3) the information sought is not already in the government's possession, and 4) enforcing the subpoena will not constitute an abuse of the court's process. One lower federal court has recently held, however, that practices under one of the national security letter statutes violate the Fourth and First Amendment.

Several bills address the dual issues raised in the case: (a) judicial review and enforcement, and (b) nondisclosure. S. 693 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 applies them to several of the national security letter statutes and imposes a 90 day limit on the nondisclosure requirements, subject to court authorized 180 day extensions based on exigent circumstances. The companion proposals contained in S. 317 and H.R. 1526 are at once more restricted and more sweeping than those in either S. 693 or S. 737. S. 317 amends 18 U.S.C. 2709 to create a "specific and articulable facts" standard when the request relates to library or bookseller records; H.R. 1526 amends 18 U.S.C. 2709 to exempt library records from the reach of the section altogether. 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.

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Introduction

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. During the 108th Congress, the President urged Congress to expand and reenforce statutory authority to use administrative subpoenas and national security letters in criminal and foreign intelligence investigations; and legislation was introduced for that purpose.[1] Related proposals have been offered during the 109th

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[1] "Congress should change the law, and give law enforcement officials the same tools they have to fight terror they have to fight other crime. Here's some examples. Administrative subpoenas, which enable law enforcement officials to obtain certain records quickly, are critical to many investigations. They're used in a wide range of criminal and civil matters, including health care fraud and child abuse cases. Yet, incredibly enough, in terrorism cases, where speed is often of the essence, officials lack the authority to use administrative subpoenas. If we can use these subpoenas to catch crooked doctors, the Congress should allow law enforcement officials to use them to catch terrorists," President George W. Bush, *Progress Report on the Global War on Terrorism* (Sept. 10, 2003), available at [http://www.whitehouse.gov/news/releases/2003/09/20030910-6.html] ; *See also*, H.R. 3037 (Rep. Feeney); S. 2555 (Sen. Kyl);S. 2679; (Sen. Kyl); H.R. 3179 (Rep. Sensenbrenner); all in the 108th Congress; *see also, H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary* (*House Hearings*), 108th Cong., 2d Sess. (2004), available at [http://www.house.gov/judiciary]; *Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention for Terrorists: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the Senate Comm. on the Judiciary (Senate Hearings I)*, 108th Cong., 2d Sess. (2004); *A Review of the Tools to Fight Terrorism Act: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary (Senate Hearings II)*, 108th Cong., 2d Sess. (2004), Member and witness statements available at [http://judiciary.senate.gov].

H.R. 3179 would not have expanded existing administrative subpoena or National Security Letter authority, but would have made it clear that the statutes authorizing the use National Security Letters are judicially enforceable and that disclosure of National Security Letter requests with obstructionist intent falls within existing criminal obstruction of justice proscriptions.

Congress, some of which deal with national security letter authority.[2]

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.[3] Critics suggest that it is little more than a constitutionally suspect "trophy" power, easily abused and of little legitimate use.[4]

More precisely, it might said in favor of the use of administrative subpoenas, including national security letters in criminal and foreign intelligence investigations that they:

- provide a time-honored, court-approved means for agencies to acquire information in order to make well informed decisions;[5]
- should be available for terrorism investigations;[6]
- do not ordinarily require probable cause and consequently can be used from the beginning of an inquiry to gather information;[7]
- can be used to gather information held by third parties other than the target of an inquiry;[8]
- often can encourage the cooperation of third parties by providing immunity for cooperation similar to that available in a judicial context;[9]

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[2] *E.g.*, S. 693 (Sen. Cornyn), S. 3 (Sen. Gregg), S. 317 (Sen. Feingold), S. 600 (Sen. Lugar), S. 737 (Sen. Craig), H.R. 1526 (Rep. Otter).

[3] *E.g.*, *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand; *Senate Hearings II*, Prepared Statement of United States Assistant Attorney General Daniel J. Bryant.

[4] *E.g.*, *Senate Hearings I*, Prepared Statement of Mr. James Robinson; *Housing Hearings*, Prepared Statement of Mr. Bob Barr.

[5] Office of Legal Policy, United States Department of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (DoJ Report)*, 7 (2002).

[6] *E.g.*, *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

[7] *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946).

[8] *E.g.*, *House Hearings*, Prepared Statement of United States Assistant Attorney General Daniel J. Bryant.

[9] *Paine v. City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001); *Scarbrough v. Myles*, 245 F.3d 1299, 1305 (11th Cir. 2001)(witness immunity).

• often can make third parties subject to nondisclosure requirements thereby reducing the possibility that the target of an investigation will flee, destroy evidence, or intimidate witnesses, or the risks to national security;[10]

• can be made judicially enforceable both to ensure compliance and to safeguard against abuse;[11]

• are less intrusive than search warrants; material is gathered and delivered by the individual rather than seized by the government; there is ordinarily an interval between the time of service of the subpoena and the time for compliance, allowing parties to consult an attorney;[12]

• can be more easily and quickly used than grand jury subpoenas, but are otherwise similar;[13] and

• are now available for investigations relating to some crimes and there is no obvious reason why they should not be available for other equally serious criminal investigations.[14]

On the other hand, it might be said that in the context of a criminal or foreign intelligence investigation that administrative subpoenas including national security letters:

• are more likely to lead to unjustified intrusions of privacy;[15]

• seem to replicate and expand existing national security letter authority, without an explanation as to why additional authority is needed;[16]

• lack the judicial safeguards that accompany the issuance of a search warrant, probable cause and issuance by a neutral magistrate, among other things;[17]

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[10] *E.g.*, *House Hearings*, Prepared Statement of United States Assistant Attorney General Daniel J. Bryant.

[11] *E.g.*, *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

[12] *Cf.*, *In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847, 854 (9th Cir. 1991)(distinguishing subpoenas from search warrants).

[13] *E.g.*, *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

[14] *Senate Hearings II*, Prepared Statement of Mr. Barry Sabin, Chief, Counterterrorism Section of the Criminal Division, United States Department of Justice.

[15] *E.g.*, *Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.

[16] *E.g.*, *House Hearings*, Prepared Statement of former Representative Bob Barr.

[17] *Id.*

• generally lack the safeguards that accompany the issuance of a grand jury subpoena in that they are ordinarily are not subject to a motion to quash or to the necessary participation of an Assistant United States Attorney;[18]

• are distinguishable from grand jury subpoenas by the simple fact that the extensive powers available to the grand jury are justified in part by the fact that the grand jury is not the government but a buffer against the abuse of governmental authority;[19]

• can be extremely expensive and disruptive for the person or entity to whom they are addressed long before the thresholds of overbreadth or oppression (the point at which a subpoena will not be enforced) are reached;[20]

• are subject to easy abuse when they are issued against third parties who may have little interest in contesting legitimacy;[21]

• are subject to easy abuse when they are issued against third parties who are granted immunity from civil liability for the disclosures;[22]

• are subject to easy abuse when they are issued against third parties who are subject to permanent gag orders precluding disclosure to targets who might otherwise contest the abuse;[23] and

• are sought for their speed,[24] an environment in which mistakes often breed.[25]

A federal district court in New York recently held 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 some of the

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[18] *E.g., Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson; *Senate Hearings II*, Prepared Statement of Professor Jonathan Turley.

[19] *E.g., Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.

[20] *E.g., In re Grand Jury Proceedings*, 115 F.3d 1240, 1244 (5th Cir. 1997).

[21] *E.g., Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.

[22] *Id.*

[23] *Id.*

[24] *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

[25] *Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.

more general case law in the area of administrative subpoenas, DoJ Press Release, September 30, 2004, available on November 2, 2004 at [http://www.usdoj.gov/opa/pr/2004/September/04_opa_664.htm].

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 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 exclusively for use in a criminal investigation. They are: (1) 18 U.S.C. 3486 (administrative subpoenas in certain health care fraud, child abuse, and Secret Service protection cases); (2) 21 U.S.C. 876 (Controlled Substance Act cases); and (3) 5 U.S.C.App.(III) 6 (Inspector General investigations).[26] 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.[27]

Administrative Subpoenas Generally.

At common law, a subpoena was a writ ordering an individual to appear before a court or tribunal, *sub poena* (under penalty) for failure to comply.[28] The writ might simply command the individual to appear *ad testificandum* (for purposes of

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[26] The text of each is appended. The characterization is "arguably" because both the Inspector General and controlled substance provisions were intended for, and are used extensively for, purposes other than criminal investigation.

[27] 18 U.S.C. 2709(communications provider records); 12 U.S.C. 3414 (financial institution records); 50 U.S.C. 436 (same); 15 U.S.C. 1681v (credit agency records); 15 U.S.C. 1681u (same); the text of each is appended. Each authorizes use of the authority in connection with an investigation into "international terrorism," a term ordinarily defined as violent criminal conduct with multinational aspects.

[28] III BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 369 (1768)(transliteration supplied)("With regard to parol evidence, or witnesses; it must first be remembered, that there is a process to bring them in by writ of subpoena ad testificandum: which commands them, laying aside all pretences and excuses, to appear at trial on pain of 100£ to be forfeited to the king. . . .").

testifying), or it might also include a clause instructing the witness to appear, again under penalty for his failure (*sub poena*), *duces tecum* (bringing with you [some designated item]).[29] Testimonial subpoenas and subpoenas duces tecum remain a prominent feature of judicial proceedings to this day.

Administrative agencies have long held the power to issue subpoenas and subpoenas duces tecum in aid of the agency's adjudicative and investigative functions. When Congress established the Interstate Commerce Commission, for example, it endowed the Commission with subpoena power:

> "[F]or the purposes of this act the [Interstate Commerce] Commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section," Interstate Commerce Act, §12, 24 Stat. 383 (1887).

There are now over 300 instances where federal agencies have been granted administrative subpoena power in one form or another.[30] 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.[31] The statute may authorize use of the subpoena power in conjunction with an agency's investigations or its administrative hearings or both.[32] Authority is usually conferred upon a tribunal or upon the head

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[29] ID. at 382 ("A second defect is of a nature somewhat familiar to the first: the want of a compulsive power for the production of books and papers belonging to the parties. In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of subpoena, which is then called a subpoena duces tecum").

[30] *DoJ Report*, 5 ("Submissions from executive branch entities and legal research identified approximately 335 existing administrative subpoena authorities held by various executive branch entities under current law.").

[31] *See e.g.*, *United States v. Iannone*, 610 F.2d 943, 945-47 (D.C.Cir.1979) holding that a statute that grants the authority "to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data" does not include the authority to compel the testimony of witnesses.

[32] *E.g.*, 7 U.S.C. 7808(a)(b) (captions omitted): "(a) The Secretary [of Agriculture] may conduct such investigations as the Secretary considers necessary for the effective administration of this chapter [relating to Hass avocado promotion, research and information], or to determine whether any person has engaged or is engaging in any act that constitutes a violation of this chapter or any order or regulation issued under this chapter.

"(b)(1) For the purpose of conducting an investigation under subsection (a) of this section, the Secretary may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take evidence, and require the production of any records that are relevant to the inquiry. The production of the records may be required from any place in the United States.

"(2) For the purpose of an administrative hearing held under section 7806(a)(2) or

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.[33]

Some statutes contain a specific mechanism to protect the confidentiality of subpoenaed information,[34] others may rely upon the general proscriptions such as those that protect trade secrets,[35] or those found in the Privacy and Freedom of

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7807(c)(3) of this title [relating to hearings to contest orders issued under the chapter or penalties imposed for failure to comply with such orders], the presiding officer may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take evidence, and require the production of any records that are relevant to the inquiry. The attendance of witnesses and the production of the records may be required from any place in the United States."

[33] *E.g.*, 28 U.S.C. 510 ("The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any officer, employee, or agency of the Department of Justice of any function of the Attorney General").

[34] *E.g.*, 15 U.S.C. 796(d)("Upon a showing satisfactory to the Federal Energy Administrator by any person that any energy information obtained under this section [which authorizes the use of subpoenas to collect energy information under the Energy Supply and Environmental Coordination Act and the Emergency Petroleum Allocation Act] from such person would, if made public, divulge methods or processes entitled to protection as trade secrets or other proprietary information of such person, such information, or portion thereof, shall be confidential in accordance with the provisions of section 1905 of Title 18; except that such information, or part thereof, shall not be deemed confidential for purposes of disclosure, upon request, to (1) any delegate of the Federal Energy Administrator for the purpose of carrying out this chapter and the Emergency Petroleum Allocation Act of 1973, (2) the Attorney General, the Secretary of the Interior, the Federal Trade Commission, the Federal Power Commission, or the General Accounting Office, when necessary to carry out those agencies' duties and responsibilities under this and other statutes, and (3) the Congress, or any committee of Congress upon request of the Chairman").

[35] 18 U.S.C. 1905 ("Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment").

Information Acts.[36]

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.[37]

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," *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741-42 (1984). Constitutional challenges arise most often under the Fourth Amendment's condemnation of unreasonable searches and seizures,[38] the Fifth Amendment's privilege against self-incrimination,[39] or the claim that in a criminal context the administrative subpoena process is an intrusion into the power of the grand jury and the concomitant right to grand jury indictment.[40]

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, *Oklahoma Press Pub.Co. v. Walling*, 327 U.S. 186 (1946). In the eyes of the Court:

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[36] 5 U.S.C. 552a and 5 U.S.C. 552, respectively. Other protective measures include those of the Right to Financial Privacy Act, 12 U.S.C. 3401 et seq.; the Health Insurance Portability and Accountability Act (HIPPA) regulations, 45 C.F.R. pt.2; the Electronic Communications Privacy Act, 18 U.S.C. 2701 et seq.; the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.; and the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g.

[37] *E.g.*, 7 U.S.C. 15 (". . .In case of contumacy by, or refusal to obey a subpoena issued to, any person, the [Commodity Futures Trading] Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. . .").

[38] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," U.S. Const. Amend. IV.

[39] ". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. Amend. V.

[40] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ." U.S. Const. Amend. V.

> The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of the court for the production of specified records have been validly made; and no sufficient showing appears to justifying setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in were made. Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which might invalidate them. 327 U.S. at 1975.

Neither the Fourth Amendment nor the unclaimed Fifth Amendment privilege against self-incrimination were thought to pose any substantial obstacle to subpoena enforcement:

> Without attempting to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation, or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be particularly described, if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. 327 U.S. at 208.

Congress had not expressly confined the Wage and Hour Administration's subpoena power to instances where probable cause for inquiry existed. Moreover, far from taking offense at any perceived intrusion upon the prerogatives of the grand jury, proximity was thought to commend rather than condemn the procedure. The Court considered the Administration akin to the grand jury whose searches end — rather than begin — with the discovery of probable cause, 327 U.S. at 215 ("The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the act, is essentially the same as the grand jury's . . . and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be limited by forecasts of the probable result of the investigation").

A few years later, dicta in *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950), 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, expressed in terms, that the disclosure sought shall not be unreasonable.'"[41]

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[41] In *Morton Salt Co.* the government had sought an injunction to enforce compliance with a Federal Trade Commission cease and desist order and the company had interposed a

Of course, Fourth Amendment reasonableness is only an issue where there is a justifiable expectation of privacy, and Fifth Amendment self-incrimination only where an individual is compelled to speak. As the Court made clear, an individual can claim neither Fourth nor Fifth Amendment privileges to bar a subpoena for documents held by a bank or other third party nor to a right to notice of the subpoena's demand.[42]

A statute or conditions precedent to judicial enforcement, 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:

> "Reading the statutes as we do, 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," *United States v. Powell*, 379 U.S. 48, 57-8 (1964).[43]

Fourth Amendment objection. The opinion may be colored by the Court's view at the time of the limited Fourth Amendment rights available to corporate entities. "While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. . . Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and public interest," 327 U.S. at 652.

[42] *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. at 742-43 ("a person inculpated by materials sought by a subpoena issued to a third party cannot seek shelter in the self-incrimination, and, whatever may be the pressures exerted upon the person to whom a subpoena is directed, the subpoena surely does not compel anyone else to be a witness against himself If the target of an investigation by the SEC has no Fifth Amendment right to challenge enforcement of a subpoena directed at a third party, he clearly can assert no derivative right to notice when the Commission issues such a subpoena. . . . It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party coveys that information or records thereof to law enforcement authorities. . . . These rulings disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers").

[43] In the IRS context, the court's process was not necessarily abused when employed to enforce an administrative summons issued for purposes of a criminal investigation, at least until the agency referred the matter to the Justice Department for prosecution, *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). The IRS summon at issue in *LaSalle* had

The lower courts continue to look to *Oklahoma Press*, *Morton Salt*, *Powell* and *LaSalle*, when called upon to enforce administrative subpoenas.[44]

Administrative Subpoenas and the Grand Jury.

Both sides of the debate find support in the law that surrounds the grand jury. Proponents of the use of administrative subpoenas in criminal cases point out that the courts have often analogized the administrative inquiry and subpoena power to the inquiries and powers of the grand jury. Opponents contend the grand jury's powers depend upon its unique and independent constitutional status, a foundation the administrative subpoena lacks.

The federal grand jury is certainly unique. It is a constitutionally acknowledged institution empowered to indict and to refuse to indict: "No person shall be held to answer for a capital, or otherwise infamous [federal] crime, unless on a presentment or indictment of a grand jury," U.S.Const. Amend.V. "[T]he whole theory of its function is that it belongs to no branch of the institutional government," but serves

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been served "solely for the purpose of unearthing evidence of criminal conduct," 437 U.S. at 299. Yet, since "Congress had not categorized tax fraud investigations into civil and criminal components, . . . the primary limitation on the use of a summons occurs [only] upon the [IRS] recommendation of criminal prosecution to the Department of Justice." 437 U.S. at 311. Thereafter, the "likelihood that [government] discovery would be broadened or the role of the grand jury infringed" contrary to the intent of Congress "is substantial if post-referral use of the summons authority were permitted," 437 U.S. at 312.

[44] *University of Medicine v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003)(inspector general's subpoena under 5 U.S.C.App.III, §6)("A district court should enforce a subpoena if the agency can show that the investigation will be conducted pursuant to a legitimate purpose; that the inquiry is relevant; that the information demanded is not already in the agency's possession, and that the administrative steps required by the statute have been followed. The demand for information must not be unreasonably broad or burdensome, *Wentz*, 55 F.3d at 908 (citing *Powell*, 379 U.S. at 57-58; *Morton Salt*, 338 U.S. at 652)"); *In re Subpoena Duces Tecum*, 228 F.3d 341, 349 (4th Cir. 2000)(upholding enforcement of a subpoena issued under 18 U.S.C. 3486 after an analysis citing *Oklahoma Press*, *Morton Salt*, and *LaSalle*, *inter alia*)("In short, an investigative subpoena, to be reasonable under the Fourth Amendment, must be (1) authorized for a legitimate governmental purpose; (2) limited in scope to reasonably relate to and further its purpose; (3) sufficiently specific so that a lack of specificity does not render compliance unreasonably burdensome; and (4) not overly broad for the purposes of the inquiry as to be oppressive, a requirement that may support a motion to quash a subpoena only if the movant has first sought reasonable condition from the government to ameliorate the subpoena's breadth"); *Hell's Angels Motorcycle Corp. v. County of Monterey*, 89 F.Supp.2d 1144, 1149 (N.D.Cal. 2000), *aff'd sub nom., Hell's Angels Motorcycle Corp. v. McKinley*, 360 F.3d 1144 (9th Cir. 2004)(subpoena issued under 21 U.S.C. 876)(citing *United States v. Sturm, Ruger Co.*, 84 F.3d 1 (1st Cir. 1996) which in turn cites *Oklahoma Press*, and *Morton Salt*)("the target of an administrative subpoena is entitled at a minimum to a judicial determination that (1) the subpoena is issued for a congressionally authorized purpose, the information sought is (2) relevant to the authorized purpose and (3) adequately described, and (4) proper procedures have been employed in issuing the subpoena"); *but see, Doe v. Ashcroft*, 334 F.Supp.2d 471, 494-506 (S.D.N.Y. 2004) (distinguishing the traditional administrative subpoena procedures and finding a Fourth Amendment violation in the coercive practice of exercising NSL authority under the procedures that do not appear to provide an avenue for judicial approval or review).

"as a kind of buffer or referee between the government and the people," *United States v. Williams*, 504 U.S. 36, 47 (1992).

Nevertheless, the grand jury is attended by Justice Department attorneys who, through the use of subpoenas and subpoenas duces tecum, arrange for the presentation of evidence before it. Unlike the search warrant, there is no threshold of probable cause or similar level of suspicion that must be crossed before the grand jury subpoena can be issued. "[T]he grand jury can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not. It need not identify the offender it suspects, or even the precise nature of the offense it is investigating," *United States v. Williams*, 504 U.S. at 48. Its proceedings are conducted in secret and even attorneys for the witnesses who testify before it must await their clients outside the closed doors of the grand jury chamber. F.R.Crim.P. 6; *United States v. Mandujano*, 425 U.S. 564, 581 (1976). The subpoena power upon which the grand jury relies, however, is the process of the court and may be enforced only through the good offices of the court. "And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the constitution or even testimonial privileges recognized at common law," *United States v. Williams*, 504 U.S. at 48.

A subpoena is generally considered less intrusive than a warrant. The warrant authorizes an officer to enter, search for and seize, forcibly if necessary at a reasonable time of the officer's choosing, that property to which the officer understands the warrant refers; the subpoena duces tecum instructs the individual to gather up the items described at his relative convenience and bring them before the tribunal at some designated time in the future. The validity of a warrant may only be contested after the fact; a motion to quash a subpoena can ordinarily be filed and heard before compliance is required.

There are at least two relatively uncommon exceptions to this general scheme of disparity. First, a subpoena may order "forthwith" compliance, demanding immediate appearance and delivery.[45] Second, while subpoenas ordinarily involve no bodily intrusions, grand jury subpoenas duces tecum have been issued for blood and saliva samples.[46] Even here, however, the individual served may choose not to

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[45] A "forthwith" subpoena is a subpoena directing the person to whom it is addressed to appear immediately either to testify or bring subpoenaed items with him. *E.g.*, *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31 (D.Conn. 2002); *In re Grand Jury Subpoenas*, 926 F.2d 541 (9th Cir. 1991); *United States v. Sears, Roebuck & Co., Inc.*, 719 F.2d 1386 (9th Cir. 1983); *United States v. Lartey*, 716 F.2d 955 (2d Cir. 1983); *see also*, Beale, Bryson, et al., GRAND JURY LAW AND PRACTICE, §6:4 (2d ed. 2002)("Forthwith subpoenas may be justified where there is a danger that evidence may be destroyed or altered or a witness may flee. The principal objection to the use of the forthwith subpoenas is that they deprive the subpoenaed party of the opportunity to consult with counsel and to challenge the validity of the subpoena before the time set for compliance"). Forthwith grand jury subpoenas are only to be used when an immediate response is justified and require the approval of the United States Attorney, *United States Attorneys' Manual* §9-11.140 (1997).

[46] *In re Shabazz*, 200 F.Supp.2d 578 (D.S.C. 2002); *In re Grand Jury Proceedings Involving Vickers*, 38 F.Supp.2d 159 (D.N.H. 1998); *United States v. Nicolosi*, 885 F.Supp. 50 (E.D.N.Y. 1995); *In re Grand Jury Proceedings (T.S.)*, 816 F.Supp. 1196 (W.D.Ky.

comply and challenge the validity of the subpoena should the government seek judicial enforcement — an option the individual whose property is subject to a search warrant clearly does not have.

The Federal Rules of Criminal Procedure declare that grand jury subpoenas duces tecum may be neither unreasonable or oppressive, F.R.Crim.P. 17(c)(2), a standard originally borrowed from the civil rules which are now much more expressive, F.R.Civ.P. 45(c). The criminal rule, which at a minimum is grounded in Fourth Amendment principles, is said to bar only the imprecise, overly burdensome, irrelevancy-seeking, or privilege-intrusive grand jury subpoena duces tecum. The Supreme Court demonstrated the deference owed the grand jury's power of inquiry in *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991). There it observed that a party seeking to quash a grand jury subpoena duces tecum bears the burden of establishing that a particular subpoena is unreasonable because it is unduly burdensome or because of its want of specificity or relevancy and that a notion to quash on relevancy grounds "must be denied unless there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation," 498 U.S. at 301.

Criminal Administrative Subpoenas.
Controlled Substance Act, 21 U.S.C. 876.

The earliest of the three federal statutes used extensively for criminal investigative purposes appeared with little fanfare as part of the 1970 Controlled Substances Act, 84 Stat. 1272 (1970). It empowers the Attorney General to issue subpoenas "in any investigation relating to his functions" under the act, 21 U.S.C. 876(a). 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:

> Subsection (a) of this section authorizes the Attorney General to subpena witnesses and compel their attendance and testimony in investigations relating to his functions under title II [relating to authority to control; standards and schedules]. He is also authorized to compel production of records or other tangible things which constitute or contain evidence and upon which he has made a finding as to materiality or relevancy. H.Rept. 91-1444, at 53 (1970).[47]

Nevertheless, the Attorney General has delegated the authority to issue subpoenas under section 876 to both administrative and criminal law enforcement personnel, 28

1993); *Henry v. Ryan*, 775 F.Supp. 247 (N.D.Ill. 1991).

[47] *See also*, S.Rept. 91-613, at 29 (1969)(emphasis added) ("Section 606(a) authorizes the Attorney General to subpena witnesses and compel their attendance and testimony *in hearings* relating to the control of controlled substances").

C.F.R. App. to Pt.0 Subpt.R, §4, and the courts have approved their use in inquiries conducted exclusively for purposes of criminal investigation.[48]

Section 876 authorizes both testimonial subpoenas and subpoenas duces tecum, 21 U.S.C. 876(a). It provides for judicial enforcement; failure to comply with the court's order to obey the subpoena is punishable as contempt of court, 21 U.S.C. 876(c). The section contains no explicit prohibition on disclosure.[49]

Inspectors General, 5 U.S.C.App.(III) 6.

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 this act, is authorized . . . to require by subpena the production of all information . . . necessary in the performance of the functions assigned by this Act. . . ." 5 U.S.C.App.(III) 6(a)(4). Its legislative history supplies somewhat clearer evidence of an investigative tool intended for use in both administrative and criminal investigations:

> Subpoena power is absolutely essential to the discharge of the Inspector and Auditor General's functions. There are literally thousands of institutions in the country which are somehow involved in the receipt of funds from Federal programs. Without the power necessary to conduct a comprehensive audit of these entities, the Inspector and Auditor General could have no serious impact on the way federal funds are expended. . . .
>
> The committee does not believe that the Inspector and Auditor General will have to resort very often to the use of subpoenas. There are substantial incentives for institutions that are involved with the Federal Government to comply with requests by an Inspector and Auditor General. In any case, however, knowing that the Inspector and Auditor General has recourse to subpoena power should encourage prompt and thorough cooperation with his audits and investigations.
>
> The committee intends, of course, that the Inspector and Auditor General will use this subpoena power in the performance of is statutory functions. The use of subpena power to obtain information for another agency component which does not have such power would clearly be improper.
>
> [The committee recognizes that there is a substantial ongoing dispute about the propriety of so-called third party subpoenas: i.e., subpoenaing records of an individual which are in the hands of an institution, such as a bank. Since *U.S. v. Miller*, 425 U.S. 435 (1976), individuals have been regarded as having no protectable right of property with respect to their bank records. A law enforcement agency can obtain such records from a bank without any showing of cause to a neutral magistrate or any notice to the individual involved. The committee notes that progress has been made on legislation concerning financial privacy which would require notice to be given to an individual whose bank records are being obtained by a law enforcement agency. Hopefully, this progress will lead to legislation of general applicability to all law enforcement authorities, including Inspector and Auditor Generals]. S.Rept. 95-1071, at 34 (1978)(footnote 7 of the committee report in brackets).

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[48] *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993); *United States v. Mountain States Tel. & Tel. Co.*, 516 F.Supp. 225 (D.Wyo. 1981); *United States v. Hossbach*, 518 F.Supp. 759 (E.D.Pa. 1980).

[49] The text of 21 U.S.C. 876 is appended.

The Justice Department reports that the "the Inspector General['s administrative subpoena] authority is mainly used in criminal investigations," *DoJ Report*, at 6, 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."[50]

Subpoena authority under the Inspector General Act is delegable,[51] and subpoenas issued under the act are judicially enforceable.[52] The act contains no explicit prohibition on disclosure of the existence or specifics of a subpoena issued under this authority.[53]

Health Care, Child Abuse & Presidential Protection, 18 U.S.C. 3486.

Unlike its companions, there can be little doubt that 18 U.S.C. 3486 is intended for use primarily in connection with criminal investigations. Section 3486 is an amalgam is three relative 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. The health care fraud provision comes from the Health Insurance Portability and Accountability Act, 110 Stat. 2018 (1996), where it caused little comment during consideration of the act.[54]

The child abuse subpoenas, on the other hand, generated some illuminating commentary. Enacted as part of the Protection of Children from Sexual Predators Act, 112 Stat.2984-985 (1998), and originally codified as 18 U.S.C. 3486A, the subpoena provision represented a compromise. The House version authorized the general subpoena power for use in the investigation of five federal child abuse offenses.[55] The version that ultimately passed, however, encompassed a wider range of federal child abuse statutes but only permitted subpoenas for the records of

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[50] *United States v. Aero Mayflower Transit Co., Inc.*, 831 F.2d 1142, 1145 (D.C.Cir. 1987); *see also*, *Inspector General v. Banner Plumbing Supply, Co., Inc.*, 34 F.Supp.2d 682, 688 (N.D.Ill. 1998); *United States v. Medic Housing, Inc.*, 736 F.Supp. 1531, 1535 (W.D.Mo. 1989).

[51] *United States v. Custodian of Records*, 743 F.Supp. 783, 786 (W.D.Okla. 1990); *Doyle v. U.S. Postal Service*, 771 F.Supp. 138, 140 (E.D.Va. 1991).

[52] 5 U.S.C. App.(III) 6(a)(4)(". . . which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States District Court . . ."); *Inspector General v. Banner Plumbing Supply Co., Inc.*, 34 F.Supp. 682, 686 (N.D. Ill. 1998); *University of Medicine and Dentistry v. Corrigan*, 347 F.3d 57, 63 (3d Cir. 2003).

[53] The text of 5 U.S.C.App. (III) 6 is appended.

[54] The committee reports accompanying passage of the act make no mention of it other than to document its presence, S.Rept. 104-156 (1995); H.Rept. 104-496 (1996); H.Rept. 104-736 (1996); and the report on a corresponding bill containing identical language simply summarizes the content of the provision, H.Rept. 104-497, at 97 (1996).

[55] *See*, H.Rept. 105-557, at 6-7(text)(1998); id. at 23 ("Under current law, federal law enforcement authorities may subpoena records in drug and health care fraud investigations without a court authorized subpoena. . . . The FBI has experienced difficulty in obtaining subpoenas in jurisdictions where U.S. attorneys lack sufficient resources to support an investigation of child pedophiles").

Internet and telephone communications providers. Senator Leahy, the ranking member of the Senate Judiciary Committee, explained this portion of the compromise during debate on the bill:

> The House bill would have given the Attorney General sweeping administrative authority to subpoena records and witnesses [for] investigations involving crimes against children. This proposed authority to issue administrative subpoenas would have given federal agents the power to compel disclosures without any oversight by a judge, prosecutor, or grand jury, and without any of the grand jury secrecy requirements. We appreciate that such [secrecy] requirements may pose obstacles to full and efficient cooperation of federal/state task forces in their joint efforts to reduce the steadily increasing use of the Internet to perpetrate crimes against children, including crimes involving the distribution of child pornography. In addition, we understand that some U.S. Attorneys' Offices are reluctant to open grand jury investigations when the only goal is to identify individuals who have not yet, and may never, commit a federal (as opposed to state or local) offense.
>
> The Hatch-Leahy-DeWine substitute accommodates these competing interests by granting the Department a narrowly drawn authority to subpoena the information that it most needs: Routine subscriber account information from Internet Service Providers (ISP) which may provide appropriate notice to subscribers. 144 *Cong.Rec.* S12264 (daily ed. October 9, 1998).

The compromise did not long survive. Buried in the omnibus funding bill for that year was a second child abuse section (18 U.S.C. 3486A) in addition to section 3486.[56] In the following Congress when the Secret Service sought subpoena authority in presidential protection cases, its request and the authority in health care fraud and child abuse cases were merged into the language of general authority now found in section 3486 and section 3486A disappeared, 114 Stat. 2717 (2000). In the process, the demise of the compromise was scarcely mentioned,[57] but its legacy may live on in the form of the greater detail found in the revamped section 3486.

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,[58] it specifically authorizes motions to quash, 18 U.S.C. 3486(a)(5), and ex parte nondisclosure court orders.[59] It affords those served a

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[56] P.L. 105-277, 112 Stat. 2681-72 (1998)("Section 3486(a)(1) of title 18, United States Code, is amended by inserting 'or any act or activity involving a Federal offense relating to the sexual exploitation or other abuse of children,' after 'health care offense,'").

[57] *See*, H.Rep.No. 106-669, at 11 n.11 (2000)("Due to inconsistent acts of Congress, administrative subpoenas have been authorized in cases involving the sexual exploitation or abuse of children under both section 3486 and section 3486A. See, Public Law No. 105-77, Title I, §122 and Public Law No. 105-314, Title I, §606. Section 3486A lists specific crimes for which these subpoenas may be used while section 3486 does not. The authority under section 3486 is far more limited, however, and applies only when the subpoena is to be served on a provider of an 'electronic communication service' or 'remote computing service'").

[58] 18 U.S.C. 3486(c). The text of 18 U.S.C. 3486 is appended.

[59] 18 U.S.C. 3486(a)(6)(A)("A United State district court for the district in which the summons is or will be served, upon application of the United States, may issue an ex parte

reasonable period of time to assemble subpoenaed material and respond, 18 U.S.C. 3486(a)(2), and in the case of health care investigations the subpoena may call for delivery no more than 500 miles away, 18 U.S.C. 3486(a)(3). In child abuse and presidential investigation cases, however, it imposes no such geographical limitation and it may contemplate the use of forthwith subpoenas.[60] It includes a "safe harbor" subsection that shields those who comply in good faith from civil liability;[61] and in health care investigations limits further dissemination of the information secured, 18 U.S.C. 3486(e).

Although the authority of section 3486 has been used fairly extensively,[62] 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.[63] The others addressed constitutional challenges, and with one

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order that no person or entity disclose to any other person or entity (other than to an attorney in order to obtain legal advice) the existence of such summons for a period of up to 90 days. (B) Such order may be issued on a showing that the things being sought may be relevant to the investigation and there is reason to believe that such disclosure may result in — (i) endangerment to the life or physical safety of any person; (ii) flight to avoid prosecution; (iii) destruction of or tampering with evidence; or (iv) intimidation of potential witnesses. (C) An order under this paragraph may be renewed for additional periods of up to 90 days upon a showing that the circumstances described in subparagraph (B) continue to exist").

[60] 18 U.S.C. 3486(a)(9)("A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(ii)[child abuse or Presidential protection cases] may require production as soon as possible, but in no event less than 24 hours after service of the subpoena"). It is unclear whether administrative subpoenas in health care cases are exempted from the general rule or the exception: administrative subpoenas in health care cases are not authorized to require production as soon as possible, or administrative subpoenas in health care cases may require immediate production without regard to the 24 hour limitation that applies in child abuse and Presidential protection cases. The safer assumption is probably that the authority is unavailable in health care investigations, since the authority is extraordinary and the need for prompt action seems likely to arise more often in child abuse and Presidential protection cases.

[61] 18 U.S.C. 3486(d)("Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer").

[62] The Justice Department reported that in the first full year after the section became effective in its current form United States Attorneys issued over 2100 administrative subpoenas under the authority of section 3486 and the FBI issued over 1800 in child abuse cases, *DoJ Report*, at 40-41. Whether due to novelty of the authority or other circumstances, no administrative subpoenas were issued under section 3486 to assist the Secret Service, *id.* at 41. As the Justice Department report observes, *DoJ Report*, at 6, the obligation to annually report on the use of the authority under section 3486 expired on December 19, 2003, 5 U.S.C. 551 note.

[63] *United States v. Daniels*, 196 F.R.D. 681, 683-84(D.Kan. 2000), *citing inter alia*, *United States v. Phibbs*, 999 F.2d 1053, 1077-78 (6th Cir. 1993), which reached the same conclusion with respect to an administrative subpoena under the controlled substance

relatively narrow exception agreed that the 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.[64] 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 request were relevant to the DoJ's investigation, 3) the information sought is not already in the DoJ's possession, and 4) enforcing the subpoena will not constitute an abuse of the court's process," 253 F.3d at 265; *see also*, 228 F.3d 349.

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 a express procedure for a motion to quash. All three, however, provide for judicial enforcement reenforced 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.[65] The Inspector General Act speaks only of subpoenas for records, documents, and the like,[66] and has been held not to include testimonial subpoenas.[67] 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.[68]

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provision, 21 U.S.C. 876.

[64] *In re Subpoenas Duces Tecum (Bailey)*, 51 F.Supp.2d 726, 731-37 (W.D.Va. 1999), *aff'd*, 228 F.3d 341, 348-50 (4th Cir. 2000); *In re Administrative Subpoena (Doe, D.P.M.)*, 253 F.3d 256, 262-64 (6th Cir. 2001). The Government did not appeal the portion of the opinion from the Western District of Virginia which held that administrative subpoenas under section 3486 addressed to the subject of a criminal investigation for the production of his personal financial records must satisfy a probable cause standard, 51 F.Supp. at 734-37, a proposition with which the Sixth Circuit could not agree, 253 F.3d at 264-65. The Sixth Circuit conceded, however, that in a particular case personal financial records might lack sufficient relevancy to measure up the Fourth Amendment's reasonableness standard, 253 F.3d at 270-71.

[65] 21 U.S.C. 876(a)(". . . the Attorney General may subpena witnesses, compel the attendance and testimony of witnesses, and require the production of any records . . .").

[66] 5 U.S.C.App.(III) 6(a)(4) (". . . each Inspector General . . . is authorized . . . (4) to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence . . .").

[67] *Burlington Northern v. Office of Inspector General*, 983 F.2d 631, 641 (5th Cir. 1993); *see also, United States v. Iannone*, 610 F.2d 943, 945 (D.C.Cir. 1979)(construing identical language from an earlier IG statute to "negate the argument that in the exercise of his special subpoena power the Inspector General could compel Iannone to appear to give testimony").

[68] 18 U.S.C. 3486(a)(1)(". . . (B) Except as provided in subparagraph (C), a subpoena issued under subparagraph (A) may require — (i) the production of any records or other things relevant to the investigation; and (ii) testimony by the custodian of the things required to be

National Security Letters.

Five statutory provisions vest government officials responsible for certain foreign intelligence investigations with authority comparable to administrative subpoena powers.[69] 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 (RFPA), section 1114, P.L.95-630, 92 Stat. 3706 (1978) and remains in force in its original form.[70] 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.[71] 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.

> [I]n certain significant instances, financial institutions [had] declined to grant the FBI access to financial records in response to requests under Section 1114(a). The FBI

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produced concerning the production and authenticity of those things. (C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond — (i) requiring that provider to disclose the information specified in section 2703(c)(2), which may be relevant to an authorized law enforcement inquiry; or (ii) requiring a custodian of the records of that provider to give testimony concerning the production and authentication of such records or information").

[69] 18 U.S.C. 2709; 12 U.S.C. 3414; 15 U.S.C. 1681v; 15 U.S.C. 1681u; 50 U.S.C. 436; the text of each is appended.

[70] " Nothing in this chapter (except sections 3415, 3417, 3418, and 3421 of this title) shall apply to the production and disclosure of financial records pursuant to requests from — (A) a Government authority authorized to conduct foreign counter- or foreign positive-intelligence activities for purposes of conducting such activities; [or] (B) the Secret Service for the purpose of conducting its protective functions (18 U.S.C. 3056; 3 U.S.C. 202, Public Law 90-331, as amended)," 12 U.S.C. 3414(a)(1)(A), (B).

[71] "Section 1114 provides for special procedures in the case of foreign intelligence . . . . though the committee believes that some privacy protections may well be necessary for financial records sought during a foreign intelligence investigation, there are special problems in this area which make consideration of such protections in other congressional forums more appropriate. Nevertheless, the committee intends that this exemption be used only for legitimate foreign intelligence investigations: investigations proceeding only under the rubric of "national security" do not qualify. Rather this exception is available only to those U.S. Government officials specifically authorized to investigate the intelligence operations of foreign governments," H.Rept. 95-1383, at 55 (1978).

> informed the Committee that the problem occurs particularly in States which have State constitutional privacy protection provisions or State banking privacy laws. In those States, financial institutions decline to grant the FBI access because State law prohibits them from granting such access and the RFPA, since it permits but does not mandate such access, does not override State law. In such a situation, the concerned financial institutions which might otherwise desire to grant the FBI access to a customer's record will not do so, because State law does not allow such cooperation, and cooperation might expose them to liability to the customer whose records the FBI sought access. H.Rept. 99-690, at 15-6 (1986).

Congress responded with an intelligence authorization act amendment to the Right to Financial Privacy Act, section 404, P.L.99-569, 100 Stat. 3197 (1986), affirmatively giving the FBI access to financial institution records in certain foreign intelligence cases, 12 U.S.C. 3414(a)(5)(A), 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.[72]

The most recent intelligence authorization act, P.L. 108-177, expanded the number of financial institutions covered by the national security letter authority under the Right to Financial Privacy Act, 117 Stat. 2628 (2004)(12 U.S.C. 3414(d)). As a consequence of the amendment the authority now extends to records held by the following "financial institutions":

(A) an insured bank (as defined in 12 U.S.C. 1813(h));
(B) a commercial bank or trust company;
(C) a private banker;
(D) an agency or branch of a foreign bank in the United States;
(E) any credit union;
(F) a thrift institution;
(G) a broker or dealer registered with the Securities and Exchange Commission;
(H) a broker or dealer in securities or commodities;
(I) an investment banker or investment company;
(J) a currency exchange;
(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;
(L) an operator of a credit card system;
(M) an insurance company;
(N) a dealer in precious metals, stones, or jewels;
(O) a pawnbroker;
(P) a loan or finance company;
(Q) a travel agency;
(R) a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;
(S) a telegraph company;

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[72] 18 U.S.C. 2709(a), (b)(captions omitted); *see also*, S.Rept. 99-541, at 43 (1986)("This provision is substantially the same as language recently reported by the Intelligence Committee as section 503 of the Intelligence Authorization Act for Fiscal Year 1987, [P.L. 99-569]").

(T) a business engaged in vehicle sales, including automobile, airplane, and boat sales;
(U) persons involved in real estate closings and settlements;
(V) the United States Postal Service;
(W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph;
(X) a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $1,000,000 which —
  (i) is licensed as a casino, gambling casino, or gaming establishment under the laws of any State or any political subdivision of any State; or
  (ii) is an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act other than an operation which is limited to class I gaming (as defined in section 4(6) of such Act);
(Y) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage;
(Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters; or
(*A*) any futures commission merchant, commodity trading advisor, or commodity pool operator registered, or required to register, under the Commodity Exchange Act.

Both the communications provider section and the Right to Financial Privacy Act section contain a nondisclosure provision[73] and a limitation on further dissemination except pursuant of guidelines promulgated by the Attorney General, 18 U.S.C. 2709(d); 12 U.S.C. 3414(a)(5)(B). 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, P.L. 103-359 (1994) and P.L. 104-93 (1996), 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 Fair Credit Reporting Act amendment as a threshold mechanism to enable them to make more effective use of its bank record access authority:

> FBI's right of access under the Right of Financial Privacy Act cannot be effectively used, however, until the FBI discovers which financial institutions are being utilized by the subject of a counterintelligence investigation. Consumer reports maintained by credit bureaus are a ready source of such information, but, although such report[s] are readily available to the private sector, they are not available to FBI counterintelligence investigators. . . .

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[73] 18 U.S.C. 2709(c)("No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section"); *see also*, 12 U.S.C. 3414(a)(5)(D). Note that unlike section 3486, the prohibition is neither temporary nor judicially supervised.

> FBI has made a specific showing . . . that the effort to identify financial institutions in order to make use of FBI authority under the Right to Financial Privacy Act can not only be time-consuming and resource-intensive, but can also require the use of investigative techniques — such as physical and electronic surveillance, review of mail covers, and canvassing of all banks in an area — that would appear to be more intrusive than the review of credit reports. H.Rept. 104-427, at 36 (1996).[74]

Both the Fair Credit Reporting Act section and the National Security Act section contain dissemination restrictions, 15 U.S.C. 1681u(f), 50 U.S.C. 436(e); as well as safe harbor (immunity), 15 U.S.C. 1681u(k), 50 U.S.C. 436(c), and nondisclosure provisions, 15 U.S.C. 1681u(d); 50 U.S.C. 436(b). 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 institution and credit agencies, P.L. 107-56, 115 Stat. 365 (2001). 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 Americans exercise of his First Amendment rights.[75]

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[74] The National Security Act section authorizes access to credit and financial institution records of federal employees with security clearances who must give their consent as a condition for clearance, 50 U.S.C. 456. Passed in the wake of the Ames espionage case, it is limited to investigations of classified information leaks. As noted at the time, "The Committee believes section 801 will serve as a deterrent to espionage for financial gain without burdening investigative agencies with unproductive recordkeeping or subjecting employees to new reporting requirements. . . . The Committee recognizes that consumer credit records have been notoriously inaccurate, and expects that information obtained pursuant to this section alone will not be the basis of an action or decision adverse to the interest of the employee involved," H.Rep.No. 103-541 at 53-4 (1994).

[75] *E.g.*, *Compare*, 18 U.S.C. 2709(b) *after* amendment by the USA PATRIOT Act ("The Director of the Federal Bureau of Investigation, or his designee *at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director*, may —

"(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that *the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and*

"(2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that *the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States*," (emphasis added)),

With, 18 U.S.C. 2709(b) *prior to* that amendment ("The Director of the Federal Bureau

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:

> Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer's file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis. 15 U.S.C. 1681v(a).

Although the subsection's legislative history treats it as a matter of first impression,[76] 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

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of Investigation, or his designee *in a position not lower than Deputy Assistant Director* may —

"(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee *in a position not lower than Deputy Assistant Director*) certifies in writing to the wire or electronic communication service provider to which the request is made that *(A) the name, address, length of service, and toll billing records sought are relevant to an authorized foreign counterintelligence investigation; and (B) there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801); and*

"(2) request the name, address, and length of service of a person or entity if the Director (or his designee *in a position not lower than Deputy Assistant Director)* certifies in writing to the wire or electronic communication service provider to which the request is made *that — (A) the information sought is relevant to an authorized foreign counterintelligence investigation; and (B) there are specific and articulable facts giving reason to believe that communication facilities registered in the name of the person or entity have been used, through the services of such provider, in communication with — (i) an individual who is engaging or has engaged in international terrorism as defined in section 101(c) of the Foreign Intelligence Surveillance Act or clandestine intelligence activities that involve or may involve a violation of the criminal statutes of the United States; or (ii) a foreign power or an agent of a foreign power under circumstances giving reason to believe that the communication concerned international terrorism as defined in section 101(c) of the Foreign Intelligence Surveillance Act or clandestine intelligence activities that involve or may involve a violation of the criminal statutes of the United States*," (emphasis added)).

[76] *E.g.*, H.Rep.No. 107-250, at 60-1 ("this section facilitates government access to information contained in suspected terrorists' credit reports when the government inquiry relates to an investigation, of or intelligence activity or analysis relating to, domestic [sic] or international terrorism. Even though private entities such as lender and insurers can access an individual's credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist's plan or source of refunding — without notifying the target").

security letter authority in the Right to Financial Privacy Act.[77] The section has a nondisclosure and a safe harbor subsection, 15 U.S.C. 1681v(c), (e), but no express means of judicial enforcement or penalties for improper disclosure of a request under the section.

Doe v. Ashcroft

Unless or until it is overturned on appeal, *Doe v. Ashcroft* is likely to color the debate over expansion or curtailment of administrative subpoena and national security letter authority. In essence, the court found that the language of 18 U.S.C. 2709 and the practices surrounding its use offended (1) the Fourth Amendment because "in all but the exceptional case it has the effect of authorizing coercive searches effectively immune from any judicial process," 334 F.Supp.2d at 506, and (2) the First Amendment because its sweeping, permanent gag order provision applies "in every case, to every person, in perpetuity, with no vehicle for the ban to ever be lifted from the recipient or other persons affected under any circumstances, either by the FBI itself, or pursuant to judicial process," *id.* at 476.

The court concluded that the national security letters before it differed from administrative subpoenas by want of judicial review either before or after "the seizure":

> While the Fourth Amendment reasonableness standard is permissive in the context of the administrative subpoenas, the constitutionality of the administrative subpoena is predicated on the availability of a neutral tribunal to determine, after a subpoena issued, whether the subpoena actually complies with the Fourth Amendment's demands. In contrast to an actual physical search, which must be justified by the warrant and probable cause requirements occurring *before* the search, an administrative subpoena "is regulated by and its justification derives from, [judicial] process" available *after* the subpoena is issued.
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> Accordingly, the Supreme Court has held that an administrative subpoena "may not be made and enforced" by the administrative agency; rather, the subpoenaed party must be able to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." In sum, longstanding Supreme Court doctrine makes clear that an administrative subpoena statute is consistent with the Fourth Amendment when it is subject to "judicial supervision" and "surrounded by every safeguard of judicial restraint." 334 F.Supp.2d at 495, quoting *inter alia*, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. at 217; *See v. City of Seattle*, 387 U.S. 541, 544-45 (1967).

By way of emphasizing the troubling sweep of the nondisclosure ban found in 18 U.S.C. 2709(c), the court pointed to legislative proposals in the 108th Congress that might serve as one of several possible models for a more narrowly tailored

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[77] In both instances, the authority is available to the FBI "for foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities," and to other agencies "to conduct investigations of, or intelligence or counterintelligence analyses relating to, international terrorism," 12 U.S.C. 3414(a)(5), (a)(1)(C); 15 U.S.C. 1681u(a), 1681v(a).

means of protecting the legitimate governmental interests upon which section 2709 rests:

> Bills pending in the House and Senate would require the Attorney General to certify, before ordering secrecy, that disclosure would present a "danger to the national security," and the non-disclosure order could later be terminated by the Attorney General or a court, if the danger expires. 334 F.Supp.2d at 521, *citing*, H.R. 3037 (108th Cong.) and S. 2555 (108th Cong.).

Proposals for Change

National Security Letters.

Several bills in the 109th Congress, address the dual issues raised in *Doe v. Ashcroft*: (a) judicial review and enforcement, and (b) nondisclosure. For instance, 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 (Senator Craig) 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 a side 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.[78] 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.[79] Yet the bills

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[78] As a general rule in criminal cases, the federal courts will quash or modify a subpoena "if compliance would be unreasonable or oppressive," F.R.Crim.P. 17(c)(2). They will quash or modify a subpoena on the basis of a constitutional or federally-recognized privilege, *see e.g.*,*United States v. Hubbell*, 530 U.S. 27 (2000); *Jaffee v. Redman*, 518 U.S. 1 (1996). Any difference between the standards of the two bills may flow from whether the Craig proposal (S. 737) understands the phrase "constitutional or other legal right or privilege" to encompass rights and privileges based only on federal law or those based on either federal or state law.

[79] S. 693 (proposed 18 U.S.C. 2709(c)(3))("The court may modify or set aside such a nondisclosure requirement if there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life

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."[80] 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 brings to 18 U.S.C. 2709, it makes a comparable change in national security letter provisions found in 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

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or physical safety of any person. In reviewing a nondisclosure requirement, the certification by the Government that the disclosure may endanger the national security of the United States or interfere with diplomatic relations shall be treated as conclusive unless the court finds that the certification was made in bad faith").

S. 737 (proposed 18 U.S.C. 2709(e)(2)(B))("The court shall set aside the nondisclosure requirement unless the court determines that there is a reason to believe that disclosure of the request under subsection (b) will result in — (i) endangering the life or physical safety of any person; (ii) flight from prosecution; (iii) destruction of evidence; (iv) intimidation of potential witnesses; or (v) otherwise seriously endangering the national security of the United States by alerting a target, a target's associates, or the foreign power of which the target is an agent, of the Government's interest in the target")

[80] 18 U.S.C. 2709(b)(proposed amendment in italics)("The Director of the Federal Bureau of Investigation, or his designee at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may — (1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, *and there are specific and articulable facts giving reason to believe that the name, address, length of service, and toll billing records sought pertain to a foreign power or an agent of a foreign power*; provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and

"(2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, *and there are specific and articulable facts giving reason to believe that communication facilities registered in the name of the person or entity have been used, through the services of such provider, in communication with — (A) an individual who is engaging or has engaged in international terrorism or clandestine intelligence activities that involve or may involve a violation of the criminal statutes of the United States; or (B) a foreign power or an agent of a foreign power* provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.").

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, *see*, n.75, supra. 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).

Legislation in the 108th Congress, H.R. 3179 (Representative Sensenbrenner) would have reenforced the five national security letter provisions with explicit authority for judicial enforcement[81] and with criminal penalties for improper disclosure of the issuance of such letters. The penalties were to be the same as those proposed under the general administrative subpoena bills offered in the 108th — imprisonment for not more than five years when committed with the intent to obstruct and for not more than one year otherwise, proposed 18 U.S.C. 1510(e). A Justice Department witness explained that, "Oftentimes, the premature disclosure of an ongoing terrorism investigation can lead to a host of negative repercussions, including the destruction of evidence, the flight of suspected terrorists, and the frustration of efforts to identify additional terrorist conspirators. For these reasons, the FBI has forgone using NSLs in some investigations for fear that the recipients of those NSLs would compromise an investigation by disclosing the fact that they had been sent an NSL," *House Hearings*, Prepared Statement of United States Assistant Attorney General Daniel J. Bryant.

The enforcement provision would have been backed by the court's contempt power, proposed 18 U.S.C. 2332h.[82] It had no explicit provisions to permit the recipient to file a motion to quash or modify the request in the letter.[83]

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[81] In *Doe v. Ashcroft*, 334 F.Supp.2d 471, 496-501 (S.D.N.Y. 2004), the Government argued unsuccessfully that the NSL statutes should be understood to include an implicit judicial enforcement component.

[82] Proposed 18 U.S.C. 2332h ("In the case of a refusal to comply with a request for records, a report, or other information made to any person under section 2709(b) of this title, section 625 (a) or (b) or 626 of the Fair Credit Reporting Act [15 U.S.C. 1681u, 1681v], section 1114(a)(5)A) of the right to Financial Privacy Act [12 U.S.C. 3414, or section 802(a) of the National Security Act of 1947 [50 U.S.C. 436(a)], the Attorney General may invoke the aid of any court of the Untied States within the jurisdiction of which the investigation is carried on or the person resides, carries on business, or may be found, to compel compliance with the request. The court may issue an order requiring the person to comply with the request. Any failure to obey the order of the court may be punished by the court as contempt thereof. Any process under this section may be served in any judicial district in which the person may be found").

[83] The bill's sponsors did not have the benefit of the subsequently announced decision in *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004).

Opponents contend that national security letters are unnecessary, explicit enforcement powers even more so, and urge that:

> At a minimum, Congress should make explicit the right of a recipient to challenge a national security letter — just as a recipient can challenge a grand jury subpoena. Congress should require some individual suspicion before compliance with a national security letter can be ordered by a court. Finally, the recipient should be able to challenge the gag provision in court, and should be allowed to contact an attorney, congressional committee, or the Justice Department Inspector General without fear of being prosecuted for violating the gag provision. *House Hearings*, Prepared Statement of former United States Representative Bob Barr.

Administrative Subpoenas in Criminal Terrorist Investigations.

Other than those involving national security letters, the only law enforcement administrative subpoena proposal introduced thus far in the 109th is the modest provision found in the foreign affairs authorization for fiscal years 2006 and 2007, S. 600 (Senator Lugar), as reported out of the Senate Foreign Relations Committee, S.Rept. 109-35 (2005). The bill authorizes the Secretary of State to issue administrative subpoenas for documents or custodial testimony in connection with the protection of U.S. foreign missions and visiting foreign dignitaries, proposed 22 U.S.C. 2709(d). The authority may only be delegated to the Deputy Secretary of State and generally adopts by cross reference the authority available to the Secret Service under 18 U.S.C. 3486, id.

H.R. 3037 (Representative Feeney) and S. 2555/S. 2599 (Senator Kyl) of the 108th Congress reflected the President's suggestion that administrative subpoena authority be made available for criminal terrorist investigations.[84] They would have authorized the Attorney General to issue administrative subpoenas under a relevancy standard in the investigation of federal crimes of terrorism, as defined in 18 U.S.C. 2332b(g)(5).[85] A federal crime of terrorism is any of over 40 violent federal crimes when committed in a manner "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," 18 U.S.C.2332b(g)(5).

The House bill would have granted authority for both testimonial subpoenas and subpoenas duces tecum. The grant in the Senate bill, much like 18 U.S.C. 3486, was to be limited to materials and custodial testimony authenticating the material subpoenaed.[86] The position represented something of a middle ground between the

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[84] The terrorist administrative subpoena proposals in S. 2555 (Sen. Kyl) and in S. 2679 (Sen. Kyl) are the same. The bills differ in other respects.

[85] The text of 18 U.S.C. 2332b(g)(5) is appended.

[86] ". . . the Attorney General may issue . . . a subpoena requiring the production of any records or other materials that the Attorney General finds relevant to the investigation, or requiring testimony by the custodian of the materials to be produced concerning the production and authenticity of those materials," S. 2555, proposed 18 U.S.C. 2332g(a)(1).

The Senate bill, however, has a somewhat broader description than section 3486 of the power of an enforcing court to compel testimony on the matter under administrative inquiry: "(1) . . . In the case of the contumacy by . . . any person, the Attorney General may invoke

controlled substance provision in 21 U.S.C. 876 which authorizes testimonial subpoenas generally and the Inspector General provision in 5 U.S.C.App.(III) 6 which authorizes only subpoenas duces tecum.

The bills were otherwise substantively identical. Both would have established a nondisclosure requirement upon the Attorney General's certification that national security might otherwise be imperiled.[87] This differs substantially from the approach taken in 18 U.S.C. 3486, the only section of the three "criminal" administrative subpoena sections that has a nondisclosure component. Section 3486 permits the court, rather than the Attorney General, to issue the nondisclosure order upon a showing that disclosure would result in flight, destruction of evidence, witness intimidation, or the risk of bodily injury, rather than the Attorney General's national security determination, 18 U.S.C. 3486(a)(6).[88] Moreover, the orders under section 3486 are only good for 90 days unless the court renews them at 90 day intervals upon a showing that the exigent circumstances which justified their original issuance continue to exist, rather than an indefinite and potentially permanent tenure at the discretion of the Attorney General, id. Finally, the bills would have permitted officials to disclose related matters to the media or Congress, but do not afford witnesses a similar privilege without the approval of the Attorney General.[89] A witness for the Department of Justice testified, however, that "the bill[s] would impose several safeguards on the use of the nondisclosure provision. The requirement would last only until the Attorney General determined that the nondisclosure requirement was no longer justified by a danger to the national

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the aid of any court of the United States . . . to compel compliance with the subpoena. (2) . . . A court of the United States described in paragraph (1) may issue an order requiring the subpoenaed person. . . to give testimony *touching the matter under investigation*. . ." S. 2555, proposed 18 U.S.C. 2332g(c)(emphasis added); *compare this with*, 18 U.S.C. 3486(c)(emphasis added) (" . . . In the case of the contumacy by . . . any person, the Attorney General may invoke the aid of any court of the United States . . . to compel compliance with the subpoena. The court may issue an order requiring the subpoenaed person. . . to give testimony *concerning the production and authentication of such records*. . .").

[87] H.R. 3037, proposed 18 U.S.C. 2332g(d)(1)("If the Attorney General certifies that otherwise there may result a danger to the national security, no person shall disclose to any other person that a subpoena was received or records were provided pursuant to this section, other than to (A) those persons to whom such disclosure is necessary to in order to comply with the subpoena, (B) an attorney to obtain legal advice with respect to testimony or the production of records in response to the subpoena, or (C) other persons as permitted by the Attorney General. The subpoena, or an officer, employee, or agency of the United States in writing, shall notify the person to whom the subpoena is directed of such nondisclosure requirement. Any person who receives a disclosure under this subsection shall be subject to the same prohibition of disclosure"); the same language appears in Senate bill with addition captions and numbering.

[88] It is unclear whether this certification authority, like the authority to issue the subpoena itself, may be delegated, is confined to the Attorney General, or is subject to an intermediate level of delegation.

[89] Or possibly of the FBI officer who issued the subpoena, for here again the extent of anticipated delegation is unclear, although the testimony below suggests there is to be no delegation of this authority.

security, and the recipient of the subpoena would be notified that the obligation had expired. In addition, notwithstanding the nondisclosure requirement, the recipient would be allowed to discuss the subpoena with his or her attorney. The recipient could challenge the nondisclosure obligation in federal court, and the court could set it aside if doing so would not endanger the national security," *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachael Brand.

Both bills would have punished disclosure with imprisonment for not more a year, not more than five years if committed with the intent to obstruct the investigation or any judicial proceeding, proposed 18 U.S.C. 2332g(d), a feature unknown, at least expressly, in the case of either 18 U.S.C. 3486, 21 U.S.C. 876, or 5 U.S.C.App.(III) 6. Of course, anyone who discloses the existence of an administrative subpoena order with an intent to obstruct might be subject to prosecution under the obstruction of justice provisions of 18 U.S.C. 1503, or as a conspirator, 18 U.S.C. 371, or principle to the commission of the terrorist crime under investigation, 18 U.S.C. 2. The more innocent form of disclosure proscribed in the bills would not appear to invite prosecution under existing law.

The bills would have provided for judicial enforcement by means of a court order to comply with the original subpoena; failure to comply is punishable as contempt of court, proposed 18 U.S.C. 2332g(c). Like 18 U.S.C. 3486(a)(5), they would have authorized witnesses to file petitions to modify or set aside the subpoena including any nondisclosure requirements in the district court for the district which the witness resides or does business.[90] Few administrative subpoena schemes have such a provision. On the other hand, neither the bills nor section 3486 allow the subject of documents subpoenaed from a third party to contest the subpoena even in the absence of a nondisclosure order.

Again like 18 U.S.C. 3486 but unlike the Inspector General or controlled substance sections, both bills would have immunized good faith compliance with an administrative subpoena issued under their provisions, proposed 18 U.S.C. 2332g(f). And they would have authorized the Attorney General to promulgate implementing guidelines, proposed 18 U.S.C. 2332g(g).

Testifying before the Senate Judiciary Committee's Subcommittee on Terrorism, Technology and Homeland Security Department of Justice witnesses

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[90] H.R. 3037, proposed 18 U.S.C. 2332g(e)("At any time before the return date specified in the summons, the person or entity summoned may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the summons. Any such court may modify or set aside a nondisclosure requirement imposed under subsection (d) at the request of a person to whom a subpoena has been directed, unless there is reason to believe that the nondisclosure requirement is justified because otherwise there may result a danger to the national security. In all proceedings under this subsection, the court shall review the government's submission, which may include classified information, ex parte and in camera"); the Senate bill uses identical text but adds additional captions.

described the need for proposed section 2332g in much the same terms used to justify its counterparts in existing law:

> In combating terrorism, prevention is key. The entire Department of Justice has shifted its focus to a proactive approach to terrorism, reflecting the reality that it not good enough to wait to prosecute terrorist crimes after they occur. For the law-enforcement officers responsible for staying a step ahead of the terrorists in these investigations, time is critical. Even a brief delay in an investigation could be disastrous. Therefore, these officers need tools that allow them to obtain information and act as quickly as possible. Administrative subpoenas are one tool that will enable investigators to avoid costly delays.
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> An administrative subpoena is an order from a government official to a third party, instructing the recipient to produce certain information. Because the subpoena is issued directly by an agency official, it can be issued as quickly as the development of an investigation requires.
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> Administrative subpoenas are a well-established investigative tool, currently available in a wide range of civil and criminal investigations. A 2002 study by the Office of Legal Policy identified approximately 335 administrative subpoena authorities existing in current law. These authorities allow the use of administrative subpoenas in investigations of a wide variety of federal offenses, such as health-care fraud, sexual abuse of children, threats against the President and others under Secret Service protection, and false claims against the United States.
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> Administrative subpoenas are not, however, currently available to the FBI for use in terrorism investigations. This disparity in the law is illogical, especially considering the particular need for quick action in terrorism investigations and the potential catastrophic consequences of a terrorist attack. . . .[I]n terrorism cases, where speed is often of the essence, officials lack the authority to use administrative subpoenas. If we can use these subpoenas to catch crooked doctors, the Congress should allow law enforcement officials to use them in catching terrorists. . . .
>
> Although grand jury subpoenas are a sufficient tool in many investigations, there are circumstances in which an administrative subpoena would save precious minutes or hours in a terrorism investigation. For example, the ability to use an administrative subpoena will eliminate delays caused by factors such as the unavailability of an Assistant United States Attorney to immediately issue a grand-jury subpoena, especially in rural areas; the time it takes to contact an Assistant United States Attorney in the context of a time-sensitive investigation; the lack of a grand jury sitting at the moment the documents are needed (under federal law, the "return date" for a grand jury subpoena must be a day the grand jury is sitting); or the absence of an empaneled grand jury in the judicial district where the investigation is taking place, a rare circumstance that would prevent a grand jury subpoena form being issued at all. *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand; *see also, Senate Hearings II*, Prepared Statement of Barry Sabin, Chief of the Counterterrorism Section of the Criminal Division, United States Department of Justice..

Not all of the Congressional witnesses spoke as highly of the proposals. At least one voiced concerns about its potential for abuse:

> Over the years, Congress has been reluctant to expand the powers of criminal law enforcement agents to interfere with the liberty and privacy rights of American citizens through administrative subpoenas used exclusively to conduct criminal investigations. While Congress has authorized administrative subpoenas in a variety of civil — and some criminal — contexts, the use of such subpoenas for criminal investigations raises a host of constitutional and policy issues not present in civil administrative matters.

> To my knowledge, Congress has never authorized the creation of a potentially secret Executive branch police proceeding of the type contemplated by these proposals. The benefit to law enforcement of granting this power must be carefully balanced against the potential loss of liberty involved. With limited exceptions, absent judicial process such as a search warrant, a grand jury subpoena or a trial subpoena, American citizens have always had the right to decline to answer questions put to them by the police or to deliver their documents without a search warrant . . . .
>
> The administrative subpoenas for terrorism cases contemplated bing the proposals . . . would compel American citizens to appear for compelled question in secret before the Executive branch of their government without the participation or protection of the grand jury, or of a pending judicial proceeding, to answer questions and produce documents. No showing of reasonable suspicion, or probable cause or imminent need or exigent circumstances would be required to authorize such subpoenas. . . .
>
> While my experience has been that federal agents act in good faith in conducting their investigations, nevertheless, as Mark Twain is quoted as having once said: "to a man with a hammer, a lot of things look like nails." To an agent with an administrative subpoena, a lot of things may look like they need a subpoena. *Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.[91]

None of the hearing witnesses appear to have the addressed the question of why the FBI's national security letter authority to issue administrative subpoena like demands in international terrorism cases does not fill the gap. It may be because organizationally the FBI agents who conduct foreign intelligence terrorism investigations are distinct from the FBI agents who conduct criminal terrorism investigations. More likely, it is because the national security letter authority frequently extends only to investigations of international terrorists and not to investigations of purely domestic terrorists and only to documents of third party custodians in particular industries.[92] It may also be because the letters must be

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[91] *See also*, *Senate Hearings II*, Prepared Statement of Professor Jonathan Turley ("Civil liberties advocates have criticized this provision as making these subpoenas too easy for the FBI and removing the potential check and balance of a prosecutor in the process. At a time when there are growing complaints over abuses by the FBI, such a power is viewed as incautious and ill-timed. While I would not personally favor such a change, however, the opposition to this provision has tended to overplay the significance of the grand jury subpoena process as a protection of individual rights. . . . Administrative subpoenas are currently sued in dozens of areas and they have been upheld by the United States Supreme Court. It is extremely rare for a federal prosecutor to deny such a request from the FBI and the elimination of an Assistant United States Attorney from the process is not likely to produce a significant change in the level of review. However, it will remove a person who represents an added point of conferral for the FBI and someone who is a witness to the investigation's development if a case proves to be abusive. . . . Given the current controversies, any measure to make investigations easier for the FBI will be viewed with great suspicion. While I do not believe that this is sufficient to oppose the provision, I would strongly encourage [Congress] to couple any . . . provision with a close oversight process to monitor the number and nature of subpoenas issued under the new law. This could be done with statutory reporting requirement or a sunset provision to monitor its application ").

[92] Testimony of a Justice Department witness at the hearings not on the terrorist administrative subpoenas but on the national security letter reenforcement seems lend

approved by a higher level of supervisory personnel and consequently may be as readily available than would be the case with the proposed administrative subpoenas.

Appendix

21 U.S.C. 876. Subpenas

(a) Authorization of use by Attorney General

In any investigation relating to his functions under this subchapter with respect to controlled substances, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing; except that a witness shall not be required to appear at any hearing more than 500 miles distant from the place where he was served with a subpena. Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Service

A subpena issued under this section may be served by any person designated in the subpena to serve it. Service upon a natural person may be made by personal delivery of the subpena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpena entered on a true copy thereof by the person serving it shall be proof of service.

(c) Enforcement

In the case of contumacy by or refusal to obey a subpena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpena. The court may issue an order requiring the subpenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

5 U.S.C. App.III, 6. Authority of Inspector General; information and assistance from Federal agencies; unreasonable refusal; office space and equipment

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized —

(1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act;

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credence to this explanation, *House Hearings*, Prepared Statement of United States Assistant Attorney General Daniel J. Bryant ("NSLs are similar to administrative subpoenas but narrower in scope. While administrative subpoenas can be used to collect a wide array of information, NSLs apply more narrowly to telephone and electronic communication transaction records, financial records from financial institutions, and consumer information from consumer reporting agencies, as well as certain financial, consumer, and travel records for certain government employees who have access to classified information").

(2) to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable;

(3) to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof;

(4) to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: Provided, That procedures other than subpenas shall be used by the Inspector General to obtain documents and information from Federal agencies;

(5) to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions assigned by this Act, which oath, affirmation, or affidavit when administered or taken by or before an employee of an Office of Inspector General designated by the Inspector General shall have the same force and effect as if administered or taken by or before an officer having a seal;

(6) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;

(7) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of Title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

(8) to obtain services as authorized by section 3109 of Title 5, United States Code, at daily rates not to exceed the equivalent rate prescribed for grade GS-18 of the General Schedule by section 5332 of Title 5, United States Code; and

(9) to the extent and in such amounts as may be provided in advance by appropriations Acts, to enter into contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.

(b)(1) Upon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested, furnish to such Inspector General, or to an authorized designee, such information or assistance.

(2) Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay.

(c) Each head of an establishment shall provide the Office within such establishment with appropriate and adequate office space at central and field office locations of such establishment, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of such offices, and shall provide necessary maintenance services for such offices and the equipment and facilities located therein.

(d) For purposes of the provisions of title 5, United States Code, governing the Senior Executive Service, any reference in such provisions to the "appointing authority" for a member of the Senior Executive Service or for a Senior Executive Service position shall, if such member or position is or would be within the Office of an Inspector General, be deemed to be a reference to such Inspector General.

(e)(1) In addition to the authority otherwise provided by this Act, each Inspector General appointed under section 3, any Assistant Inspector General for Investigations under such an Inspector General, and any special agent supervised by such an Assistant Inspector General may be authorized by the Attorney General to —

(A) carry a firearm while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General;

(B) make an arrest without a warrant while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General, for any offense against the United States committed in the presence of such Inspector General, Assistant Inspector General, or agent, or for any felony cognizable under the laws of the United States if such Inspector General, Assistant Inspector General, or agent has reasonable grounds to believe that the person to be arrested has committed or is committing such felony; and

(C) seek and execute warrants for arrest, search of a premises, or seizure of evidence issued under the authority of the United States upon probable cause to believe that a violation has been committed.

(2) The Attorney General may authorize exercise of the powers under this subsection only upon an initial determination that —

(A) the affected Office of Inspector General is significantly hampered in the performance of responsibilities established by this Act as a result of the lack of such powers;

(B) available assistance from other law enforcement agencies is insufficient to meet the need for such powers; and

(C) adequate internal safeguards and management procedures exist to ensure proper exercise of such powers.

(3) The Inspector General offices of the Department of Commerce, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of the Treasury, Department of Veterans Affairs, Agency for International Development, Environmental Protection Agency, Federal Deposit Insurance Corporation, Federal Emergency Management Agency, General Services Administration, National Aeronautics and Space Administration, Nuclear Regulatory Commission, Office of Personnel Management, Railroad Retirement Board, Small Business Administration, Social Security Administration, and the Tennessee Valley Authority are exempt from the requirement of paragraph (2) of an initial determination of eligibility by the Attorney General.

(4) The Attorney General shall promulgate, and revise as appropriate, guidelines which shall govern the exercise of the law enforcement powers established under paragraph (1).

(5)(A) Powers authorized for an Office of Inspector General under paragraph (1) may be rescinded or suspended upon a determination by the Attorney General that any of the requirements under paragraph (2) is no longer satisfied or that the exercise of authorized powers by that Office of Inspector General has not complied with the guidelines promulgated by the Attorney General under paragraph (4).

(B) Powers authorized to be exercised by any individual under paragraph (1) may be rescinded or suspended with respect to that individual upon a determination by the Attorney General that such individual has not complied with guidelines promulgated by the Attorney General under paragraph (4).

(6) A determination by the Attorney General under paragraph (2) or (5) shall not be reviewable in or by any court.

(7) To ensure the proper exercise of the law enforcement powers authorized by this subsection, the Offices of Inspector General described under paragraph (3) shall, not later than 180 days after the date of enactment of this subsection, collectively enter into a memorandum of understanding to establish an external review process for ensuring that adequate internal safeguards and management procedures continue to exist within each Office and within any Office that later receives an authorization under paragraph (2). The review process shall be established in consultation with the Attorney General, who shall be provided with a copy of the memorandum of understanding that establishes the review process. Under the review process, the exercise of the law enforcement powers by each Office of Inspector General shall be reviewed periodically by another Office of Inspector General or by a committee of Inspectors General. The results of each review shall be communicated in writing to the applicable Inspector General and to the Attorney General.

(8) No provision of this subsection shall limit the exercise of law enforcement powers established under any other statutory authority, including United States Marshals Service special deputation.

18 U.S.C. 3486. Administrative subpoenas

(a) Authorization. —

(1)(A) In any investigation relating of —

(i)(I) a Federal health care offense; or (II) a Federal offense involving the sexual exploitation or abuse of children, the Attorney General; or

(ii) an offense under section 871 or 879, or a threat against a person protected by the United States Secret Service under paragraph (5) or (6) of section 3056, if the Director of the Secret Service determines that the threat constituting the offense or the threat against the person protected is imminent, the Secretary of the Treasury,

may issue in writing and cause to be served a subpoena requiring the production and testimony described in subparagraph (B).

(B) Except as provided in subparagraph (C), a subpoena issued under subparagraph (A) may require —

(i) the production of any records or other things relevant to the investigation; and

(ii) testimony by the custodian of the things required to be produced concerning the production and authenticity of those things.

(C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond —

(i) requiring that provider to disclose the information specified in section 2703(c)(2), which may be relevant to an authorized law enforcement inquiry; or

(ii) requiring a custodian of the records of that provider to give testimony concerning the production and authentication of such records or information.

(D) As used in this paragraph, the term "Federal offense involving the sexual exploitation or abuse of children" means an offense under section 1201, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, in which the victim is an individual who has not attained the age of 18 years.

(2) A subpoena under this subsection shall describe the objects required to be produced and prescribe a return date within a reasonable period of time within which the objects can be assembled and made available.

(3) The production of records relating to a Federal health care offense shall not be required under this section at any place more than 500 miles distant from the place where the subpoena for the production of such records is served. The production of things in any other case may be required from any place within the United States or subject to the laws or jurisdiction of the United States.

(4) Witnesses subpoenaed under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(5) At any time before the return date specified in the summons, the person or entity summoned may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the summons, or a prohibition of disclosure ordered by a court under paragraph (6).

(6)(A) A United State district court for the district in which the summons is or will be served, upon application of the United States, may issue an ex parte order that no person or entity disclose to any other person or entity (other than to an attorney in order to obtain legal advice) the existence of such summons for a period of up to 90 days.

(B) Such order may be issued on a showing that the things being sought may be relevant to the investigation and there is reason to believe that such disclosure may result in —

(i) endangerment to the life or physical safety of any person;

(ii) flight to avoid prosecution;

(iii) destruction of or tampering with evidence; or

(iv) intimidation of potential witnesses.

(C) An order under this paragraph may be renewed for additional periods of up to 90 days upon a showing that the circumstances described in subparagraph (B) continue to exist.

(7) A summons issued under this section shall not require the production of anything that would be protected from production under the standards applicable to a subpoena duces tecum issued by a court of the United States.

(8) If no case or proceeding arises from the production of records or other things pursuant to this section within a reasonable time after those records or things are produced, the agency to which those records or things were delivered shall, upon written demand made by the person producing those records or things, return them to that person, except where the production required was only of copies rather than originals.

(9) A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(ii) may require production as soon as possible, but in no event less than 24 hours after service of the subpoena.

(10) As soon as practicable following the issuance of a subpoena under paragraph (1)(A)(ii), the Secretary of the Treasury shall notify the Attorney General of its issuance.

(b) Service. — A subpoena issued under this section may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it. Service upon a natural person may be made by personal delivery of the subpoena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

(c) Enforcement. — In the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpoena. The court may issue an order requiring the subpoenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony concerning the production and authentication of such records. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

(d) Immunity from civil liability. — Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer.

(e) Limitation on use. — (1) Health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health; or if authorized by an appropriate order of a court of competent jurisdiction, granted after application showing good cause therefor.

(2) In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.

(3) Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

12 U.S.C. 3414

(a)(1) Nothing in this chapter (except sections 3415, 3417, 3418, and 3421 of this title) shall apply to the production and disclosure of financial records pursuant to requests from:

(A) a Government authority authorized to conduct foreign counter- or foreign positive-intelligence activities for purposes of conducting such activities;

(B) the Secret Service for the purpose of conducting its protective functions (18 U.S.C. 3056; 3 U.S.C. 202, Public Law 90-331, as amended); or

(C) a Government authority authorized to conduct investigations of, or intelligence or counterintelligence analyses related to, international terrorism for the purpose of conducting such investigations or analyses.

(2) In the instances specified in paragraph (1), the Government authority shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority.

(3) No financial institution, or officer, employee, or agent of such institution, shall disclose to any person that a Government authority described in paragraph (1) has sought or obtained access to a customer's financial records.

(4) The Government authority specified in paragraph (1) shall compile an annual tabulation of the occasions in which this section was used.

(5)(A) Financial institutions, and officers, employees, and agents thereof, shall comply with a request for a customer's or entity's financial records made pursuant to this subsection by the Federal Bureau of Investigation when the Director of the Federal Bureau of Investigation (or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director) certifies in writing to the financial institution that such records are sought for foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(B) The Federal Bureau of Investigation may disseminate information obtained pursuant to this paragraph only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(C) On the dates provided in section 415b of Title 50, the Attorney General shall fully inform the congressional intelligence committees (as defined in section 401a of Title 50) concerning all requests made pursuant to this paragraph.

(D) No financial institution, or officer, employee, or agent of such institution, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to a customer's or entity's financial records under this paragraph.

(b)(1) Nothing in this chapter shall prohibit a Government authority from obtaining financial records from a financial institution if the Government authority determines that delay in obtaining access to such records would create imminent danger of —

(A) physical injury to any person;

(B) serious property damage; or

(C) flight to avoid prosecution.

(2) In the instances specified in paragraph (1), the Government shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority.

(3) Within five days of obtaining access to financial records under this subsection, the Government authority shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank designated by the head of the Government authority setting forth the grounds for the emergency access. The Government authority shall thereafter comply with the notice provisions of section 3409(c) of this title.

(4) The Government authority specified in paragraph (1) shall compile an annual tabulation of the occasions in which this section was used.

[there is no subsection (c)]

(d) For purposes of this section, and sections 1115 and 1117 [12 U.S.C. 3415, 3417 relating to cost reimbursement and civil penalties respectively] insofar as they relate to the operation of this section, the term "financial institution" has the same meaning as in subsections (a)(2) and (c)(1) of section 5312 of title 31, United States Code, except that, for purposes of this section, such term shall include only such a financial institution any part of which is located inside any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the United States Virgin Islands. [Subsection (d) was added by subsection 374(a) of the Intelligence Authorization Act for Fiscal Year 2004, P.L. 108-177, 117 Stat. 2628 (2003).]

18 U.S.C. 2709

(a) Duty to provide. — A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) Required certification. — The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may —

(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and

(2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Prohibition of certain disclosure. — No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(d) Dissemination by bureau. — The Federal Bureau of Investigation may disseminate information and records obtained under this section only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations

conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(e) Requirement that certain congressional bodies be informed. — On a semiannual basis the Director of the Federal Bureau of Investigation shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, concerning all requests made under subsection (b) of this section.

15 U.S.C. 1681v. Disclosures to Governmental agencies for counterterrorism purposes

(a) Disclosure

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer's file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis.

(b) Form of certification

The certification described in subsection (a) shall be signed by a supervisory official designated by the head of a Federal agency or an officer of a Federal agency whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate.

(c) Confidentiality

No consumer reporting agency, or officer, employee, or agent of such consumer reporting agency, shall disclose to any person, or specify in any consumer report, that a government agency has sought or obtained access to information under subsection (a).

(d) Rule of construction

Nothing in section 1681u of this title shall be construed to limit the authority of the Director of the Federal Bureau of Investigation under this section.

(e) Safe harbor

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or other information pursuant to this section in good-faith reliance upon a certification of a governmental agency pursuant to the provisions of this section shall not be liable to any person for such disclosure under this subchapter [FN1], the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

15 U.S.C. 1681u. Disclosures to FBI for counterintelligence purposes

(a) Identity of financial institutions

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 3401 of Title 12) at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that information, signed by the Director of the Federal Bureau of Investigation, or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Identifying information

Notwithstanding the provisions of section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which

certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Court order for disclosure of consumer reports

Notwithstanding section 1681b of this title or any other provision of this subchapter, if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, a court may issue an order ex parte directing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that the consumer report is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.

(d) Confidentiality

No consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall disclose to any person, other than those officers, employees, or agents of a consumer reporting agency necessary to fulfill the requirement to disclose information to the Federal Bureau of Investigation under this section, that the Federal Bureau of Investigation has sought or obtained the identity of financial institutions or a consumer report respecting any consumer under subsection (a), (b), or (c) of this section, and no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall include in any consumer report any information that would indicate that the Federal Bureau of Investigation has sought or obtained such information or a consumer report.

(e) Payment of fees

The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

(f) Limit on dissemination

The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

(g) Rules of construction

Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, in connection with a judicial or administrative proceeding to enforce the provisions of this subchapter. Nothing in this section shall be construed to authorize or permit the withholding of information from the Congress.

(h) Reports to Congress

(1) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence and the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Select Committee on Intelligence and the Committee on Banking, Housing, and Urban Affairs of the Senate concerning all requests made pursuant to subsections (a), (b), and (c) of this section.

(2) In the case of the semiannual reports required to be submitted under paragraph (1) to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, the submittal dates for such reports shall be as provided in section 415b of Title 50.

(i) Damages

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of —

(1) $100, without regard to the volume of consumer reports, records, or information involved;

(2) any actual damages sustained by the consumer as a result of the disclosure;

if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and

(4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

(j) Disciplinary actions for violations

If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

(k) Good-faith exception

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(l) Limitation of remedies

Notwithstanding any other provision of this subchapter, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(m) Injunctive relief

In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

50 U.S.C. 436. Requests by authorized investigative agencies

(a) Generally

(1) Any authorized investigative agency may request from any financial agency, financial institution, or holding company, or from any consumer reporting agency, such financial records, other financial information, and consumer reports as may be necessary in order to conduct any authorized law enforcement investigation, counterintelligence inquiry, or security determination. Any authorized investigative agency may also request records maintained by any commercial entity within the United States pertaining to travel by an employee in the executive branch of Government outside the United States.

(2) Requests may be made under this section where —

(A) the records sought pertain to a person who is or was an employee in the executive branch of Government required by the President in an Executive order or regulation, as a condition of access to classified information, to provide consent, during a background investigation and for such time as access to the information is maintained, and for a period of not more than three years thereafter, permitting access to financial records, other financial information, consumer reports, and travel records; and

(B)(i) there are reasonable grounds to believe, based on credible information, that the person is, or may be, disclosing classified information in an unauthorized manner to a foreign power or agent of a foreign power;

(ii) information the employing agency deems credible indicates the person has incurred excessive indebtedness or has acquired a level of affluence which cannot be explained by other information known to the agency; or

(iii) circumstances indicate the person had the capability and opportunity to disclose classified information which is known to have been lost or compromised to a foreign power or an agent of a foreign power.

(3) Each such request —

(A) shall be accompanied by a written certification signed by the department or agency head or deputy department or agency head concerned, or by a senior official designated for this purpose by the department or agency head concerned (whose rank shall be no lower than Assistant Secretary or Assistant Director), and shall certify that —

(i) the person concerned is or was an employee within the meaning of paragraph (2)(A);

(ii) the request is being made pursuant to an authorized inquiry or investigation and is authorized under this section; and

(iii) the records or information to be reviewed are records or information which the employee has previously agreed to make available to the authorized investigative agency for review;

(B) shall contain a copy of the agreement referred to in subparagraph (A)(iii);

(C) shall identify specifically or by category the records or information to be reviewed; and

(D) shall inform the recipient of the request of the prohibition described in subsection (b) of this section.

(b) Disclosure of requests

Notwithstanding any other provision of law, no governmental or private entity, or officer, employee, or agent of such entity, may disclose to any person, other than those officers, employees, or agents of such entity necessary to satisfy a request made under this section, that such entity has received or satisfied a request made by an authorized investigative agency under this section.

(c) Records or information; inspection or copying

(1) Notwithstanding any other provision of law (other than section 6103 of Title 26), an entity receiving a request for records or information under subsection (a) of this section shall, if the request satisfies the requirements of this section, make available such records or information within 30 days for inspection or copying, as may be appropriate, by the agency requesting such records or information.

(2) Any entity (including any officer, employee, or agent thereof) that discloses records or information for inspection or copying pursuant to this section in good faith reliance upon the certifications made by an agency pursuant to this section shall not be liable for any such disclosure to any person under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(d) Reimbursement of costs

Any agency requesting records or information under this section may, subject to the availability of appropriations, reimburse a private entity for any cost reasonably incurred by such entity in responding to such request, including the cost of identifying, reproducing, or transporting records or other data.

(e) Dissemination of records or information received

An agency receiving records or information pursuant to a request under this section may disseminate the records or information obtained pursuant to such request outside the agency only —

(1) to the agency employing the employee who is the subject of the records or information;

(2) to the Department of Justice for law enforcement or counterintelligence purposes; or

(3) with respect to dissemination to an agency of the United States, if such information is clearly relevant to the authorized responsibilities of such agency.

(f) Construction of section

Nothing in this section may be construed to affect the authority of an investigative agency to obtain information pursuant to the Right to Financial Privacy Act (12 U.S.C. 3401 et seq.) or the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.).

18 U.S.C. 2332b(g)(5)

[T]he term "Federal crime of terrorism" means an offense that —

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of —

18 U.S.C. 32 (destruction of aircraft or aircraft facilities)
18 U.S.C. 37 (violence at international airports)
18 U.S.C. 81 (arson within special maritime and territorial jurisdiction)
18 U.S.C. 175 or 175b (biological weapons)
18 U.S.C. 175c (smallpox virus)
18 U.S.C. 229 (chemical weapons)
18 U.S.C. 351 (a), (b), (c), or (d) (congressional, cabinet, and Supreme Court assassination and kidnaping)
18 U.S.C. 831 (nuclear materials)
18 U.S.C. 832 (participation in nuclear and weapons of mass destruction threats)
18 U.S.C. 842(m) or (n) (plastic explosives)
18 U.S.C. 844(f)(2) or (3) (arson and bombing of Government property risking or causing death)
18 U.S.C. 844(i) (arson and bombing of property used in interstate commerce)
18 U.S.C. 930(c) (killing or attempted killing during an attack on a Federal facility with a dangerous weapon)

18 U.S.C. 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad)
18 U.S.C. 1030(a)(1) (protection of computers)
18 U.S.C. 1030(a)(5) (A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (protection of computers)
18 U.S.C. 1114 (killing or attempted killing of officers and employees of the United States) 18 U.S.C. 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons)
18 U.S.C. 1203 (hostage taking)
18 U.S.C. 1361 (destruction of government property)
18 U.S.C. 1362 (destruction of communication lines, stations, or systems)
18 U.S.C. 1363 (injury to buildings or property within special maritime and territorial jurisdiction of the United States)
18 U.S.C. 1366(a) (destruction of an energy facility)
18 U.S.C. 1751(a), (b), (c), or (d) (Presidential and Presidential staff assassination and kidnaping)
18 U.S.C. 1992 (wrecking trains)
18 U.S.C. 1993 (terrorist attacks and other acts of violence against mass transportation systems)
18 U.S.C. 2155 (destruction of national defense materials, premises, or utilities)
18 U.S.C. 2156 (destruction of national defense materials)
18 U.S.C. 2280 (violence against maritime navigation)
18 U.S.C. 2281 (violence against maritime fixed platforms)
18 U.S.C. 2332 (certain homicides and other violence against United States nationals occurring outside of the United States)
18 U.S.C. 2332a (use of weapons of mass destruction)
18 U.S.C. 2332b (acts of terrorism transcending national boundaries)
18 U.S.C. 2332f (bombing of public places and facilities)
18 U.S.C. 2332g (anti-aircraft missiles)
18 U.S.C. 2332h (radiological dispersal devices)
18 U.S.C. 2339 (harboring terrorists)
18 U.S.C. 2339A (providing material support to terrorists)
18 U.S.C. 2339B (providing material support to terrorist organizations)
18 U.S.C. 2339C (financing of terrorism)
18 U.S.C. 2340A (torture)
42 U.S.C. 2122 (section 92 of the Atomic Energy Act of 1954)(atomic weapons)
42 U.S.C. 2284 (section 236 of the Atomic Energy Act of 1954)(sabotage of nuclear facilities or fuel)
49 U.S.C. 46502 (aircraft piracy)
49 U.S.C. 46504(second sentence) (assault on a flight crew with a dangerous weapon)
49 U.S.C. 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft)
49 U.S.C. 46506 (if homicide or attempted homicide is involved: application of certain criminal laws to acts on aircraft)
49 U.S.C. 60123(b) (destruction of interstate gas or hazardous liquid pipeline facility