

The FBI Fails (For Now) to Grab Subpoena Powers

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Has the FBI failed in a Bush-blessed, attempted power-grab?

With several key provisions of the controversial Patriot Act set to expire later this year, Congress has been working for months on legislation that would extend and perhaps restrict those provisions. Most of the debate has concerned whether the Patriot Act went too far and has focused on the measure's Section 215, which allows the FBI to obtain library records and other "tangible things" in a terrorism or national security investigation by obtaining a warrant from the super-secret Foreign Intelligence Surveillance Act (FISA) court.

But the FBI, with the presumed approval of the White House, has been pushing for power that would go beyond that of the controversial Section 215. In particular, the bureau has wanted the new Patriot Act measure to award it the right to issue administrative subpoenas. With an administrative subpoena, an FBI agent could--without going to a court or a grand jury--demand that a person or institution hand over any record on another person or organization: financial papers, health records, library records, e-mails and more. The order would be subject to judicial review only if the recipient--say, an Internet service provider--opposed the order. Administrative subpoenas would give the FBI greater power than Section 215 and national security letters. (With a national security letter, the FBI can, without bothering a court, obtain a limited set of information--certain financial documents, credit reports and Internet-use records. But a federal court last year declared national security letters unconstitutional. The Bush Administration has filed an appeal.) Moreover, as Kate Martin, director of the Center for National Security Studies, notes, "The FBI wants this administrative subpoena power forever"--that is, with no sunset provision. Beating back the FBI's demand for this authority would be a victory for the civil liberties community. And so far, the FBI has been losing.

Opposition to FBI administrative subpoenas has united civil libertarians of the left and right. Nancy Libin, staff counsel at the Center for Democracy and Technology, notes that administrative subpoena power is "really kind of scary. The FBI would have the right to approach any business or person and say, 'Hand over whatever we want,' and a gag order would be attached. You can't challenge the subpoena. You can't talk about it. If an FBI agent wants a grand jury subpoena, he has to go through a prosecutor. It's not just an agent issuing a subpoena. Administrative subpoenas would make Section 215 moot." Paul Rosenzweig, a senior legal fellow at the Heritage Foundation and a prominent champion of the original Patriot Act, says, "I don't like administrative subpoenas. Judges have to be involved. A law that permits the uninhibited exercise of executive authority is bad." And Suzanne Spalding, former assistant general counsel at the CIA, argues that "removing courts is a mistake."

In its search for administrative subpoena authority, the FBI turned to the Senate Intelligence Committee. In May, as the committee was considering legislation to reauthorize parts of the Patriot Act, Valerie Caproni, the FBI's general counsel, testified before it, claiming that the bureau desperately needs administrative subpoenas for its terrorism investigations: "We cannot wait to disrupt terrorist acts or to prosecute terrorist crimes after they occur. To stay a step ahead of the terrorists, investigators need tools allowing them to obtain relevant information as quickly as possible." She noted that regulatory agencies that probe healthcare fraud and child abuse can issue administrative subpoenas. But as Democratic members of the Intelligence Committee pointed out in a subsequent report, Caproni, upon being questioned, "could not document significant past or current instances when national security investigations faltered or were hindered due to lack of an administrative subpoena authority."

The Democrats also noted that the administrative subpoena power available to other agencies is far more limited than what the FBI has been seeking. And when the Democrats proposed providing administrative subpoena power to the FBI for "emergency use," Republicans on the committee,

apparently fronting for the FBI, voted against it. Emergency authority was not good enough; the FBI wanted full and everyday use of this wide-ranging power.

Why has the FBI been hellbent on administrative subpoena authority? Rosenzweig says he suspects it is a case of bureaucratic "gimme, gimme, gimme." Robert Litt, a former federal prosecutor and past senior Justice Department official, notes that the FBI "hates having to go through the Department of Justice to get information. But going to an assistant US Attorney to get a subpoena is hardly that burdensome."

Litt says the FBI's current drive for administrative subpoena authority is part of a years-long effort to expand the bureau's power that predates September 11, 2001. After 9/11 the Bush Administration proposed antiterrorism legislation that included a provision that would allow the FBI to issue administrative subpoenas. But Congress resisted and stuck to the notion that the FBI's authority to obtain records ought to be subject to judicial review. Congress did relax pre-existing restrictions, giving birth to the infamous Section 215. "None of us who participated in drafting Section 215 thought it would become so controversial, given that we retained FISA court procedures," says Beryl Howell, who at the time was general counsel for the Democratic-controlled Senate Judiciary Committee. "Originally the FBI wanted administrative subpoenas so they would not have to go to court to get third-party records, so they could bypass courts and prosecutors. Section 215 was a disappointment for the FBI."

The FBI lost the battle in 2001 but did not forget about the issue. In June the Republican-controlled Intelligence Committee, led by chairman Pat Roberts, approved Patriot Act legislation that granted the FBI administrative subpoena authority. Under this bill it would be a crime in some instances for the recipient of such a subpoena to tell anyone that he or she had received one. Democratic members of the committee complained that such a gag order "could prevent the recipient of an FBI administrative subpoena from exercising First Amendment rights to protest government action, including by bringing abuses to the attention of members of Congress or Inspectors General."

By winning over the Senate Intelligence Committee, the FBI had only managed to clear a low hurdle. "The intelligence committees on the Hill are generally viewed as being held hostage by the agencies they oversee, but the judiciary committees are not," says one former senior Capitol Hill staffer. "Judiciary committee members tend to be more familiar with law enforcement and civil liberties issues and sometimes more skeptical of additional authority. It's par for the course for the FBI to go to the intelligence committees, which say yes, and then it's the judiciary committees' job to say no or to work out a compromise. Usually this happens behind closed doors, with staff aides on the different committees holding informal discussions. But not this year."

As the Senate Intelligence Committee was doing the FBI's bidding, the House and Senate Judiciary Committees--which also have jurisdiction over the reauthorization of the Patriot Act--signaled that they were cool to idea of administrative subpoena authority. The Republican chairmen of the committees--Representative James Sensenbrenner Jr. and Senator Arlen Specter--both opposed the proposal. They were not swayed by the FBI argument that it has extensive powers to obtain evidence when conducting criminal investigations and should be able to do the same in terrorism and national security cases. "The problem," says Howell, "is that in a criminal investigation there are procedures built in to counterbalance any FBI overreaching. A subpoenaed party can complain to a judge. Grand jury investigations proceed under court supervision. These safety valves do not exist in national security investigations, which tend to be broader investigations than criminal investigations. That's why members of Congress--Republicans and Democrats--have been skeptical of granting the FBI this power." And as Kate Martin points out, if the FBI is investigating suspected terrorists as part of a criminal investigation, it can use all the available criminal tools. A Senate aide who worked on this matter adds, "Given all the concerns regarding Section 215 and the sensitivity of third-party records, people recognized that if you take judges out of the equation--which is what an administrative subpoena does--that would be a step back."

Sensenbrenner, a conservative Republican, and Specter, a moderate Republican, ended up crafting different versions of the new Patriot Act legislation. The bill produced by Sensenbrenner's committee (and approved by the full House) preserved the controversial parts of the Patriot Act and extended these measures for ten years. The bill written by Specter's committee (and OK'd by the Senate) applied several new restrictions to these provisions and gave them four more years of life. But both pieces of legislation left out administrative subpoena authority. (The Senate Intelligence Committee's Patriot Act legislation was essentially shoved aside.) Next, the two measures will go to a House-Senate conference, where Specter, Sensenbrenner and other senators and representatives will attempt to produce a compromise bill acceptable to both houses. This might offer the FBI one more shot at obtaining administrative subpoena authority, but Congressional aides say it's unlikely the bureau can overcome opposition from the chairmen of the judiciary committees.

But before the House approved its Patriot Act update, Representative Jeff Flake, a Republican, passed a little-noticed amendment that would bolster national security letters. This amendment, according to civil liberties advocates, could eventually become a backdoor for administrative subpoena authority. "The only difference between Flake's amendment and Roberts's administrative subpoena proposal," says Kate Martin, "is that Roberts would permit the seizure of every kind of record and thing, and the Flake amendment only involves those categories of records covered by the existing national security letters. If the Flake amendment gets passed in the final version of this legislation, the FBI will simply try to expand its coverage to everything else."

While civil liberties advocates appear to have thwarted the FBI on outright administrative subpoena authority, the bureau has not declared this case closed. The latest tussle is just another round in a battle that is expected to continue. "It's hard to see stopping something bad as a win," says an aide for a Democratic senator who opposed the administrative subpoena proposal. "But we're going to have to come back again and again to keep stopping it." Indeed, in late July--after the House and Senate had produced versions of the Patriot Act legislation without administrative subpoena authority--FBI director Robert Mueller was still urging Congress to hand the FBI such power. "The FBI is always persistent," says Beryl Howell. "They don't give up."