

being made. Let me be very clear about one thing; the pension promises made by companies to their employees carry with them an obligation to make sure those promises are kept. An employer's obligation is to have sufficient funds set aside to meet the pension promises it has made, not merely to have met the minimum funding requirements of the tax code or ERISA.

As Congress strengthens the pension funding rules, we also need to be cognizant of the potential negative consequences of these changes. Pension plans, like all employee benefits, are voluntarily offered by employers. Congress created tax and other incentives that encourage companies to offer pension plans because it believes these are important benefits for employees. Many of the administration's proposals go too far and will discourage companies from maintaining and offering these important benefits. The proposal Congress considers must be more balanced. We should join together to enhance retirement security for all Americans by strengthening Social Security, shoring up our pension system and encouraging more Americans to save.

#### ADMINISTRATIVE SUBPOENAS AND PATRIOT ACT REAUTHORIZATION

Mr. KYL. Mr. President, I understand that the senior Senator from Oregon, Mr. WYDEN, spoke yesterday regarding the reauthorization of the USA PATRIOT Act. I look forward to the Senate acting later this year on PATRIOT Act reauthorization, but today I just want to address one aspect of the Senator's speech, his opposition to administrative subpoena power.

In his speech, the Senator argued that any reauthorization should not extend those subpoena powers to FBI terrorism investigators. He correctly noted that Intelligence Committee Chairman ROBERTS has held hearings about extending this authority, which is common within the Government, to FBI agents investigating terrorism. I was happy to see Chairman ROBERTS do this because last year I cosponsored S. 2555, the Judicially Enforceable Terrorism Subpoenas Act. On June 22, 2004, I chaired a hearing in the Judiciary Subcommittee on Terrorism, Technology, and Homeland Security that examined this subpoena power and heard testimony regarding how the subpoenas work and how the government protects civil liberties when using them.

One of the things that struck me as I learned about administrative subpoena power was how widespread it is in our Government and how unremarkable a law enforcement tool it really is. It was for that reason that I asked the Senate Republican Policy Committee, which I chair, to examine this issue in greater detail, to study the constitutional and civil liberties questions that critics have raised, and to identify the other contexts where the Federal Gov-

ernment has this power. The resulting report was consistent with my previous research and the testimony that I had heard during my subcommittee hearings. We give this subpoena power to postal investigators and Small Business Administration bank loan auditors and IRS agents, and we do not have a problem with Government abuse or deprivation of civil liberties. Shouldn't we also give it to those who are charged with rooting out terrorism before it strikes our neighborhoods?

I look forward to the upcoming debate on PATRIOT Act reauthorization, and I certainly intend to support it. At the same time, I commend Chairman ROBERTS for his efforts and hope that we will have the opportunity to ensure that our FBI terrorism investigators are not hamstrung as they continue to work to protect our Nation.

I ask unanimous consent that this policy paper, dated September 9, 2004, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SHOULD POSTAL INSPECTORS HAVE MORE POWER THAN FEDERAL TERRORISM INVESTIGATORS?

#### INTRODUCTION

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

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

#### TERRORISM INVESTIGATORS' SUBPOENA AUTHORITY IS TOO LIMITED

Federal investigators routinely need third-party information when attempting to unravel a criminal enterprise. In the context of a terrorism investigation, that information could include: financial transaction records that show the flow of terrorist financing; telephone records that could identify other terrorist conspirators; or retail sales receipts

or credit card statements that could help investigators uncover the plot at hand and capture the suspects. When third parties holding that information decline to cooperate, some form of subpoena demanding the information be conveyed must be issued. The Supreme Court unanimously has approved the use of subpoenas to gather information, recognizing that they are necessary and wholly constitutional tools in law enforcement investigations that do not offend any protected civil liberties. [See unanimous decision written by Justice Thurgood Marshall in *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984).]

There are different kinds of subpoenas, however, and under current law, the only way that a terrorism investigator (typically, the FBI) can obtain that third-party information is through a "grand jury subpoena." If a grand jury has been convened, investigators can usually obtain a grand jury subpoena and get the information they need, but that process takes time and is dependent on a number of factors. First, investigators themselves cannot issue grand jury subpoenas; instead, they must involve an assistant U.S. Attorney so that he or she can issue the subpoena. This process can be cumbersome, however, because assistant U.S. Attorneys are burdened with their prosecutorial caseloads and are not always immediately available when the investigators need the subpoena. Second, a grand jury subpoena is limited by the schedule of a grand jury itself, because the grand jury must be "sitting" on the day that the subpoena demands that the items or documents be returned. Grand juries do not sit at all times; indeed, in smaller jurisdictions, the only impaneled grand jury may meet as little as "one to five consecutive days per month." [See United States Dept of Justice, Federal Grand Jury Practice, at §1.6 (2000 ed.). For example, in Madison, Wisc., the federal grand jury only meets a few days every three weeks. See Clerk of the Court for the Western District of Wisconsin, "Grand Jury Service," revised April 15, 2004.]

The following hypothetical illustrates the deficiency of current law. Take the fact that Timothy McVeigh built the bomb that destroyed the Oklahoma City Federal Building while he was in Kansas; and take the fact that under current practices, grand juries often are not sitting for 10-day stretches in that state. If FBI agents had been tracking McVeigh at that time and wanted information from non-cooperative third parties—perhaps the supplier of materials used in the bomb—those agents would have been unable to move quickly if forced to rely on grand jury subpoenas. McVeigh could have continued his bomb-building activities, and the FBI would have been powerless to gather that third-party information until the grand jury returned—as many as 10 days later. [Information on Kansas federal grand jury schedules provided to Senate Republican Policy Committee by Department of Justice. In addition, Department of Justice officials have testified to another scenario: even where grand juries meet more often (such as in New York City), an investigator realizing she urgently needs third-party information on Friday afternoon still could not get that information until Monday, because the grand jury would have gone home for the weekend. See Testimony of Principal Deputy Assistant Attorney General Rachel Brand before the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security on June 22, 2004.]

The current dependence on the availability of an assistant U.S. Attorney and the schedule of a grand jury means that if time is of the essence—as is often the case in terrorism

investigations—federal investigators, lacking the necessary authority, could see a trail turn cold.

#### THE BETTER ALTERNATIVE: ADMINISTRATIVE SUBPOENA AUTHORITY

The deficiency of grand jury subpoenas described above can be remedied if Congress provides “administrative subpoena” authority for specific terrorism-related contexts. Congress has authorized administrative subpoenas in no fewer than 335 different areas of federal law, as discussed below. [See U.S. Department of Justice, Office of Legal Policy, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities, May 13, 2002, at p. 5 (hereinafter “DOJ Report”).] Where administrative subpoena authority already exists, government officials can make an independent determination that the records are needed to aid a pending investigation and then issue and serve the third party with the subpoena. This authority allows the federal investigator to obtain information quickly without being forced to conform to the timing of grand jury sittings and without requiring the help of an assistant U.S. Attorney. And, as simply another type of subpoena, the Supreme Court has made clear that it is wholly constitutional. [See *Jerry T. O'Brien*, 467 U.S. at 747–50.]

The advantages of updating this authority are substantial. The most important advantage is speed: terrorism investigations can be fast-moving, and terrorist suspects are trained to move quickly when the FBI is on their trail. The FBI needs the ability to request third-party information and obtain it immediately, not when a grand jury convenes. Moreover, this subpoena power will help with third-party compliance. As Assistant Attorney General Christopher Wray stated in testimony before the Senate Judiciary Committee, “Granting [the] FBI the use of [administrative subpoena authority] would speed those terrorism investigations in which subpoena recipients are not inclined to contest the subpoena in court and are willing to comply. Avoiding delays in these situations would allow agents to track and disrupt terrorist activity more effectively.” [Assistant Attorney General Christopher Wray, in testimony before the Senate Judiciary Committee, October 21, 2003.] Thus, Congress will provide protection for a legitimate business owner who is more than willing to comply with law enforcement, but who would prefer to do so pursuant to a subpoena rather than through an informal FBI request.

#### CONSTITUTIONAL PROTECTIONS

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

First, the government cannot seek an administrative subpoena unless the authorized federal investigator has found the information relevant to an ongoing investigation. [See S. 2555, §2(a) (proposed 18 U.S.C. §2332g(a)(1)).] The Attorney General has the authority to delegate this power to subordinates within the Department of Justice. See 28 U.S.C. §510.] The executive branch—whether Republican or Democrat—carefully monitors its agents to ensure that civil liberties are being protected and that authorities are not being abused. [See, for example, Executive Order Establishing the President’s Board on Safeguarding Americans’ Civil Liberties (August 27, 2004), detailing extensive interagency oversight of civil liberties protections for Americans.]

Second, the administrative subpoena is not self-enforcing. There is no fine or penalty to the recipient if he refuses to comply. Thus, if

the recipient of an administrative subpoena believes that the documents or items should not be turned over, he can file a petition in federal court to quash the subpoena, or he can simply refuse to comply with the subpoena and force the government to seek a court order enforcing the subpoena. And, as one federal court has emphasized, the district court’s “role is not that of a mere rubber stamp.” [*Wearly v. Federal Trade Comm’n*, 616 F.2d 662, 665 (3rd Cir. 1980).] Just as a grand jury subpoena cannot be unreasonable or oppressive in scope [Federal Grand Jury Practice, at §5.40], an administrative subpoena must not overreach by asking for irrelevant or otherwise-protected information.

The Supreme Court has addressed the standards for enforcing administrative subpoenas.

In *United States v. Powell*, the Supreme Court held that an administrative subpoena will be enforced where (1) the investigation is “conducted pursuant to a legitimate purpose,” (2) the subpoenaed information “may be relevant to that purpose,” (3) the information sought is not already in the government’s possession, and (4) the requesting agency’s internal procedures have been followed. [379 U.S. 48, 57–58 (1964); see also *EEOC v. Shell Oil*, 466 U.S. 54, 73 n.26 (1984) (citing *Powell* in EEOC context and adding that the request for information cannot be “too indefinite” or made for an “illegitimate purpose”); *Jerry T. O'Brien*, 467 U.S. at 747–48 (reaffirming *Powell* in context of SEC administrative subpoena).] In addition, the Supreme Court has stated that the recipient may challenge the subpoena on “any appropriate ground” [*Reisman v. Caplin*, 375 U.S. 440, 449 (1964)], which could include a privilege against self-incrimination, religious freedom, freedom of association, attorney-client privilege, or other grounds for resisting subpoenas in the grand jury context. [See cases collected in Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Civil and Compulsory Process*, 47 Vand. L. Rev. 573, 589 (1994), cited in DOJ Report, at p. 9 n.19.] This “bifurcation of power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power.” [*United States v. Security Bank and Trust*, 473 F.2d 638, 641 (5th Cir. 1973).]

Third, where the authorized agent has not specifically ordered the administrative subpoena recipient not to disclose the existence of the subpoena to a third party, the recipient can notify the relevant individual and that individual may have the right to block enforcement of the subpoena himself. [In *Jerry T. O'Brien*, the Supreme Court noted that a “target may seek permissive intervention in an enforcement action brought by the [Securities & Exchange] Commission against the subpoena recipient” or may seek to restrain enforcement of the administrative subpoena. 467 U.S. at 748.] In many cases the “target” (as opposed to the recipient) will have full knowledge of the subpoena.

However, this is not always the case; sometimes the administrative subpoena authority includes a provision prohibiting the recipient from discussing the subpoena with anyone other than his or her attorney. Some critics have argued that federal investigators should not be able to gather information related to an individual without notifying that individual, and that every person has an inherent right to know about those investigations. [See generally *Jerry T. O'Brien*, 467 U.S. at 749–50 (rejecting demand that SEC must notify any potential defendant of existence of pending administrative subpoena).] But, as the Supreme Court has held, there is no constitutional requirement that the subject of an investigation receive notice that

the administrative subpoena has been served on a third party. Justice Thurgood Marshall wrote for a unanimous Court that a blanket rule requiring notification to all individuals would set an unwise standard. [Id. at 749–51. The issue in that case was the nondisclosure provisions of the administrative subpoena authority used by the SEC when investigating securities fraud.] He explained that investigators use administrative subpoenas to investigate suspicious activities without any prior government knowledge of who the wrongdoers are, so requiring notice often would be impossible. [Id. at 749.] Moreover, granting notice to individuals being investigated would “have the effect of laying bare the state of the [government’s] knowledge and intentions midway through investigations” and would “significantly hamper” law enforcement. [Id. at 750 n.23.] Providing notice to the potential target would “enable an unscrupulous target to destroy or alter documents, intimidate witnesses,” or otherwise obstruct the investigation. [Id. at 750.] The Court further emphasized that where “speed in locating and halting violations of the law is so important,” it would be foolhardy to provide notice of the government’s administrative subpoenas. [Id. at 751.]

#### MOST GOVERNMENT AGENCIES HAVE ADMINISTRATIVE SUBPOENA AUTHORITY

Given these extensive constitutional protections, it is unsurprising that Congress has extended administrative subpoena authority so widely. Current provisions of federal law grant this authority to most government departments and agencies. [DOJ Report, at p. 5. See appendices A–C to DOJ Report that describe and provide the legal authorization for each of these administrative subpoena powers.] These authorities are not restricted to high-profile agencies conducting life-or-death investigations. To the contrary, Congress has granted administrative subpoena authority in far less important contexts. For example, 18 U.S.C. §3061 authorizes postal inspectors to issue administrative subpoenas when investigating any “criminal matters related to the Postal Service and the mails.” One can hardly contend that federal investigators should be able to issue administrative subpoenas to investigate Mohammed Atta if they suspect he broke into a mailbox but should not have the same authority if they suspect he is plotting to fly airplanes into buildings.

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

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

Internal Revenue Service investigations of such crimes as tax evasion. [Congress granted administrative subpoena authority to the Small Business Administration through section 310 of the Small Business Investment Act of 1958. Delegation to investigators and other officials is authorized by 15 U.S.C. §634(b). Relevant criminal provisions also include the offer of loan or gratuity to bank examiner (18 U.S.C. §212), acceptance of a

loan or gratuity by bank examiner (18 U.S.C. §213), and receipt of commissions or gifts for procuring loans (18 U.S.C. §215).]

The Bureau of Immigration and Customs Enforcement investigations of violations of immigration law. [See 8 U.S.C. §1225(d)(4) (granting administrative subpoena power to "any immigration officer" seeking to enforce the Immigration and Naturalization Act).]

Federal Communications Commission investigations of criminal activities, including obscene, harassing, and wrongful use of telecommunications facilities. [See 47 U.S.C. 409(e) (granting subpoena authority to FCC); 47 U.S.C. §155(c)(1) (granting broad delegation power so that investigators and other officials can issue administrative subpoenas); 47 U.S.C. §223 (identifying criminal provision for use of telecommunications system to harass).]

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

Department of Labor investigations of criminal activities under the Employee Retirement Income Security Act (ERISA). [See 29 U.S.C. §1134(c) (authorizing administrative subpoenas); Labor Secretary's Order 1-87 (April 13, 1987) (allowing for delegation of administrative subpoena authority to regional directors).]

Criminal investigations under the Export Administration Act, such as the dissemination or discussion of export-controlled information to foreign nationals or representatives of a foreign entity, without first obtaining approval or license. [See 50 App. U.S.C. §2411 (granting administrative subpoena authority for criminal investigations).]

Corporation of Foreign Security Holders investigations of criminal activities relating to securities laws. [See 15 U.S.C. §77t(b) (granting administrative subpoena authority in pursuit of criminal investigations).]

Department of Justice investigations into health care fraud [See 18 U.S.C. §3486(a)(1)(A)(i)(I) (granting administrative subpoena authority).] and any offense involving the sexual exploitation or abuse of children. [See 18 U.S.C. §3486(a) (granting administrative subpoena authority).]

Moreover, Congress has authorized the use of administrative subpoenas in a great number of purely civil and regulatory contexts—where the stakes to the public are even lower than in the criminal contexts above. Those include enforcement in major regulatory areas such as securities and antitrust, but also enforcement for laws such as the Farm Credit Act, the Shore Protection Act, the Land Remote Sensing Policy Act, and the Federal Credit Union Act. [DOJ Report, App. A1 & A2.]

Nor are these authorities dormant. The Department of Justice reports, for example, that federal investigators in 2001 issued more than 2,100 administrative subpoenas in connection with investigations to combat health care fraud, and more than 1,800 administrative subpoenas in child exploitation investigations. [DOJ Report, at p. 41.] These authorities are common and pervasive in government—just not where it arguably counts most, in terrorism investigations.

#### S. 2555 WOULD UPDATE THE ADMINISTRATIVE SUBPOENA AUTHORITY

S. 2555, the Judicially Enforceable Terrorism Subpoenas Act of 2004 (the "JETS Act"), would enable terrorism investigators to subpoena documents and records in any

investigation concerning a federal crime of terrorism—whether before or after an incident. As is customary with administrative subpoena authorities, the recipient of a JET subpoena could petition a federal district court to modify or quash the subpoena. Conversely, if the JET subpoena recipient simply refused to comply, the Department of Justice would have to petition a federal district court to enforce the subpoena. In each case, civil liberties would be respected, just as they are in the typical administrative subpoena process discussed above.

The JETS Act also would allow the Department of Justice to temporarily bar the recipient of an administrative subpoena from disclosing to anyone other than his lawyer that he has received it, therefore protecting the integrity of the investigation. However, the bill imposes certain safeguards on this non-disclosure provision: disclosure would be prohibited only if the Attorney General certifies that "there may result a danger to the national security of the United States" if any other person were told of the subpoena's existence. [S. 2555, §2(a) (proposed 18 U.S.C. §2332g(c)).] Moreover, the JET subpoena recipient would have the right to go to court to challenge the nondisclosure order, and the Act would protect the recipient from any civil liability that might otherwise result from his good-faith compliance with such a subpoena.

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

#### CONCLUSION

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

#### 40TH ANNIVERSARY OF GRISWOLD V. CONNECTICUT

Ms. CANTWELL. Mr. President, I rise today to commemorate the 40th anniversary of the Supreme Court's crucial decision in *Griswold v. Connecticut*.

Forty years ago, Estelle Griswold and Dr. Lee Buxton were arrested and convicted for counseling married couples on birth control methods, and prescribing married couples contraceptives. They challenged their convictions, and the Supreme Court overturned them, ruling that the Connecticut law under which they were charged was unconstitutional. The Court found that the Government had no place in interfering in the intimately private marital bedroom. Justice William O. Douglas, in writing the Court's opinion, scoffed at the notion of police searching private bedrooms for evidence of contraceptive use. This landmark decision, cited in countless numbers of decisions since then on the constitutional right to privacy, guarantees the right of married couples to use birth control.

Yet the relevance of this decision goes far beyond contraceptive use. In

rendering its decision, the Court recognized a "zone of privacy" arising from several constitutional guarantees. The Court acknowledged that while the right of privacy is not enumerated specifically in anyone place, it is inherent in several areas within the Bill of Rights and throughout the Constitution. This very American notion of privacy served as a cornerstone of precedent, paving the way for other decisions and further solidifying as established law the constitutional right to privacy. *Roe v. Wade*, guaranteeing a woman's right to choose, was a logical application of *Griswold*.

Today, Americans' privacy rights are threatened on many fronts. The Government is asserting greater and greater investigative powers. Some pharmacists are refusing to fill prescriptions for legal contraceptives. The anniversary of *Griswold* gives us all an opportunity to reflect on the importance of preserving our privacy rights. The Court recognized that we are born with privacy rights as Americans, and we have a particular responsibility as Senators to protect these rights for our constituents.

#### MORT CAPLIN ON THE NATION'S TAX SYSTEM

Mr. KENNEDY. Mr. President, earlier this year, Mort Caplin, a founding partner of the law firm Caplin & Drysdale in Washington, DC, and the outstanding IRS Commissioner under President Kennedy, delivered the Erwin Griswold Lecture at the annual meeting of the American College of Tax Counsel, which was held in San Diego.

In his eloquent and very readable address, Mr. Caplin summarizes the evolution of our modern tax system, the current challenges it faces, the recent efforts by Congress to achieve reform, the alarming drop in compliance and revenue collection, and the ethical responsibilities of the tax bar.

Mr. Caplin's remarks are especially timely today as Congress struggles to deal with its own responsibility for the effectiveness, integrity and fairness of our tax laws. All of us in the Senate and House can benefit from his wise words, and I ask unanimous consent that his lecture be printed at this point in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Virginia Tax Review, Spring 2005]

#### THE TAX LAWYER'S ROLE IN THE WAY THE AMERICAN TAX SYSTEM WORKS

(By Mortimer M. Caplin)

It is a high privilege to be asked to deliver this Erwin N. Griswold Lecture and a treat too to see so many old friends and meet so many new ones. In honor of our namesake, I would like to touch on four matters of relevance: (1) Dean Griswold's impact on the tax law, (2) the role of the U.S. Tax Court, (3) the role of the IRS, and (4) the tax lawyer's role in the way the American tax system works.