

May 23, 2005

The Honorable Pat Roberts
Chairman
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

The Honorable John D. Rockefeller IV
Vice Chairman
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Roberts and Vice Chairman Rockefeller:

We are writing to express our opposition to granting to the FBI in national security investigations so-called “administrative subpoena” powers, which would allow the FBI to write its own search and disclosure orders with no judicial approval.

At the very time when there seems to be an emerging consensus around adding meaningful checks and balances to PATRIOT Act powers to protect against government abuse, “administrative subpoenas” would represent a new, unchecked power. At the very time when the Attorney General is supporting amendments to strengthen judicial oversight of orders under Section 215 of the PATRIOT Act, authorization of “administrative subpoenas” would move radically in the opposite direction.

Indeed, Attorney General Gonzales has repeatedly emphasized that the *prior* judicial approval required for Section 215 orders is a safeguard against abuse. The Attorney General’s assurances would be meaningless, however, if the FBI could issue disclosure orders with no judicial approval.

For decades, the FBI has sought general administrative subpoena power and the Congress has repeatedly refused to grant it, out of concern for the unchecked nature of such authority. Administrative subpoenas are typically suited for the regulatory context—to investigate the administration of federal benefits programs, for example. To say the least, the FBI’s intelligence division is not an administrative agency. Administrative subpoenas have also been made available in certain criminal contexts, where the rigorous checks and balances of the criminal justice system provide much-needed protection against abuse. It would be especially unwise to extend this power to intelligence investigations, which are broader, more secretive, and less subject to scrutiny than criminal cases.

Under current law, the FBI already has far-reaching compulsory powers to obtain any relevant information when it is investigating terrorism, under both its criminal and intelligence authorities. The government has made no showing that these powers are insufficient. To the contrary, it has repeatedly praised the PATRIOT Act as providing the necessary tools to prevent terrorism and to prosecute a host of terrorism-related cases. Given these broad existing powers, and given the widespread public and Congressional concern that some of the existing PATRIOT Act powers are not subject to sufficient checks and balances, there is no justification for going even further down the path of unchecked authority.

The 9/11 Commission concluded that the burden of proof for retaining – and equally so for adding – a particular governmental power should be on the executive to explain (a) that the power actually materially enhances security, and (b) that there is adequate supervision of the executive’s use of the power to ensure protection of civil liberties. Neither burden has been satisfied here, and we urge you not to adopt such an unjustified and largely unaccountable new power.

Sincerely,

American Booksellers Association
American Civil Liberties Union
American Library Association
American Policy Center
Association of American Physicians and Surgeons
Association of American Publishers
Bill of Rights Defense Committee
Center for American Progress
Center for Democracy and Technology
Center for National Security Studies
Cyber Privacy Project
Electronic Frontier Foundation
Electronic Privacy Information Center
Fairfax County Privacy Council
Free Congress Foundation
Friends Committee on National Legislation
Gun Owners of America
Liberty Coalition
National Asian Pacific American Legal Consortium
National Association of Criminal Defense Lawyers
People For the American Way
Privacilla.org
Republican Liberty Caucus
The Rutherford Institute
U.S. Bill of Rights Foundation

cc: Senator Orrin Hatch
 Senator Mike DeWine
 Senator Christopher Bond
 Senator Trent Lott
 Senator Olympia Snowe
 Senator Chuck Hagel
 Senator Saxby Chambliss
 Senator John Warner

Senator Carl Levin
Senator Dianne Feinstein
Senator Ron Wyden
Senator Evan Bayh
Senator Barbara Mikulski
Senator Jon Corzine