



SEARCH:

[Search Options](#)[News](#) > [Opinion](#) > [Editorials](#)

EDITORIAL

Liberty Bushwhacked

Saturday, September 13, 2003; Page A20

PRESIDENT BUSH asked Congress this week to "untie the hands of our law enforcement officials" by passing three new counterterrorism proposals. Two of these are relatively insignificant, but one is dramatically dangerous -- and it has received little attention. Mr. Bush wants Congress to give federal investigators the power to compel witnesses to submit to secret interrogations without the traditional protections of the grand jury.

▼ ADVERTISING In more technical terms, Mr. Bush wants to give the Justice Department the power to issue "administrative subpoenas" instead of grand jury subpoenas to compel documents or testimony from reluctant witnesses. The administration argues that grand jury subpoenas can be too slow in emergency situations. The administrative approach, Mr. Bush said, is faster and already "used in a wide range of criminal and civil matters. . . . If we can use these subpoenas to catch crooked doctors, the Congress should allow law enforcement officials to use them in catching terrorists."

That may sound reasonable, and current law does permit investigators in certain types of cases to use administrative subpoenas, which FBI agents can issue with far less oversight. But until now there have been important limits to administrative subpoena power. While investigators can use an administrative subpoena to obtain documents, they cannot normally compel testimony in criminal cases. The exception is a provision of federal drug law on which the Bush proposal, contained in a bill introduced this week by Rep. Tom Feeney (R-Fla.), is modeled. Yet even there, prosecutors generally use the power to obtain records, not testimony, law enforcement experts say. In this country, in other words, if you don't want to talk to the FBI, you don't have to -- and the only way the Justice Department can force you to talk is to put you in front of 23 of your fellow citizens with a court stenographer making a detailed transcript. All of this significantly deters abuse.

Under Mr. Feeney's bill, the bureau in terrorism cases could subpoena a witness and, if that person balks, get the courts to "compel compliance" on pain of contempt. So, absent an assertion of a privilege, you could no longer refuse to talk to investigators without the protections of a grand jury. Moreover, the bill would give the department the authority, if it certifies that "a danger to national security" would result from disclosure of the subpoena, to slap a gag order on the witness. This is entirely at odds with traditional grand jury procedure, in which witnesses are specifically exempted from the secrecy that surrounds proceedings. And unlike in the drug context, there's reason to fear that this authority would be used routinely in the context of terrorism.

This radical new power is unnecessary as well as dangerous. It's not as though seeking grand jury subpoenas is especially burdensome. Prosecutors don't need to seek a grand jury's approval for each subpoena they issue; rather, they often issue them on behalf of the grand juries. Federal rules allow them to keep signed and sealed blank subpoenas for use when necessary. While it is probably true that getting grand jury subpoenas out the door is more cumbersome in certain jurisdictions than in others, that would at most suggest

Today's Post Editorials

- [Paying the Price](#) (Post, Sept. 14, 2003)
- [Where Is She?](#) (Post, Sept. 14, 2003)
- [The Partisan Fix](#) (Post, Sept. 14, 2003)

What's Your Opinion?

- Share Your Views About Editorials and Opinion Pieces on Our [Message Boards](#)
- [About Message Boards](#)



Free E-mail Newsletters

- [News Headlines](#)
- [News Alert](#)

[Subscribe to](#)**The Washington Post**

- [E-Mail This Article](#)
- [Printer-Friendly Version](#)
- [Permission to Republish](#)

tinkering with some local rules and practices. Mr. Feeney's bill would do a lot more than tinker.

Asked to account for the extraordinary power proposed in the bill, a department spokeswoman initially suggested that Mr. Feeney may have drafted it badly. Only when it was pointed out that similar language had appeared in the so-called "Patriot II" draft bill the Justice Department prepared and leaked early this year did the department even acknowledge that it supports this bill as written. We hope Congress will take a different view.

© 2003 The Washington Post Company

[News](#) > [Opinion](#) > [Editorials](#)

GO

GO

SEARCH:

[Search Options](#)

washingtonpost.com

Personalize Your Post | Go to [mywashingtonpost.com](#)

[Home](#)

[News](#)

[Politics](#)

[Entertainment](#)

[Live Discussions](#)

[Photos](#)

[Marketplace](#)

[Jobs](#)