

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.