

## There Are Limits to Congress's Investigatory Powers

*Businesses across all sectors of the economy should be knowledgeable about how best to respond to a Congressional investigation, and ultimately, if the investigatory Committee is not satisfied with voluntary compliance efforts, the options available to them for objecting to a Congressional subpoena.*

By Harry Sandick, Eric Beinhorn, Kate Ross

Congress' authority to conduct investigations under its "power of inquiry" is derived implicitly from Article I's vesting of "legislative Powers" with Congress. This constitutional power is broad in scope: Congress is authorized to initiate investigations, hold hearings, gather testimony or documents from witnesses, and in certain situations, compel compliance with its investigations through the issuance and enforcement of subpoenas. The current Congress has been eager to exercise this authority by investigating a wide variety of issues, often on issues that are of interest to the public. (See, H.R. Comm. And S. Comm. On the Judiciary, 119th Cong., [Letter to David Coleman](#) (October 1, 2025); H.R. Subcomm. on Cybersecurity, Info. Tech., and Gov. Innovation, 119th Cong., [Letter to Dara Khosrowshahi](#) (Sept. 24, 2025); H.R. Comm. On Oversight and Gov. Reform, 119th Cong., [Letter to David Joyner](#) (Sept. 4, 2025).)

To facilitate these investigations, the current 119th Congress has provided certain Committee chairs with "unilateral subpoena authority," which "represents a major expansion of investigatory power that may have implications for any businesses subject to federal regulation and oversight." See, Michael Brady et al., "[Congress' Subpoena and Oversight Changes Merit Businesses' Review](#)," Bloomberg Law (Feb. 7, 2025). As a result, businesses across all sectors of the economy should be knowledgeable about how best to respond to a Congressional investigation, and ultimately, if the Committee is not satisfied with voluntary compliance efforts, the options available to them for objecting to a Congressional subpoena.

### Congress's Powers and Procedures

Congress's implied powers vest it with the authority to initiate investigations, hold hearings, gather testimony and documents, and lastly, compel compliance with its investigation through the issuance and enforcement of subpoenas. However, not all Congressional investigations are the same, and different investigations warrant different responses.

At the outset, the initial inquiry from a Congressional committee will often seek *voluntary* cooperation. In other words, Congressional committees will send informal letters as a first effort to obtain the requested information, which may take the form of non-compulsory requests for the production of documents or information (or in some cases witness interviews). The organization or individual responding to Congress's informal requests for information may negotiate the scope and timing of its response, and in some instances, may choose not to comply with the request at all. In many cases, partial compliance with the requests is sufficient to provide the Committee with what it needs for its investigative purposes. Committee staff often recognizes that imposing immense burdens on the recipients of subpoenas is unfair, and that as in civil litigation, they will meet objections if they seek to impose unduly burdensome obligations on individuals or organizations. In addition, in some instances, Congressional committees lack

the interest or bandwidth to take any adverse step in response to noncompliance with a voluntary request.

That said, with noncompliance comes the risk that the Congress may issue *mandatory* requests for information in the form of subpoenas. Congressional subpoenas are formal legal demands, typically compelling production of requested documents or requiring witnesses to testify before a Congressional committee. Penalties for noncompliance with Congressional subpoenas may include civil and criminal charges for contempt of Congress.

### **Potential Objections to a Congressional Subpoena**

Litigated disputes over challenges to a Congressional subpoena are rare and are often avoided through compromise between the committee and the witness. However, organizations and individuals should know that there are affirmative objections available to witnesses who face a Congressional subpoena that impinges on the recipient's Constitutional rights or common law privileges.

#### *First Amendment*

In a given case, there may exist a basis to oppose a Congressional subpoena where the information sought is protected by a qualified privilege that emanates from rights guaranteed by the First Amendment: freedom of speech and freedom of association. Speech on public issues is entitled to "special protection" under the First Amendment. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). The Supreme Court also has recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition, for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages and to do so in private." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010). For these reasons, Congressional action that may curtail the freedom to associate is subject to the closest scrutiny. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

In *Barenblatt v. United States*, the Supreme Court mandated that courts balance the public and private interests at issue when reviewing Congressional demands for information that may implicate First Amendment protections. 360 U.S. 109, 132 (1959). The "critical element" in this balancing is "the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness." *See, Watkins v. United States*, 354 U.S. 178, 198 (1957).

Based on these principles, the recipient of a Congressional subpoena may have grounds to argue that its fundamental right to keep private the sought information outweighs Congress's interest in its disclosure. For example, where a Congressional subpoena seeks internal materials relating to a group's support of litigation, those materials may be withheld from Congress on grounds that this work is a form of expression and association protected under the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). *See, AFL-CIO v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (holding that the "compel[led] public disclosure of an association's confidential internal materials ... intrudes on the privacy of association and belief guaranteed by the First Amendment").

Targets of congressional subpoenas should be aware that First Amendment privacy interests are "not easily overridden"; the party seeking the information must assert a "compelling interest" in

obtaining the information. *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976). Individuals and organizations, therefore, should take heed that First Amendment principles may be employed in objecting to a Congressional subpoena.

### *Fifth Amendment Privilege Against Self-Incrimination*

A witness subject to a Congressional subpoena also may invoke Fifth Amendment privileges against self-incrimination. The Fifth Amendment establishes that “no person ... shall be compelled in any criminal case to be a witness against himself[.]” Although the Fifth Amendment’s protection expressly refers to “criminal cases[s],” the Supreme Court has extended the privilege against self-incrimination to witnesses appearing before a Congressional committee. Thus, the Fifth Amendment privilege protects a witness, in certain scenarios, from contempt charges despite their refusal to respond to Congressional inquiries.

In *Quinn v. United States*, 349 U.S. 155, 162 (1955), the Supreme Court adopted a fairly lenient standard for determining whether the Fifth Amendment protection against self-incrimination was properly invoked during a Congressional inquiry. The Court held that invocation of the Fifth Amendment privilege “does not require any special combination of words,” nor any “ritualistic formula or talismanic phrase” — rather, “[i]f an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected [] by the committee[.]” So long as the prospective witness reasonably places the Congressional committee “on notice” of a potential claim of privilege, the witness’s Fifth Amendment protection is deemed properly invoked.

Notably, this privilege primarily extends to testimony, *not* documentary evidence, and may be invoked only by individual witnesses, *not* on behalf of corporations, partnerships or other organizations. *See, Braswell v. United States*, 498 U.S. 99, 104–118 (1988).

### *Attorney-Client Privilege*

Although Congress has at times asserted that it is not bound to respect the invocation of attorney-client privilege, Supreme Court precedent has stated otherwise. In fact, the Court recently confirmed that the attorney-client privilege is available to targets of Congressional inquiries. In *Trump v. Mazars USA*, 591 U.S. 848 (2020), the Supreme Court endorsed the principle that “recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation,” and asserted that “recipients [of Congressional subpoenas] have long been understood to retain common law and constitutional privileges. *Id.* at 863. Crucially, common law privileges include attorney-client privilege, which according to Chief Justice Roberts, *must* be recognized by Congressional committees. Subsequent to *Mazars*, no court has ruled that the attorney-client privilege is inapplicable to Congressional investigations.

The Court’s majority opinion in *Mazars* sends a signal to targets of Congressional inquiries that, at minimum, a varied ideological coalition on the nation’s highest Court supports a private party’s ability to object to Congressional subpoenas on traditional common law privilege grounds (presumably including other standard testimonial privileges such as spousal privilege or therapist-patient privilege). Permitting invocation of the attorney-client privilege in response to a Congressional subpoena represents an effort by the Court, whether deliberate or not, to limit Congress’s investigatory reach.

### **Concluding Thoughts**

Even while the aforementioned objections to Congressional subpoenas may be available to organizations and individuals, in many cases, trying to comply (at least in part) with requests for documents and information is often the better course due to the expense and burden of litigation. In addition, the threat of a contempt proceeding is one that many clients would like to avoid. That said, it is good to know that there are limits to what Congress can ask of a witness. In those instances where compliance would impinge on an individual's or a businesses' Constitutional protections, that individual or business may object to a Congressional subpoena under the First Amendment, Fifth Amendment, and principles of the attorney-client privilege. In addition, given that Congress is aware of these limitations, it stands to reason that Committee staff and counsel for witnesses alike should keep those limitations in mind when negotiating compliance with informal requests and subpoenas.

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