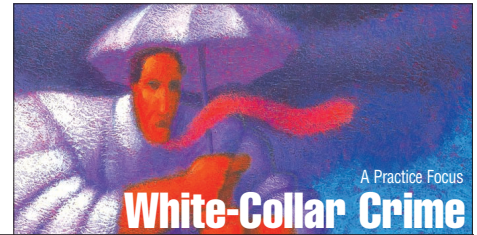


## When Congress Calls

The usual rules for subpoenas don't apply, but certain limits still exist.



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**Y**ou can place your Federal Rules of Civil Procedure back on the shelf and forget your experience filing motions to quash. You have now entered the realm of the congressional subpoena, and a new set of rules apply.

Seemingly bounded only by U.S. borders and the “legitimate legislative sphere,” the list of potential recipients—from citizens to corporations—is far broader than just the executive branch.

Unappealing risks await any corporate executive opposing a congressional subpoena. If you want to challenge the legal sufficiency of the request for documents or testimony, you must first refuse to comply and then raise your arguments as defenses in a contempt proceeding.

The most difficult part of deciding how to respond to a congressional subpoena is translating the process into familiar terms. Understanding the unique nature of the congressional subpoena power and its limits is essential to crafting an informed response.

### BRAVE NEW WORLD?

It was impossible for Congress to ignore the increasing public frustration with the military's failures. The promise of success following a troop surge was met only by increased violence.

The House of Representatives responded by creating a select committee to investigate shortcomings in the military's plan. The committee subpoenaed documents from two Cabinet secretaries. After consulting with the president, the Cabinet secretaries agreed to turn over all requested documents except for those that might threaten the public's security. The committee took only two months to conclude that the bulk of the blame should rest on the Cabinet secretary in charge of the military. Congress transferred major wartime functions to another Cabinet department.

This is not breaking news you recently missed. These are the events surrounding the first use of the congressional subpoena power. In 1792, the House investigated the staggering defeat of Gen. Arthur St. Clair by Indian forces and concluded that the War Department was particularly responsible because of a lack of adequate supplies provided to the troops. President

George Washington concluded that the investigation and the requests for documents and testimony were appropriate exertions of congressional power.

Though Congress has used its subpoena power for more than 200 years, the available legal responses are still clouded in mystery for most recipients. Unfamiliar with the nuances of a congressional subpoena, recipients are often frustrated by their apparent lack of options: Either give in to the demands or face a contempt of Congress citation. Such a citation is simply not an option for most corporate executives.

### IMPORTANT LIMITS

Even though Congress has broad authority to issue subpoenas, there are still important limitations. The four words in the language of congressional subpoenas you must know are power, privilege, procedure, and pertinence.

**Power: Does the committee have the authority to issue and enforce this subpoena?**

A congressional subpoena is enforceable only if the committee issuing the subpoena has the authority to do so. Even though the Constitution does not explicitly grant Congress the power to issue subpoenas, the Supreme Court has stated that Congress' authority to investigate is “as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution” and that subpoenas are “an indispensable ingredient of lawmaking.” Through its rules, Congress has delegated this power to all standing committees and subcommittees, and special committees are given authority through resolutions.

Three enforcement mechanisms give teeth to subpoenas. If a witness refuses to testify or produce documents, either chamber can vote to enforce its subpoena and certify the refusal to the Department of Justice for prosecution under a criminal contempt of Congress statute. The Senate can also refer the matter to a court for enforcement under a civil contempt statute. Though it hasn't done so in the past half-century, Congress can also use its inherent contempt power to try, convict, and imprison witnesses who fail to comply.

Enforcing congressional subpoenas through contempt proceedings is nearly as old as the subpoenas themselves. In 1812,

Congress issued its first contempt citation to a newspaper editor who refused to identify those who leaked information from a secret House meeting. The editor spent a night in jail.

The scope of the congressional subpoena power is broad, but not limitless—each subpoena must pursue a valid legislative purpose. But for corporations, the prospects for challenging the subpoena in court are limited and not very attractive. In *Eastland v. United States Servicemen's Fund* (1975), the Supreme Court declared that any subpoena that falls within the “legitimate legislative sphere” is protected from judicial review by the Constitution’s speech or debate clause. On top of this, there is a strong presumption that congressional investigations operate within valid legislative purposes. Because courts generally avoid reviewing direct challenges to congressional subpoenas, a recipient must refuse to comply and raise any objections as defenses in a contempt proceeding.

Are your options really this grim? A contempt citation can be more damaging than production of the documents. Members of Congress know this and are willing to use it to their advantage. Facing a contempt proceeding is not your only option, however, nor is it necessarily the most effective. Professionals familiar with congressional investigations can help communicate objections to the committee and possibly negotiate a production agreeable to both sides.

#### **Privilege: Would testifying or producing documents infringe any rights or privileges?**

The constitutional rights you enjoy before courts will generally be available before a congressional committee. The Supreme Court has held that the Bill of Rights applies to witnesses before congressional investigations. There are, however, key differences in the nature of constitutional privileges in this context:

- **Fifth Amendment:** Congress has recognized the Fifth Amendment privilege against self-incrimination since 1834, when the director of the Bank of the United States invoked it to avoid turning over subpoenaed bank documents. A committee may, however, make its own determination that the privilege is improperly asserted or require the witness to show up to a hearing—under bright lights and before the cameras—and repeatedly assert the privilege.

- **First Amendment:** Unlike under the Fifth Amendment, rights invoked under the First Amendment do not act as an absolute bar against testimony before a congressional investigation. For example, the Supreme Court determined that the legislative interests of Congress can outweigh a witness’s assertion of the First Amendment to avoid disclosing his membership in a political organization.

- **Fourth Amendment:** Recipients may invoke the Fourth Amendment as a defense in a contempt proceeding if they believe that the congressional subpoena is unreasonably broad. The Supreme Court generally has equated the scope of a subpoena with that of the investigation, which can be very broad and difficult to challenge.

The long-standing position of most members of Congress has been that recognition of common-law privileges such as attorney-client and spousal privileges, in contrast to that of constitutional privileges, is fully within the discretion of the investigating committee and its parent chamber. This position has not been

resolved in the courts, and in practice, Congress has only rarely refused to recognize the attorney-client privilege.

It is possible, of course, to work with the committee to craft a production that does not implicate any privilege claims.

#### **Procedure: Was the subpoena issued according to committee rules?**

To issue a subpoena, a majority of a quorum of the committee or subcommittee’s members must vote in favor of issuance. Several committees have delegated the power to issue a subpoena to the committee chairman, with varying degrees of autonomy.

The subpoena will include the name of the issuing committee or subcommittee; the time, date, and place of the hearing; and a description of any documents sought. A congressional subpoena can be served anywhere in the United States without the limitations found in the Federal Rules of Civil Procedure. Subpoenas are served by committee staff members or U.S. marshals.

A congressional subpoena is valid only if the committee follows its own rules on issuance. Because those rules vary significantly, it is important to become familiar with the rules and practices of the particular investigating committee as well as the details of the issuance. Courts require strict adherence to these rules, but minor errors in form, such as a mistake in a corporation’s formal name, will not invalidate the subpoena.

#### **Pertinence: Does the subpoena seek evidence relevant to the investigation?**

A committee or subcommittee with properly delegated authority is limited by the scope of that authority. A subpoena recipient can challenge the subpoena on the grounds that the request for documents is not pertinent to the investigation. This could be raised as a defense in a criminal contempt proceeding.

Courts have invalidated congressional subpoenas for documents based on lack of pertinence in several scenarios. For example, a request for all financial documents during a specified time period was invalid because it improperly covered personal financial records. Another court found that a request for all internal records of a state agency fell outside the scope of a committee’s investigation. And the Supreme Court ruled that questions to a witness can also lack the required pertinence if they stray from the legislative purpose of the inquiry.

Though challenges based on lack of pertinence have succeeded in the past, a witness risks a criminal contempt conviction when refusing to comply. Before making the decision to challenge a congressional subpoena in this manner, it is important to analyze all instances of a committee’s presentation of the subject matter of its investigation to determine the scope of proper inquiry.

For a corporation targeted by a congressional investigation, the stakes can be extremely high. Understanding the unique investigative tools that Congress has at its disposal, especially their limitations, is the first step toward a vigorous and effective defense.

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