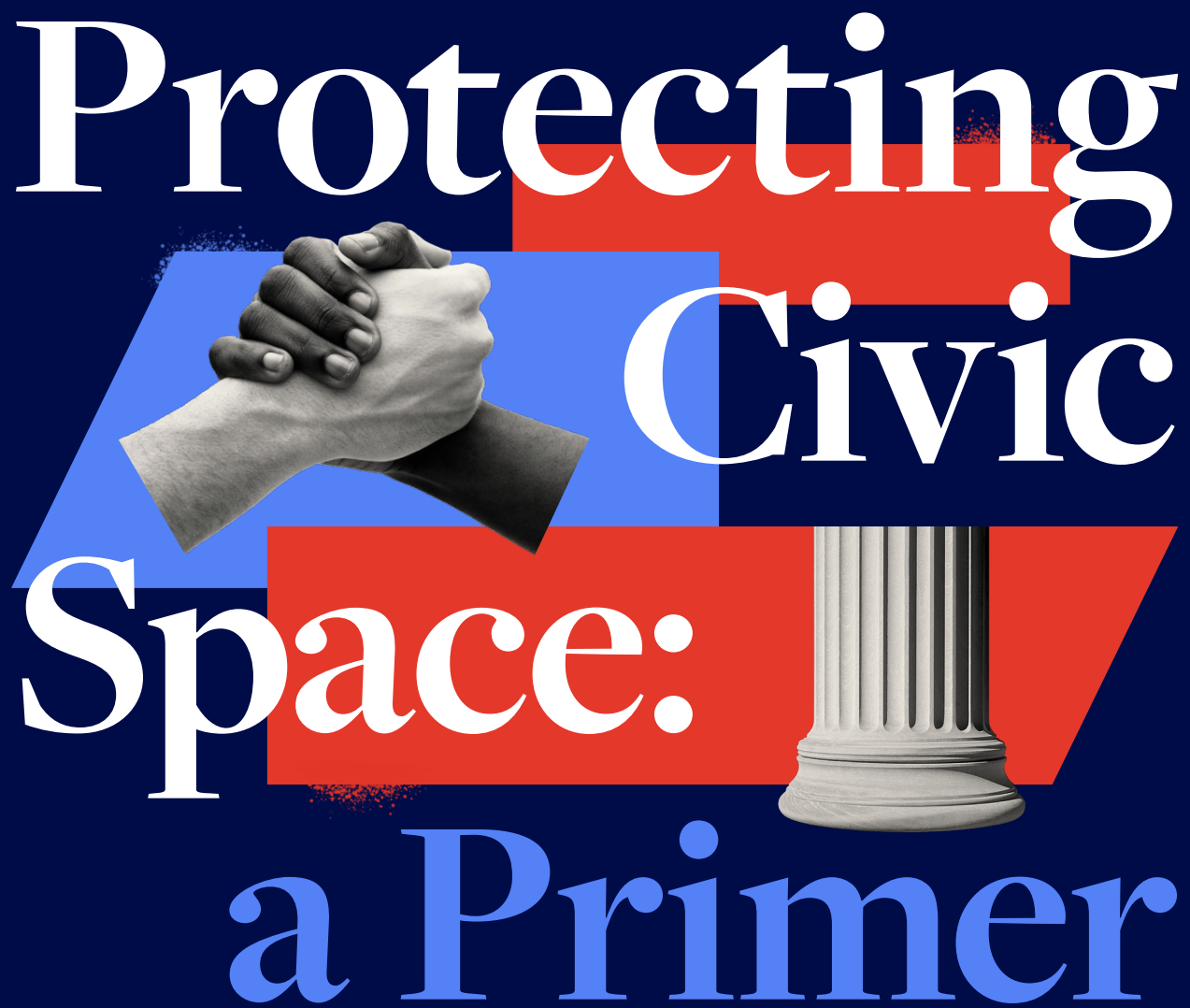


# Protecting Civic Space: a Primer



How to prepare your organization  
for politicized government investigations

SEPTEMBER 2024

This guide is not meant to, and does not, offer legal advice. Any organization or individual who receives a government inquiry should consult with an attorney.

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# Introduction: the Threat to Civic Space

This primer has two goals. First, it aims to orient civil society organizations to the different types of vexatious or retributive investigations that state and federal government actors may undertake. Second, it is intended to help organizations identify concrete actions they can take now to prepare for and mitigate these threats.

**IN THE PAST, AUTHORITARIAN-MINDED** leaders bent on upending democratic checks and balances often came to power forcefully and swiftly, including by means of a military coup d'état. But threats to democracy have evolved over recent decades.

Today, democracies more often die gradually, as institutional, legal, and political constraints are chipped away, one by one. This has happened, or is happening, in places like Russia, Hungary, India, Venezuela, Turkey — and the United States. By using “salami tactics,” slicing away at democracy one sliver at a time, modern authoritarians cement themselves in power incrementally and gradually.

Democratic decline is often exacerbated by a tightening of the space in which civil society organizations operate. These organizations have the ability to serve as vocal counterpoints to the autocratic faction, particularly when they operate as part of a broad and diverse pro-democracy coalition. Civil society organizations play critical roles in identifying and checking abuses of power, keeping the media focused on authoritarian threats, and holding bad actors accountable. They also serve as an essential support system, sustaining the health of the pro-democracy movement and strengthening critical democratic institutions like elections offices and courts.

As autocratic factions within a country grow more powerful, they often seek to undermine the civil society organizations they see as a threat. This pattern has been observed in democracies around the world. Organizations abroad have faced regulatory harassment, invasive audits, online harassment, threats of violence, and vexatious government investigations.

And now American civil society organizations — including those doing a wide range of work and serving diverse constituencies — are experiencing their own versions of these attacks. Texas Attorney General Ken Paxton has tried to shut down Annunciation House, a Catholic migrant shelter in El Paso, and is widening investigations into other nonprofits serving migrants. Senator Ted Cruz has begun investigating “radical left” climate and energy nonprofits such as the Environmental Law Institute and Rewiring America. And Senator Josh Hawley has initiated inquiries related to whether funders with 501(c)(3) status are “illegally” supporting university campus protests.

Regardless of the ultimate outcome, investigations like these have ramifications. They may impugn an organization’s reputation. They may monopolize an organization’s time and resources to the detriment of its core work. They may reduce staff morale.

In some cases, these ramifications — more than the outcome of the investigation itself — may be the point.

Investigations can also have a chilling effect on the field at large. One organization might be targeted in part to send a message to others that the threat of continuing their work is too great. Investigations may incentivize other organizations to distance themselves from the target in an attempt at self-preservation. Organizations may also engage in “anticipatory obedience” — taking steps to comply with the anticipated demands of an autocratic regime by preemptively ceasing lawful, mission-driven activities that could make an organization a potential target. They fall in line or stop opposing the autocrat out of fear of consequences even before they themselves are targeted. That leaves fewer people and organizations standing up to challenge the autocrat.

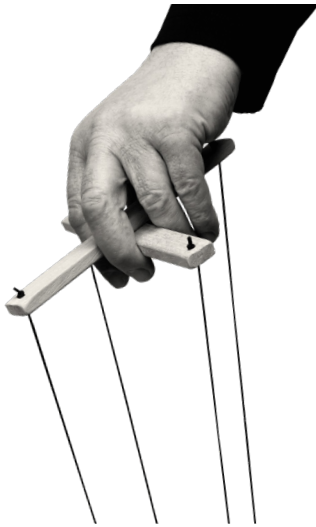
This primer has two goals:

First, it aims to orient civil society organizations to the different types of vexatious or retributive investigations that state and federal government actors may undertake. This includes descriptions on pages 8–25 of the investigative capabilities of key government entities at the federal and state level, as well as three case studies on pages 26–33 to illustrate how these investigations play out in real life.

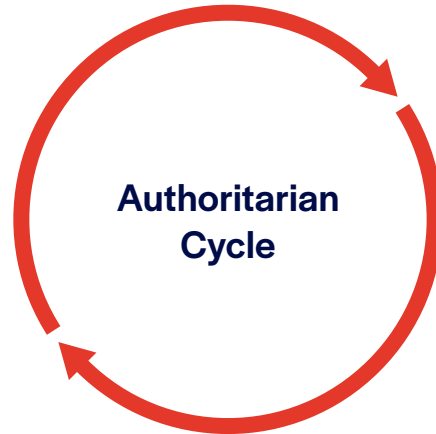
Second, it is intended to help organizations identify concrete actions they can take now to prepare for and mitigate these threats. Eleven strategies can be found on pages 34–38, covering a range of governance, communications, and security measures that can help ensure organizations are as ready as possible in the event of an inquiry.

# The chilling effect of politicized investigations

**1** An autocrat uses government power to investigate and punish groups or individuals they disagree with.



**2** A climate of fear leads to anticipatory obedience and fewer organizations operate in targeted sectors.



**4** Government power is further consolidated, enabling even more pronounced abuses.



**3** With reduced civil society support, institutions weaken and fail to check the autocrat's abuse of power.

# Investigations Quick Guide

## What are the consequences of being investigated?

Read more about government investigative powers on pages 8–23.

Regardless of the outcome, an investigation can have steep costs.

- ✘ Negative media attention
- ✘ Loss of funders or partners
- ✘ Staff attrition and reduced morale
- ✘ Reduced capacity for mission-focused work
- ✘ Risk of anticipatory obedience
- ✘ Diminished pro-democracy coalition

Potential penalties depend on the investigating entity.

- ✘ Financial penalties
- ✘ Loss of tax-exempt nonprofit status
- ✘ Revocation of licenses
- ✘ Other agency or state-dependent sanctions
- ✘ Frozen assets or orders to close
- ✘ Incarceration (rare cases)

## What should your organization do if it's being investigated?

Find out more about responding to inquiries on pages 24–25.

# 1

### Don't panic.

Remaining level-headed will help ensure good decision-making and avoid disrupting your core work.

# 2

### Contact a lawyer.

Lawyers bring expertise in responding to government agencies so you can stay focused on your mission.

# 3

### Make a plan.

A good response plan will prepare you and your donors to manage politicized investigations.



# How can your organization prepare for a potential investigation?

Read more on steps your organization should take on pages 34–38.

✓ **Keep calm and carry on with the mission.**

Don't let fear or panic prevent you from continuing your work.

✓ **Establish physical and cybersecurity protocols.**

Implement tools and training that will keep staff safe in an emergency.

✓ **When in doubt, contact a lawyer. (And have one ready!)**

Many law firms and legal services organizations will provide pro-bono consultations or representation.

✓ **Get honest with funders and partners.**

Let them know about the threat — they may even be able to mobilize extra resources.

✓ **Have a plan.**

Decide what to do before it happens — including how and whether you'll communicate about it.

✓ **Build broad coalitions.**

Organizations that work together within civic spaces are more successful at combating authoritarianism.

✓ **Embrace good governance.**

Always maintain strong operating and financial practices.

✓ **Assume anything in writing could be disclosed.**

Avoid language that could be a flashpoint in emails, texts, and other records.

✓ **Implement document retention policies now.**

Make sure all staff understand what to keep and for how long.

✓ **Train staff to be aware of bad-faith actors.**

Individuals posing as volunteers or potential clients may attempt to elicit or record statements out of context.

✓ **Ensure confidential information is protected.**

Handling, distribution, and storage policies should be codified and followed.

# Types of Government Investigations

As civic space begins to close, civil society organizations conducting mission-driven work that conflicts with the political or policy goals of government officials are at heightened risk of being singled out for government investigations at both the federal and state levels.

To prepare to face potential investigations, organizations need to understand the various tools government agencies have at their disposal and how to respond.

# Federal Investigations and Oversight

**THE FEDERAL EXECUTIVE BRANCH** administers and enforces the law as enacted by Congress. The executive branch encompasses three types of organizations, all of which are equipped with the authority and tools to conduct investigations:

- Fifteen executive departments led by an appointed member of the President's Cabinet, such as the Department of State and the Department of Labor
- Over 150 total executive agencies that operate under the direct authority of the president, such as the Environmental Protection Agency
- Over 50 independent federal commissions and agencies, such as the Securities and Exchange Commission



# Department of Justice

## Criminal and civil investigations

**THE DEPARTMENT OF JUSTICE (DOJ)**, headed by the Attorney General of the United States, oversees federal law enforcement as well as all criminal prosecutions and civil litigation in which the United States is a party. DOJ can investigate a range of federal civil and criminal matters, including money laundering, fraud schemes, violations of civil rights statutes, tax code violations, human trafficking, and risks to national security.

In each geographical district of the United States, a United States Attorney's Office (USAO) oversees federal investigations and prosecutions for the region. Many federal law enforcement agencies, like the Federal Bureau of Investigation and components of the Department of Homeland Security, have field offices throughout the country where they work — sometimes hand-in-hand with state and local law enforcement — to investigate criminal activity. These agencies share the information they gather with the USAO in the relevant district.

A DOJ investigation may be either civil or criminal, or a single investigation may have both criminal and civil components. As such, organizations should have a basic familiarity with the differences between civil and criminal investigations.

In a *criminal* matter, every investigation carries the possibility that an individual can be convicted of a crime and fined or sentenced to prison; an organization can also be convicted of a crime and sanctioned. In a *civil* matter, the government can enforce the laws through financial penalties or by ordering an organization to stop taking some sort of action, but there are no liberty interests at stake.

Although DOJ has not traditionally prioritized civil society organizations or other nonprofits for investigation, it could. It is charged with enforcing the full spectrum of civil and criminal law, covering a broad range of conduct that could be used as a predicate to investigate a civil society organization.

Recently, for example, DOJ launched a civil investigation into a climate nonprofit for violating the Immigration and Nationality Act by posting job advertisements that deterred non-citizens from applying for open positions. That investigation led to a settlement agreement with the nonprofit in May 2024, under which it will pay a civil penalty, provide back pay, and submit to a period of compliance monitoring. Criminal investigations by DOJ into civil society organizations, on the other hand, are relatively uncommon (though certainly not unheard of). But some lawmakers have called on DOJ to change that.

# Internal Revenue Service

## Investigations into nonprofit status

**THE INTERNAL REVENUE SERVICE (IRS)** has the power to grant — and to rescind — an organization’s nonprofit status. Organizations that are organized and operated exclusively for charitable purposes are eligible for tax-exempt status under section 501(c)(3) of the Internal Revenue Code, provided that they do not attempt to influence legislation as a substantial part of their activities and refrain from participating in any campaign activity for or against political candidates.

The IRS is responsible for investigating and ensuring tax-exempt organizations’ compliance with the tax code. It audits organizations in two ways: (1) by sending a written request for documents; or (2) by sending agents to an organization to collect information in person. The IRS also conducts compliance checks over matters that do not rise to the level of an audit.

If the IRS determines an organization is not in compliance with the tax code, it may revoke the organization’s tax-exempt status. In addition, in certain circumstances, it may refer the matter to DOJ for criminal prosecution.

# Federal Executive Branch Agencies

Investigations related to immigration, business operations, federal grants, civil rights, and more

**BEYOND THE IRS AND DOJ**, other federal agencies have the authority to conduct investigations. Although their investigative tools are similar, the specific tools and authorities available vary across federal agencies.

For example, agencies seeking to investigate an organization may request documents or interviews with the organization's representatives to gather information. Pursuant to statutory authority, some federal agencies also have the authority to issue administrative subpoenas or civil investigative demands (CIDs) if there is reason to believe that a person or entity possesses documents or other information relevant to an investigation.

The CID is a vehicle for the government to demand the production of documents, written interrogatory responses, and even sworn testimony in order to gather evidence before litigation begins. The government also uses CIDs as a way to assess whether to initiate enforcement proceedings. CIDs can be issued to organizations that are the ultimate target of a government investigation, or to others that are not the target but that may have information relevant to the investigation.

Organizations should consult with counsel before responding to any of these investigative inquiries.

Examples of federal agency investigative activity outside of DOJ and the IRS include:

## **Department of Homeland Security**

The Department of Homeland Security (DHS) contains several investigative components, which have broad authority to investigate potential violations of immigration law, as well as smuggling, terrorism, human and drug trafficking, fraud, and many other crimes. DHS includes U.S. Immigration and Customs Enforcement (ICE), which is authorized to arrest, detain, and remove noncitizens, and to investigate businesses and other organizations for potential immigration law violations. Homeland Security Investigations (HSI), a division within ICE, can conduct worksite raids, a particularly visible enforcement tool often used to expose undocumented employees. HSI also investigates a wide range of criminal activity, with a particular emphasis on cross-border activity.

## Department of Labor

Investigators from the U.S. Department of Labor’s Wage and Hour Division may initiate investigations to observe business operations, examine payroll and other business records, interview employees, and enforce penalties as applicable for wage or overtime violations, child labor, or other violations of federal labor laws. While employers may be represented by counsel during these investigations, investigators are not required to provide advance notice of a visit and may show up unannounced.

## Treasury Department

The U.S. Treasury Department is organized into several operating bureaus and offices. The Treasury Department’s largest bureau is the IRS, but there are other entities with investigative powers, including the Office of Foreign Assets Control (OFAC), the Office of Terrorist Financing and Financial Crimes, and the Office of International Affairs. The Treasury Department can investigate claims of economic abuse, fraudulent investments, and tax fraud against civil society organizations operating both domestically and internationally.

For example, in early 2006, without notice or a hearing, OFAC froze over \$1 million in assets belonging to KindHearts – a former charitable organization that provided humanitarian assistance in the United States and abroad, including to Muslim-majority countries – effectively shutting down the organization’s operations. OFAC subsequently threatened to designate KindHearts as a “pecially designated global terrorist” without providing the organization with a reason or meaningful opportunity to defend itself. In 2008, the ACLU filed and won (at least in part) a lawsuit against OFAC in a federal district court in Ohio. The court also affirmed, however, that OFAC’s designation of KindHearts as a “pecially designated global terrorist” did not violate the organization’s due-process rights.

## USAID

The U.S. Agency for International Development (USAID) maintains an Office of Investigations and a workforce of Special Agents who investigate civil, criminal, and administrative violations related to USAID, the Millennium Challenge Corporation, the United States African Development Foundation, the Inter-American Foundation, and the U.S. Development Finance Corporation. Investigations typically focus on preventing fraud, waste, and abuse among contractors, grantees, and host-country counterparts. Agents have full law enforcement authority, including the ability to conduct surveillance and undercover operations. Many USAID grantees are civil society organizations. The agency maintains a Compliance and Fraud Prevention Pocket Guide to help agency employees and stakeholders identify potential fraud and other activities to report.

## Civil rights offices

Many federal agencies also have offices of civil rights, which have the authority to investigate possible civil rights violations at organizations they fund. The Department of Education's Office of Civil Rights, for example, enforces a number of civil rights statutes, including Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. In the wake of the Supreme Court's decision in *Students for Fair Admissions v. Harvard*, several advocacy organizations — including America First Legal and the Equal Protection Project — have filed complaints with a number of agencies, including the Department of Education's Office of Civil Rights and the Equal Employment Opportunity Commission, seeking investigatory action against universities and businesses that have Diversity, Equity and Inclusion (DEI) programs.

It is worth noting that executive branch agencies also have broad powers that go beyond formal investigative tools. The power to execute federal law and implement federal policies includes distributing federal grants, licenses, and other public resources; providing relief in disasters; partnering with the private sector to accomplish public aims; and conducting many other tasks. This power can be leveraged in a variety of ways to engage in retaliatory investigations or take other action against disfavored organizations.

Civil society organizations should take stock of the various ways their organization interacts with federal agencies and programs to assess other potential vulnerabilities to retribution or harassment.



# Congress

## Broad investigations and oversight

**ALTHOUGH THE U.S. CONSTITUTION** does not expressly authorize Congress to conduct investigations, the Supreme Court has long recognized that Congress has an inherent, constitutional prerogative to conduct investigations “in aid of its legislative function.” Because Congress’ power to legislate is expansive, Congress has broad discretion in deciding the scope and relevance of information it can request, and courts generally have interpreted this to mean that Congress can investigate virtually any topic that has a nexus to its legislative duties.

Thus, the congressional committees that carry out such investigations and inquiries have broad authority to request and, at times, to *demand* that private parties turn over documents and information, sit for a deposition, or testify at a hearing. This power is not unlimited, but there have been only a relatively small number of court cases during our country’s history challenging congressional oversight authority.

There is historical precedent for Congress abusing its authority to investigate private citizens and civil society organizations. From 1938 to 1975, the House Un-American Activities Committee investigated labor leaders, civil rights activists, academics, scientists, and government employees for having alleged or suspected Communist beliefs, notably overseeing the infamous “McCarthy hearings.”

In recent years, some members of Congress have increased their focus on oversight activity. The rise of social media and the demand for “viral” clips have led to a heightened interest in the video footage of contentious exchanges with a witness that sometimes take place during oversight hearings.

Congressional committees — not individual members — wield the oversight power of Congress, and each committee exercises that power through a chairperson. Overarching House and Senate rules govern how committees in each chamber conduct investigations and hold hearings. In addition, each committee adopts specific rules that govern its investigations and define its jurisdiction.

Congress has a variety of tools it can use to seek information from civil society organizations. The most common of these are outlined below and summarized with recommended responses on pages 24-25. Investigations may start informally, but some can escalate to more formal procedures.

## Letter inquiries and document requests

Congressional committees often send letters requesting documents or information from private parties. These easy-to-send, informal requests are typically the first tool congressional committees wield. They can help a committee put pressure on multiple parties to produce documents of interest for a particular investigation.

Illustrating how common these requests can be, during the 118th Congress, House Judiciary Committee Chairman Jim Jordan sent out hundreds of letters to companies, organizations, and individuals. The letters requested that recipients turn over internal documents and communications with other organizations, among other items.

Similarly, Senator Ted Cruz, in his capacity as Ranking Member of the Senate Commerce, Science, and Transportation Committee, sent a letter to the President of the Environmental Law Institute (ELI), a national progressive environmental organization. Senator Cruz alleged that ELI's program to educate federal judges about climate change was not ideologically neutral and requested access to broad swaths of documents, including communications, curriculum materials, and funding and spending records.

The consequences of receiving a letter inquiry or document request vary. Compliance with letter requests is voluntary, but not all letter requests are the same: Some letters, such as those from a committee chair or another influential member, come with a higher risk of escalation to a subpoena if the requests are not addressed satisfactorily. Sometimes if the receiving party does not respond to the committee's satisfaction, there will be follow-up requests via email or phone call. Such situations can lead to escalation, including additional requests and ultimately a subpoena that demands compliance.

## Interviews

Congress may also ask a witness to sit for a voluntary interview. Such interviews can take many different forms, subject to negotiation between the relevant congressional committee and the recipient of the request (or their counsel). Because informal interviews are voluntary and not subject to the same requirements as formal depositions (discussed below), parties have broader parameters to negotiate, for example, whether the interview will be in person, who will be present at the interview, and the scope of the questioning. Notably, committing perjury before Congress — even in an informal interview — is subject to prosecution.

## Subpoenas

Congressional subpoenas require heightened attention, as they are formal legal demands with detailed terms for compliance. They are issued with the implicit threat of sanctions for noncompliance, including being held in contempt of Congress.

Subpoenas are typically issued by a congressional committee that was dissatisfied with a party's response to a letter request.

Each committee's rules differ as to the formal requirements that must be met to issue a subpoena. Some committees may issue a subpoena via a unilateral decision of the committee chair, while others require a majority vote. Most House committees have now given their chairs unilateral subpoena authority, weakening the barrier to issuing them. Only one committee in the Senate has given its chair unilateral subpoena authority: the Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations.

Congress has the ability to punish parties that refuse to comply with congressional subpoenas, including by referring the party to DOJ for prosecution for criminal contempt of Congress and filing civil litigation to enforce the subpoena. Though rare, in recent years Congress has issued a number of criminal contempt referrals. Some of those even resulted in prosecutions and convictions. Congress has also filed civil lawsuits seeking subpoena enforcement.

Subpoenas may compel the production of documents or require witnesses to appear at a deposition or hearing. Longstanding practice is for parties who receive a subpoena to negotiate terms of compliance, usually with the staff of the committee that issued the subpoena.

## Depositions

A deposition is a mechanism through which a congressional committee can elicit sworn testimony from a witness in a non-public setting, similar to depositions that occur in the context of civil litigation. The frequency of congressional depositions has increased in recent years. Depositions are subject to formal regulations promulgated by the House or Senate Rules Committee, including that depositions be taken under oath and transcribed.

## Witness hearings

Congressional hearings are opportunities for congressional committees to raise the political salience of important policy issues and to publicly question witnesses. They are also one of the primary avenues for political theater and for members to create "viral" moments to raise money or otherwise boost their political profile.

If an organization receives a request for a representative to appear at a hearing or to provide documents or testimony, they should consult with counsel to assess the request and get advice as to when and how to engage with Congress. Counsel may also be able to negotiate directly with committee staff to narrow the scope of investigative requests.

# State Investigations and Oversight

**JUST AS AT THE FEDERAL LEVEL**, there is a risk that civil society organizations may be targeted for politicized investigations by state government officials.

State government officials conduct oversight and investigations using many of the same tools their federal counterparts employ. They also undertake investigations for many of the same core motivations: State legislators investigate matters that could be the subject of legislation, and state attorneys general and other state agencies enforce and administer the laws of the state.



# State Attorneys General

## Criminal and civil investigations

**STATE ATTORNEYS GENERAL (AGs)** serve as the chief law enforcement officers in their states and have considerable power to investigate potential violations of state law and sometimes federal law. Many also have the power to issue legal opinions that can shape the law on particular topics. State AG oversight authority carries the full force of law.

Although the authority of state AGs varies somewhat, they generally can employ oversight tactics that parallel those of their federal counterparts and use many of the same investigative tools:

- Informal inquiries that may begin or appear as conversational
- Letters and written inquiries
- Document requests
- In-person site visits from an employee or representative of the state AG's office (these can be pre-planned or unannounced)
- Subpoenas (including grand jury subpoenas)
- Civil investigative demands (CIDs)

Depending on the instrument a state AG uses to seek information from an organization, they may initiate a legal process that requires an organization to respond. For example, although not every letter request requires a response, a CID typically does.

# State Tax and Charity Oversight Agencies

## Investigations into nonprofit status and charitable solicitations

**ALL 50 STATES HAVE** their own official taxation agency. Both state and federal tax agencies can recommend that state AGs open prosecutions into alleged tax crimes, including fraud and evasion. Audits conducted by state tax agencies are just as serious as ones conducted by federal agencies and can result in civil or criminal penalties. The state can take away licenses, issue fines, and even prohibit an entity from operating as a nonprofit. Criminal penalties are much rarer and graver.

Many states also have agencies tasked with regulating nonprofit organizations' solicitation of charitable contributions. Organizations are typically required to register with these agencies before they ask for donations, and they often have to submit periodic financial reports. State agencies charged with overseeing charitable contributions can impose penalties — from fines to bans on making charitable solicitations within the state — and, in some circumstances, file criminal charges against organizations that fail to meet these requirements.

# Other State Agencies

Investigations related to business operations, state grants, civil rights, and more

**STATE AGENCY INVESTIGATIONS ARE** structurally similar to federal agency investigations. Just as DOJ is the nucleus of federal law enforcement, state AGs generally are the hub of law enforcement at the state level. Governors also have authority over a number of state executive agencies that function similarly to federal agencies. States may have a long list of commissions, departments, divisions, and agencies that have statutory authority to administer and enforce state law.

Similar to their federal counterparts, state regulatory agencies also possess significant investigative authorities that could be wielded to punish a civil society organization for its disfavored views or status. For example, in 2018, New York State’s top financial services regulator allegedly pressured banks and insurance companies to stop doing business with the National Rifle Association (NRA) in exchange for reduced liability for other infractions. The Supreme Court recently held that the NRA plausibly alleged that the agency had overstepped its authority and violated the NRA’s First Amendment rights, explaining that while the superintendent of the agency “was free to criticize the NRA and pursue the conceded violations of New York insurance law,” she could not “wield her power ... to threaten enforcement actions against [state-]regulated entities in order to punish or suppress the NRA’s gun-promotion advocacy.”

Although their investigative tools are similar, the specific tools and authorities available will vary across state agencies. State agencies investigating an organization may request (or demand) documents or seek to interview representatives to gather information. They may also coordinate with state or local law enforcement to gather evidence for potential prosecution.



# State Legislatures

## Broad inquiries that vary by state

**LIKE CONGRESS, STATE LEGISLATURES** have broad authority to investigate matters that could be the subject of legislation or that otherwise further the body's legislative purpose. Each legislative body has different authority, as outlined by the respective state constitution. Within and across legislative bodies, different chambers and committees will have their own rules. But state legislators have the same core set of tools that federal legislators have: They can request and, at times, *demand* that private parties turn over documents and information, sit for a deposition, or testify at a hearing.

# Key Investigative Tools

Understanding government capabilities and recommended responses

	REQUIREMENTS	RECOMMENDED ACTION
<h2>Law enforcement outreach</h2> <p>A federal or state official or law enforcement agent may contact an organization by visiting in person, sending a letter, or initiating a phone call.</p>	<p><b>May require a response.</b></p> <p>While the authority of these officials can be intimidating, engagement is sometimes voluntary. An organization often may refuse to answer questions and generally may deny officials access to non-public areas of their business. (An official may have a warrant or other legally valid justification for a site visit or informational request/demand. Such visits may require compliance and must be evaluated on a case-by-case basis with the assistance of an attorney.)</p>	<p><b>Contact a lawyer.</b></p> <p>If an organization receives a letter, call, visit, or other information request from a state or federal agency, it should contact a lawyer before deciding whether and how to respond.</p>
<h2>Interview requests</h2> <p>The government can ask individuals (in their personal capacity or as a representative of an organization) to sit for interviews where a team of prosecutors and/or investigative agents ask questions and record written notes.</p>	<p><b>Voluntary with risk of escalation.</b></p> <p>When government officials request an interview, it will not always be clear whether the person or organization they wish to interview is themselves a target of investigation or may simply be thought to have information about someone else who is a target. Failure to respond could lead to further investigative steps.</p>	<p><b>Contact a lawyer.</b></p> <p>There are pros and cons to voluntary interviews, and organizations should consult with counsel before responding to such requests.</p>
<h2>Document requests and letter inquiries</h2> <p>Government agencies can ask organizations to provide documents for review. Officials may seek documents relating to an organization's financial records, business practices, or client information.</p>	<p><b>Voluntary with risk of escalation.</b></p> <p>Without a lawfully issued subpoena or a civil investigative demand, these document requests are voluntary. If the request comes from a legislative committee chair or other influential member, however, there is a higher chance of escalation to a subpoena if it is ignored.</p>	<p><b>Contact a lawyer.</b></p> <p>A recipient of such a request should consult with counsel before agreeing to provide documents to the government.</p>

## REQUIREMENTS

## RECOMMENDED ACTION

### Civil investigative demands (CIDs)

If there is reason to believe a person or entity possesses information relevant to an investigation, some government agencies have the authority to issue a CID. This is a vehicle to demand the production of documents, written interrogatory responses, or sworn testimony in order to gather evidence before litigation begins. CIDs are one way the government can assess whether to initiate enforcement proceedings.

**Requires immediate attention.**

Responding to a CID is not voluntary, and government agencies generally can enforce CIDs in court. CIDs can be issued to organizations that are targets of a government investigation, or to others that are not being targeted but may have information of interest to the government.

**Contact a lawyer.**

If an organization receives a CID, it is prudent to consult with counsel who can advise on whether, when, and how to negotiate directly with the government regarding the scope of the information sought. Back-and-forth with counsel is routine — and often expected — for government lawyers, and it can be helpful in reducing the burden of compliance.

### Subpoenas

Several government agencies can issue subpoenas — formal written orders to appear in a legal proceeding or to produce documents to the government. Subpoenas can also compel an individual, in their personal capacity or as the representative of an organization, to sit for a deposition.

**Requires immediate attention.**

Subpoenas are not voluntary, and a failure to respond can result in being held in contempt.

**Contact a lawyer.**

An organization should consult counsel upon receiving a subpoena to determine the proper response. Just as with CIDs, counsel can often negotiate with the government to narrow the scope of information sought. (Subpoenas can take different forms, including administrative, congressional, and those served as part of an ongoing criminal or civil case. Counsel will help you understand the scope and requirements for each of these).

### Grand Jury Subpoenas

If the government believes that a person or organization has information relevant to a potential violation of criminal law, it can issue a subpoena for that person or organization to testify before a grand jury or to produce relevant documents.

**Requires immediate attention.**

Grand jury subpoenas are not voluntary.

**Contact a lawyer.**

An organization should consult counsel upon receiving a grand jury subpoena to determine the proper response. Grand juries operate with special rules around confidentiality and disclosure, so an organization that has received a grand jury subpoena should not publicize or discuss it.

# Case Studies: Three Real Investigations

This section illustrates what investigations can look like in practice when abused by government actors. Over the past decade, groups from across the ideological spectrum have experienced undue scrutiny at the state and federal level — occurrences that are only likely to increase if an authoritarian takes hold of the levers of power.



# Attempting to shut down a Texas migrant shelter

**ANNUNCIATION HOUSE IS A CATHOLIC** volunteer organization located approximately ten blocks from the U.S.-Mexico border that seeks to serve the “poorest of the poor.” It has been offering housing and resources to migrants in El Paso, Texas since 1978. Annunciation House volunteers live in community with the guests, and they also participate in advocacy related to immigration issues.

On February 7, 2024, Texas Attorney General Ken Paxton sent three lawyers to Annunciation House. The lawyers demanded to enter the premises and search Annunciation House’s records without a warrant, stating that the “attorney general’s office had the power to immediately enter the building without one.” When Annunciation House refused, the attorney general’s office issued an administrative subpoena for a large volume of documents with a one-day deadline. Paxton specifically sought the names of individual residents of the shelter, as well as information about their medical history and the identity of their family members. Through counsel, Annunciation House sought judicial intervention, arguing that one day was not enough time and asking a judge to determine which documents the shelter was legally required to turn over.

Annunciation House was granted a temporary restraining order (TRO). AG Paxton subsequently filed a countersuit that sought to overturn the TRO and have the shelter shut down altogether. Pending these proceedings, Paxton issued the following statement:

“The chaos at the southern border has created an environment where NGOs, funded with taxpayer money from the Biden Administration, facilitate astonishing horrors including human smuggling. While the federal government perpetuates the lawlessness destroying this country, my office works day in and day out to hold these organizations responsible for worsening illegal immigration.”

The matter became increasingly high-profile and attracted attention from the national press. Pope Francis himself weighed in on *60 Minutes*, calling the investigation “sheer madness.”

On July 1, 2024, the state district court judge issued a pair of rulings denying AG Paxton’s requests for an injunction and penalties and granting summary judgment in favor of Annunciation House. He ruled that the state failed to establish probable grounds to close the nonprofit and found that it had violated the organization’s religious freedoms. On July 15, Paxton appealed. On August 23, the Texas Supreme Court granted Paxton’s appeal.

## Case Study Learnings

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- ➔ **State attorneys general (AGs) are political actors** who may act for partisan reasons or for perceived political gain.
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- ➔ **State AGs willing to abuse their power may deploy a variety of tactics** like the ones used against Annunciation House:
    - Using government lawyers to intimidate small organizations that may not have their own legal counsel
    - Forcing an organization to incur legal expenses or find pro-bono counsel
    - Smearing the organization's reputation, as Paxton did when he referred to Annunciation House in court filings as an "illegal stash house" using "its real estate to engage in human smuggling"
    - Attempting to scare organizations with the threat of enforcement activity and unreasonable deadlines in order to secure immediate compliance with their demands
    - Attempting to halt operations and/or shut down the organization entirely
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- ➔ **Some state AGs will push the envelope and test just how far they can go** to further political ends or intimidate perceived political opponents. As the state's top law enforcement officer, state AGs are constitutionally obligated to enforce state law, yet as the lower court noted in the Annunciation House case, "there was no attempt whatsoever to negotiate by the attorney general, which is what gives the court rise for concern that there are ulterior political motives here ... that go outside of what the law requires, go outside of what the law demands."
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# Heightened scrutiny for tax-exempt status of Tea Party-aligned groups

**IN 2010, THE NUMBER** of applications the Internal Revenue Service (IRS) received for tax-exempt status increased as certain nonprofit organizations began organizing around the “Tea Party” movement. In 2013, an IRS official admitted that some agency personnel had been improperly flagging applications for tax-exempt status: Applications from organizations with terms like “Tea Party” and “patriots” in their name were being pulled and held for extra scrutiny.

While press reports at the time painted this “scandal” as an instance of the Obama Administration targeting its political opponents, investigative journalism and a 2017 report from the Treasury Department later revealed that organizations with “occupy,” “progressive,” and “clean energy” in their names also received extra scrutiny during the period from 2004 to 2013.

The IRS personnel flagged hundreds of these 501(c) applications for additional layers of review, questioning, and delay, sometimes requesting donor information or extraneous and sensitive information not necessary to determine an organization’s tax-exempt status.

In 2017, DOJ entered into settlements with 469 groups who claimed to have been improperly targeted for heightened review. Then-Attorney General Jeff Sessions announced the settlements, saying, “The IRS’s use of these criteria as a basis for heightened scrutiny was wrong and should never have occurred. It is improper for the IRS to single out groups for different treatment based on their names or ideological positions. Any entitlement to tax exemption should be based on the activities of the organization and whether they fulfill requirements of the law, not the policy positions adopted by members or the name chosen to reflect those views.”

Notably, these improperly flagged applications were not the result of retribution on the part of political appointees. Rather, they were the work of IRS bureaucrats who sloppily enforced their own rules. The frequency, scope, and severity of these kinds of investigations would likely have been much more extensive had White House or other political appointees directed IRS personnel to target organizations they designated as the opposition.



## Case Study Learnings

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- ➔ **Organizations that are perceived as having an ideological bent may receive additional scrutiny** when interfacing with government officials for the purposes of taxation, grants, or federal funding.

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- ➔ **Individuals will sometimes act improperly or misinterpret the guidance they receive on the job.** Even though the day-to-day operations of the IRS are carried out by nonpartisan, career civil servants, this case study illustrates the ways in which political institutions are human institutions. In this case, the Treasury Inspector General for Tax Administration found that IRS personnel had flagged applications for tax-exempt status for further review based on the organizations' names or policy positions rather than on indications of political activity or campaign intervention.

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- ➔ **Where agency personnel misuse their enforcement authority, there are checks in place to remedy the problem.** In this case, those checks were external ones. A free and independent press works to bring incidents like this to public attention, and public attention places pressure on government officials to root out misconduct.

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- ➔ **An authoritarian regime would heighten the threat of federal agency personnel misusing their authority** to obstruct the work of various civil society organizations.

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- ➔ **Speaking publicly may be beneficial if an organization believes it is being improperly targeted** for the nature of its mission or the views of its members. It may also want to reach out to allies and partners. In this case, more than 400 nonprofit organizations that believed they were improperly targeted by the IRS worked in concert to publicize the issue and ultimately to form a class that would jointly seek legal remedies. Pushing back can succeed if an organization speaks up, gets organized, and uses its resources effectively.

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# Illegally recorded conversations and a faux scandal

**IN 2013, PLANNED PARENTHOOD** was the target of a “sting” operation that illegally recorded, and later misrepresented, conversations with its personnel.

Planned Parenthood had a longstanding practice of donating fetal tissue to medical research, and it received reimbursements to cover the costs of handling and transferring these tissue specimens. Individuals claiming to be from the Center for Medical Progress (CMP), a fictitious biomedical research company, trespassed on Planned Parenthood properties and illegally recorded meetings with abortion providers. CMP then used the video footage to claim that Planned Parenthood was “selling baby parts” and profiting from the use of fetal tissue. Planned Parenthood was vindicated of any wrongdoing, and those who recorded the conversations were convicted of breaking federal and state laws. But that did not stop Congress and several states from treating the incident as a scandal and making Planned Parenthood the target of their own investigations.

When the edited videos became public, 13 states and five congressional committees launched investigations into Planned Parenthood and its practices of receiving reimbursement for fetal tissue donation. The House Oversight Committee subpoenaed and obtained all unedited video footage from CMP.

None of these investigations concluded that Planned Parenthood had violated the law. In the end, it was CMP, and not Planned Parenthood, that was charged with a crime.

## Case Study Learnings

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- ➔ **Organizations should be on guard for bad-faith actors** during day-to-day interactions: Not everyone who approaches an organization does so with good or honest intentions.

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- ➔ **Spurious claims from private actors may not dissuade government entities from taking action** – in fact, the opposite may be true. Despite the baseless allegations against Planned Parenthood, governmental officials still pursued partisan and politicized inquiries into the organization.

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- ➔ **An organization carrying out its mission with ethics and integrity can often survive even the heaviest scrutiny.** Planned Parenthood carried on with its work while investigations swirled for years and ultimately found nothing.

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# How to Prepare Your Organization

One hallmark of a functioning democracy is a diverse range of active civil society organizations, some with ideological goals that are shared by elected officials and some that are not. If any of these organizations find themselves on the receiving end of government scrutiny, it can be unclear whether the attention is lawful and legitimate or motivated by partisan politics or authoritarian tactics.

The 11 strategies on the following pages outline how organizations can — and should — prepare for investigations in a way that mitigates risk and allows them to carry on with lawful work.

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## 1 Keep calm and carry on with the mission.

Despite valid fears of potential investigations, organizations should resist the urge to panic and continue to serve the public interest by carrying out their mission. Organizations should remind employees and stakeholders that they have a plan in place to respond to governmental inquiries — one that ensures they can both respond to the inquiry and continue with their mission-related work.

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## 2 When in doubt, contact a lawyer. (And have one ready!)

If an organization does not currently retain counsel, it should know who it would call if it receives an investigative inquiry. Many law firms and legal services organizations may be able to provide representation, or at least an initial consultation, on a pro-bono basis. Additionally, most state bar associations offer lawyer referrals and can be a good place to start a search for legal services.

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## 3 Have a plan.

Before an organization is subject to investigation by the government, it should already have a contingency plan in place. This plan should include a crisis communications framework and instructions on how to utilize its internal and external resources to respond to an investigation.

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## 4 Embrace good governance.

Even when there is less concern about politicized government investigations or other overreach, an organization should establish and maintain strong governance practices. Strong internal governance and finance practices can protect an organization if and when it comes under scrutiny. These practices include:

- Implementing strong internal procedures to ensure compliance with 501(c)(3) and/or 501(c)(4) tax status
  - Ensuring that state registrations for charitable solicitations are up to date
  - Authorizing an independent body to carry out annual financial audits
  - Adopting and enforcing policies related to whistleblower protection
  - Maintaining clarity around the board of directors' roles and responsibilities
  - Building or enhancing an independent, professional human resources role
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## 5 Implement document retention policies now.

Organizations should develop and follow a document retention policy, including policies for email communications. They need a policy outlining what to keep and how long to keep it. Having a policy that is documented, known by staff, and adhered to helps organizations manage their records and avoid later allegations that documents were destroyed improperly. Organizations should implement document retention policies now, *before* they are faced with the prospect of an inquiry or investigation.

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## 6 Ensure confidential information is protected.

Alongside document-retention policies, organizations should ensure they have policies and procedures around handling confidential information, including document management systems for storage, standardized naming conventions for confidential information, and codified policies around how to safeguard and distribute such information.

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## 7 Establish physical and cybersecurity protocols.

Organizations should be mindful of the physical security risks their employees might face while under investigation. Organizations should require physical security training and implement emergency response protocols to keep their employees both physically and emotionally safe.

Organizations should also be prepared to address the rising threat of cyber attacks. They can strengthen their cyber protections by implementing the following practices, among others: adopting written cybersecurity policies, conducting mandatory staff training that teaches employees how to spot and flag different hacker techniques, and installing a virtual private network (VPN) that protects users by encrypting their data.

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## 8 Get honest with funders and partners.

Organizations targeted for politicized government investigations should be upfront with their donors about these potential threats. Being honest shows integrity and demonstrates that the organization has nothing to hide. Moreover, funders and partners may be able to provide technical assistance or additional funding to support responding to an inquiry. And communicating with like-minded organizations, as appropriate, can be a good way to mobilize external resources and avoid interruptions to the work and mission.

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## 9 Build broad coalitions.

Organizations may think it is easier to deal with threats quietly by self-censoring, cutting off politically controversial funders, and distancing themselves from targeted organizations or those already under investigation. Research shows, however, that organizations that work with a broad coalition and fight against polarization within civic spaces combat authoritarianism more successfully.

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## 10 Assume anything in writing could be disclosed.

In addition to the federal Freedom of Information Act (FOIA), states also have their own FOIA laws, often called public records acts, to compel the production of certain categories of information. This could include an organization's communications with government officials or agencies. Organizations should be aware of public records laws and assume that written work could eventually be disclosed — voluntarily or not.

When communicating with any agent of the state or federal government, especially in writing, organizations should keep in mind that, although some categories of documents are protected from disclosure by FOIA exemptions and exclusions, emails and other written records can often be obtained by a private party via a FOIA or other public records request. This can include text messages to a government staffer's personal number and emails to a staffer's personal account.

Organizations should use good email hygiene and avoid communicating in ways that are prone to being taken out of context. If one document is swept into the scope of a subpoena or FOIA request without a large body of research or background information to provide important context, it could become a flashpoint.

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## 11 Train staff to be aware of bad-faith actors.

Not every person who contacts an organization with questions or seeking services may be acting in good faith. If bad actors publicize surreptitiously recorded conversations, for example, that can snowball into scrutiny from government agencies. An organization can guard against this by considering what aspects of its mission or services may be considered controversial to opponents or most susceptible to scrutiny.

- Remember that phone and online conversations, as well as in-person visits, may be surreptitiously recorded. Political provocateurs have targeted non-profits and other organizations by posing as volunteers, donors, potential clients, or even patients and eliciting statements (which they record) from an unsuspecting staff member that may later be taken out of context and used against the organization.
  - Every organization should have a process in place for handling incoming inquiries and ensuring that any intake personnel follow predetermined scripts and do not give out unnecessary information over the phone.
  - Remind staff that not everyone who contacts the organization “for help” may be doing so in good faith.
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# Conclusion:

## Resisting a looming threat

**POLITICIZED GOVERNMENT INVESTIGATIONS** can feel threatening. Indeed, that's often the point. But as outlined in this guide, they need not be paralyzing. Organizations can — and should — take steps now to ensure that lawful, mission-driven work continues even in the face of an investigation. In doing so, organizations can protect their ability to meet their missions and, more broadly, help guard against the closing of civic space — which remains one of the strongest defenses against the autocratic movement.

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