

MAURA HEALEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

TEL: (617) 727-2200
www.mass.gov/ago

July 13, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to your July 6, 2016, letter (“July Letter”), which, like your letters of May 18 and June 17, seeks documents and information in connection with ongoing law enforcement and investigative activities of the Massachusetts Attorney General’s Office (“MA AGO”) regarding potential violations of Massachusetts law by ExxonMobil Corporation (“Exxon”). This letter supplements our responsive letters to you of June 2 and 24, principally to address new arguments raised in your July Letter.

As you know from our letter of June 2, the focus of MA AGO’s investigation is to determine whether Exxon, in violation of Massachusetts law, misled consumers and/or investors by taking public positions regarding the impact of fossil fuel combustion on climate change and Exxon’s business that contradict Exxon’s own knowledge and understanding, including as documented by Exxon’s own scientific research. For example, in 1981, Exxon understood that “[a]tmospheric CO₂ will double in 100 years if fossil fuels grow at 1.4%/a,” and that such a doubling of CO₂ would result in a “3 [degree Celsius] global average temperature rise and 10 [degree Celsius] at poles” which would cause “major shifts in rainfall/agriculture” and melting of polar ice.¹ Despite Exxon’s knowledge, and its recognition that there may need to be “an orderly transition to non-fossil fuel technologies,”² by 1998, Exxon’s Randy Randol was nonetheless participating as a member of the “Global Climate Science Communications Team” that was engaged in a concerted effort to challenge the “scientific underpinning of the global climate change theory” in the media, and taking the position that “[i]n fact, it [sic] not known for sure

¹ Preliminary Statement on Exxon’s Position on The Growth of Atmospheric Carbon Dioxide, from Henry Shaw to Dr. E. E. David, Jr., (May 15, 1981), *available at* <https://insideclimatenews.org/sites/default/files/documents/Exxon%20Position%20on%20CO2%20%281981%29.pdf>.

² *Id.*



whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it.”³

MA AGO is entitled to investigate what Exxon knew and communicated to others about these issues, since those facts are highly relevant to our prospective determination of whether Exxon violated Massachusetts law and misled consumers and/or investors. It appears, from documents such as the above-cited Draft Global Climate Science Communications Plan, that Exxon may have communicated with many entities to misrepresent facts about the impacts of climate change and climate-driven risks to its business; the fact that some of those entities may have conducted research or employed scientists does not diminish the relevance of Exxon’s communications to them, nor give this Committee authority to probe into or interfere with MA AGO’s investigation of potential violations by Exxon of Massachusetts law.

Neither the Rules of the House of Representatives⁴ (“House Rules”), the Science, Space and Technology Committee’s own rules⁵ (“Committee Rules”), nor the Committee’s Oversight Plan⁶ (“Plan”) authorize the Committee to conduct an investigation of a sovereign state’s exercise of its law enforcement authority in connection with the state’s consumer and investor protection statute. House Rule X establishes standing committees. Standing committee jurisdiction concerns matters related to federal agencies, application of federal law, implementation of federally-funded programs, and tax and economic implications of federal policies. The standing committees have general oversight responsibilities to assist the House in its evaluation of the application of federal laws; “conditions and circumstances” that “may indicate the necessity or desirability of enacting new or additional legislation”; formulation of federal law; and whether federal programs are being carried out consistent with Congress’s intent. *See* House Rule X, Clause 2(a)-(b) (general oversight responsibilities).

Committee Rule VIII (Oversight and Investigations) provides that the Committee “shall review and study . . . the application . . . of those laws, . . . the subject matter of which is within its jurisdiction” including “all laws, programs, and Government activities relating to nonmilitary research and development” in accordance with House Rule X, and must prepare a plan of its oversight activities. *See* Committee Rule VIII (emphasis supplied); *see also* Plan at 1. In light of the capitalized term “Government” and in light of House Rule X, the term “those laws” in Committee Rule VIII refers to federal laws.

³ *See, e.g.*, Draft Global Climate Science Communications Action Plan (Apr. 3, 1998), *available at* <http://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf>. There are other publicly-available documents which further demonstrate this historical contradiction in positions taken by Exxon internally and externally. *See e.g.*, MA AGO Civil Investigative Demand 2016-EPD-36, issued Apr. 19, 2016, *available at* <http://www.mass.gov/ago/docs/energy-utilities/exxon/ma-exxon-cid-.pdf>

⁴ Rules of the House of Representatives, 114th Cong. (Jan. 6, 2015), *available at* <http://clerk.house.gov/legislative/house-rules.pdf>

⁵ Rules of the Science, Space, and Technology Committee, 114th Cong., *available at* https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Committee%20on%20Science%20Space%20and%20Technology%20Rules%20114th%20Congress%20v2_0.pdf

⁶ Science, Space, and Technology Committee Oversight Plan for 114th Congress, *available at* <https://science.house.gov/sites/republicans.science.house.gov/files/documents/SST%20Oversight%20Plan%20for%20the%20114th%20Congress.pdf>

Similarly, the Plan prepared by the Committee focuses on oversight of federal agencies, with a key goal of eliminating “waste, fraud, and abuse.” No provision of the Plan discusses a need or plan to investigate any state activities, and no such investigation would aid the Committee in fulfilling its charge pursuant to House Rule X. While the Plan suggests that the Committee will engage in oversight efforts in connection with “scientific integrity,” it is limited to oversight of federal agencies. *See, e.g.*, Plan at 9 (the Committee will continue to “collect and examine allegations of intimidation of science specialists in federal agencies, suppression or revisions of scientific findings, and mischaracterizations of scientific findings because of political or other pressures”) and *id.*, (the Committee will develop and implement “scientific integrity principles within the Executive Branch.”) Read in the context of the overall Plan, it is obvious the Committee’s focus is on and limited to scientific findings made or funded by federal government agencies, not by private corporations, such as Exxon.

As we previously conveyed in our letter of June 2, Congress’s power may not be used to investigate matters “unrelated to a valid legislative purpose.” *Quinn v. U.S.*, 75 S. Ct. 668, 672 (1955). The MA AGO investigation is unrelated to a valid federal legislative purpose. *See New York v. U.S.* 505 U.S. 144, 162 (1992) (Constitution does not “confer upon Congress the ability to require the States to govern according to Congress’ instructions”) and therefore, may not be the subject of the exercise of Congress’s power.

None of the cases cited in your July Letter suggests a different result with respect to MA AGO’s right under Massachusetts law to investigate possible violations of a state statute protecting consumers and investors without Congressional interference. *In the Matter of the Special April 1977 Grand Jury* concerned a federal grand jury subpoena issued to a state attorney general concerning potential criminal law violations by him personally, and specifically did not involve an investigation “into the affairs of the State of Illinois.” 581 F.2d 589, 592 (7th Cir. 1978). *Freilich* concerned a claim that a federal statutory reporting requirement compelled states to implement a federal regulatory program and therefore amounted to unconstitutional “commandeering” under *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981). *See Freilich v. Bd. of Directors of Upper Chesapeake Health, Inc.*, 142 F.Supp. 2d 679, 696-97 (D. Md. 2001) (citing *Hodel*, at 288). *Michigan Department of Community Health* involved a federal administrative subpoena issued by the Drug Enforcement Administration to a state agency where there was a clear nexus between the federal investigation and enforcement of a federal law. *See U.S. v. Mich. Dep’t of Cmty. Health*, No. 1:10-mc-109, 2011 U.S. Dist. LEXIS 59445 (W.D. Mich. June 3, 2011). Even there, the court denied the DEA’s petition to enforce its subpoena with respect to certain records in the state agency’s possession. *Id.* at *41. Put simply, none of the cases which you have cited provides that a Congressional committee can force a state Attorney General to disclose the substance or results of an official investigation into possible violations of state law by a private company.

We note that on June 23, 2016, Ranking Committee Member Eddie Bernice Johnson wrote you that your requests for information about state AGO investigations into Exxon “are an illegitimate exercise of Congressional oversight power,” and she provided a detailed legal explanation as to why. In addition to the arguments which we have made and the authorities which we have cited in our responsive letters to you as grounds for our declination to provide documents about our investigation, we refer you again to Rep. Johnson’s letter attached hereto.

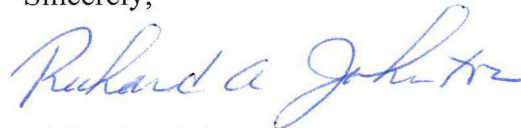
July 13, 2016

Page 4

Furthermore, as you know, Exxon has challenged, in Massachusetts state court and Texas federal district court, the civil investigative demand MA AGO served upon the company, and Exxon has not yet produced any documents to MA AGO. Thus the vast majority of existing documents sought by the Committee and in MA AGO's possession constitutes core attorney work product, attorney-client communications, deliberative process documents and other privileged materials that are protected from disclosure.

In response to your various letters, MA AGO continues respectfully to decline to provide the requested materials to the Committee. As we indicated in a call with your staff today, we are willing to confer by telephone with you or your staff, provided that Representative Eddie Bernice Johnson, Ranking Member of the Committee, and/or her staff, are invited and permitted to participate in any discussions between our offices.

Sincerely,



Richard A. Johnston
Chief Legal Counsel

Cc: Honorable Eddie Bernice Johnson, Ranking Member, Science, Space and Technology Committee

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

2321 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6301

(202) 225-6371
www.science.house.gov

June 23, 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith,

On May 18, 2016, you wrote to 17 state and territorial attorneys general and 8 non-governmental organizations (NGOs) demanding documents related to possible investigations into fossil fuel industry fraud regarding climate change.¹ On June 17, 2016, after receiving what were presumably unsatisfactory responses from these attorneys general and NGOs, you sent a second round of demands to these same groups. These demands are an illegitimate exercise of Congressional oversight power, and I urge you to immediately cease this abuse of authority.

In a Congress in which the Committee on Science, Space, and Technology's oversight powers have been repeatedly abused, this latest action stands apart. In addition to mischaracterizing innumerable facts, laws, and legal precedents surrounding this situation, the May 18 and June 17 letters have now led the Committee on Science, Space, and Technology to the precipice of a Constitutional crisis. Never in the history of this formerly esteemed Committee has oversight been carried out with such open disregard for truth, fairness, and the rule of law.

The state and territorial attorneys general, representatives for the targeted NGOs, and 43 Democratic Members of Congress² have already written to you to patiently explain the

¹ Attorneys General from: California, Connecticut, District of Columbia, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Mexico, New York, Oregon, Rhode Island, U.S. Virgin Islands, Virginia, Vermont, Washington. NGOs: 350.org, Climate Accountability Institute, The Climate Reality Project, Greenpeace, Pawa Law Group, P.C., The Rockefeller Brothers Fund, Rockefeller Family Fund, Union of Concerned Scientists. All Committee letters and responses are available at: <http://democrats.science.house.gov/letter/document-requests-sent-state-attorneys-general-and-environmental-groups>

² Letter from Hon. Donald S. Beyer Jr. to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (June 2, 2016); Letter from Hon. Paul D. Tonko to Hon. Lamar Smith, Chairman, H. Comm. On

illegitimacy of your “investigation.” Since you have apparently rejected their responses, I will endeavor to highlight once more the factual and legal shortcomings of your demand letters.

The Majority’s Letters Mischaracterize State Attorney General Actions

Both your May 18 and June 17 letters refer to a “coordinated attempt to attack First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution...”³ In laying out your factual case, you state:

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by you and other members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics taken in close coordination with certain special interest groups and trial attorneys may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.⁴

Ignoring for a moment the grossly inappropriate and unsubstantiated innuendo contained in these statements, I would like to highlight the factual deficiencies in your claims.

First of all, it is important to accurately report on the actions of the state and territorial attorneys general. As the New York Attorney General’s Office noted in their response to your May 18 letter, they are investigating “whether ExxonMobil Corporation violated New York’s securities, business and consumer fraud laws by making false or misleading statements to investors and consumers relating to climate change driven risks and their impact on Exxon’s business.”⁵ In other words, these state attorneys general are investigating potential fraud under state law.

The Commonwealth of Massachusetts Office of the Attorney General laid out the factual basis for these fraud investigations in some detail in its June 2, 2016, response letter, stating:

Publicly available Exxon documents establish that at least by July 1977, Exxon’s own scientists informed Exxon management that the release of carbon dioxide from burning fossil fuels was causing global temperatures to increase, a situation that would, the scientists warned Exxon management, give rise to “the need for hard decisions regarding changes in energy strategies.” Publicly available Exxon

Science, Space, & Tech. (June 10, 2016); Letter from Hon. Ted W. Lieu to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (June 9, 2016).

³ Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, May 18, 2016, pg. 4.

⁴ *Id.*

⁵ Letter from Leslie B. Dubeck, Counsel, Office of the New York Attorney General to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., May 26, 2016, pg. 1.

documents also confirm that Exxon's scientists were, in the early 1980s, predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a 2 to 3 degree Celsius increase could lead to melting of polar ice, rising sea levels and "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration." Exxon's scientists counseled Exxon management that it would be possible to "avoid the problem by sharply curtailing the use of fossil fuels." One Exxon scientist warned in no uncertain terms that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)." Despite Exxon's early understanding of the science of climate change and the threats posed by climate change to human populations and global ecosystems, other publically available documents suggest that Exxon may have participated in later self-interested efforts to mislead the public, including investors and consumers, with respect to the impacts of climate change in order to defeat governmental policy measures designed to address the threat of climate change.⁶

These accusations were widely reported in the press in 2015.⁷ Moreover, these accusations should have come as no surprise to you or your staff as they formed the same factual basis that compelled 20 scientists to write to the U.S. Attorney General to suggest that Racketeer Influenced and Corrupt Organizations Act (RICO) investigations might be warranted against fossil fuels companies that potentially knowingly defrauded the American public. You previously instigated an investigation against one of those scientists for exercising his constitutionally protected First Amendment right to petition the government.⁸ This is the first of many instances where the irony of your current accusations becomes evident.

Multiple state attorneys general also pointed out the legal fallacy of your accusations of First Amendment violations. For instance, the Oregon Attorney General's Office pointed out that:

[y]our letter also incorrectly accuses this office of investigating entities based on their speech or beliefs concerning climate change. Please be advised this office

⁶ Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 2, 2016, pgs. 1-2 (citations omitted).

⁷ See, e.g., Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago: A new investigation shows the oil company understood the science before it became a public issue and spent millions to promote misinformation*, Scientific American, Oct. 26, 2015, available at <http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/> And, Neela Banerjee, Lisa Song, and David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, Inside Climate News, Sep. 16, 2015, available at <http://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming>

⁸ Press Release, H. Comm. On Science, Space, and Tech., "Smith: Taxpayer-Funded Climate Org Allegedly Seeks Criminal Penalties for Skeptics," Oct. 1, 2015, available at <https://science.house.gov/news/press-releases/smith-taxpayer-funded-climate-org-allegedly-seeks-criminal-penalties-skeptics>

will not be dissuaded from considering whether state laws, including consumer protections laws, may provide redress against knowingly false commercial speech concerning global warming. The First Amendment simply does not protect fraudulent speech. *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (“This government power [to protect people against fraud] has always been recognized in this country and is firmly established.”).⁹

The notion that fraudulent speech is not protected by the U.S. Constitution would seem to be beyond dispute. Nonetheless, despite the state attorneys general pointing very specifically to the factual and legal deficiencies of your accusations, your June 17, 2016, letters persist in leveling these baseless accusations against the attorneys general, stating:

This statement suggests that your office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, you are saying that if your office disagrees with whether fossil fuel companies’ scientists were conducting and using the “best science,” the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists’ First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.¹⁰

Nothing in that assertion bears any relationship to the statements of the various state attorneys general. These state investigations have nothing to do with deciding “what science is valid and what science is invalid.” The investigations, as multiple attorneys general pointed out, are concerned with whether certain fossil fuel companies believed or knew one set of facts, and yet publically disseminated another in order to enrich themselves at others expense. These allegations constitute textbook fraud.¹¹

These investigations have a well-known precedent. In the 1990s, various state attorneys general sued tobacco companies for the state-borne healthcare costs associated with tobacco use. One of the bases for the claims was that the tobacco industry engaged in a conspiracy to conceal and misrepresent “the addictive and harmful nature of tobacco/nicotine.”¹² These suits resulted in the Master Settlement Agreement in 1998, where the four largest tobacco companies settled all pending state claims related to the healthcare costs related to tobacco.¹³ The Federal Government soon followed suit. In

⁹ Letter from Frederick M. Boss, Deputy Attorney General, Oregon Department of Justice letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 1, 2016, pg. 2.

¹⁰ Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, June 17, 2016, pg. 3.

¹¹ Black’s Law Dictionary defines fraud as: “A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” Black’s Law Dictionary 670 (7th ed. 1999).

¹² Civil Action Complaint, Commonwealth of Pennsylvania, *Commonwealth of Pennsylvania v. Philip Morris, Inc.*, pg. 10, April 1997.

¹³ Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview*, available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf>

1999 the U.S. Department of Justice brought RICO Act actions against the largest tobacco companies.¹⁴ The parallels of that case with the current state attorneys general investigations cannot be overstated. In *U.S. v. Philip Morris*, the government alleged that the tobacco industry internally knew of the health risks of their products for decades, yet engaged in a well-financed conspiracy to deceive the American public about the health effects of tobacco. This included financing scientific studies questioning the links between tobacco and health problems and the creation of front organizations to hide links to the tobacco financing. The U.S. government won the case, and the decision was upheld on appeal.¹⁵

I have repeatedly criticized your tendency to rely upon former tobacco industry-funded scientists, consultants, and public relations firms in past Committee investigations and hearings.¹⁶ Given your past reliance on such “experts”, it’s perhaps unsurprising that you are now questioning these legitimate state attorneys general investigations of potential fraudulent actions against the American people.

The Majority’s Investigation of State Attorneys General is Unconstitutional

A Congressional document demand to a state attorney general is exceptionally unusual. Such a demand from the Science Committee is unheard of.

State attorney generals are elected officials of sovereign state governments. They are not employees of the Federal Government, nor are they subject to federal oversight or control, including by the United States Congress.

You note in your June 17 letter that Congress’s oversight powers are well established and broad, citing such authorities as the “U.S. Constitution, Art. 1; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep’t of Justice’s handling of the Teapot Dome scandal); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975)(U.S. Senate committee investigating the activities of U.S. Servicemen’s Fund and their effect on the morale of members of the Armed Services.)”¹⁷ The existence of Congress’s oversight powers goes without saying, and is a well-established principle of law. You go on to make an important point about the source of Congressional oversight power, stating:

¹⁴ U.S. Department of Justice, *Litigation Against Tobacco Companies Home*, <https://www.justice.gov/civil/case-4>

¹⁵ *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

¹⁶ See, e.g., Letter from Hon. Eddie Bernice Johnson, Ranking Member, to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., August 6, 2013, available at <http://democrats.science.house.gov/sites/democrats.science.house.gov/files/Letter.pdf>

And, *Ensuring Open Science at EPA: Hearing Before the Subcomm. On the Environment of the H. Comm. On Science, Space, & Tech.*, 113th Cong. 16-17 (2014) (statement of Hon. Eddie Bernice Johnson, Ranking Member).

¹⁷ Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, June 17, 2016, pg. 1 (note).

Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."¹⁸

This analysis is particularly relevant to the "investigation" at hand. Congress's broad oversight powers are directly tied to our power to legislate. Thus, by the authority you have relied upon in your own letters, Congress has no legal oversight authority over issues or actions that fall outside Congress's legislative authority.

As nearly every state attorney general who responded to your May 18 letters indicated, state government law enforcement officials acting in their official capacities are not within Congress' legislative control. For instance, in its May 27, 2016, response to your demand letter, the California Attorney General's Office noted:

[w]e do not believe it is within the jurisdiction of Congress to demand documents from a state law enforcement official such as the California Attorney General. Although Congress' investigative jurisdiction is broad, that is because it tracks Congress' power to legislate and appropriate concerning federal matters. But the power to investigate does not extend beyond those matters. (See, e.g. *Barenblatt v. U.S.* (1959) 360 U.S. 109, 111 ["Congress may only investigate into those areas in which it may potentially legislate or appropriate"].) Investigations and prosecutions of state law enforcement actions by state attorneys general are not federal matters. To the contrary, under the Constitution and laws of the United States, such activities partake of police powers reserved to the states, and are not subject to federal interference. (See, e.g., *New York v. U.S.* (1992) 505 U.S. 144, 162 ["the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"].)¹⁹

As a reminder, the Tenth Amendment to the U.S. Constitution reads as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.²⁰

Implicit in the powers reserved to the states under the Tenth Amendment are state police powers. In case after case, the courts have struck down Congressional attempts to regulate state government activities, including exercise of their police powers.²¹ It is clear that Congress has no legislative authority to dictate the actions of state attorneys general.

¹⁸ *Id.* at 1, citing *Eastland v. United States Servicemen's Fund*, 431 U.S. 491, 504 n. 15 (1975) (quoting *Barenblatt v. United States* 360 U.S. 109, 111 (1959)).

¹⁹ Letter from Martin Goyette, Senior Assistant Attorney General, State of California Department of Justice letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., May 27, 2016, pg. 2.

²⁰ U.S. Const. amend. X.

²¹ See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (striking down a gun-free school zone provision); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating a provision of the Violence Against Women Act); and, *United States v. Constantine*, 296 U.S. 287 (1935) (invalidating an excise tax imposed on violators of local law).

Even if Congress did have some inroad into regulation of state police powers, such a legislative authority would not rest with the Committee on Science, Space, and Technology. Our oversight jurisdiction (which is broader than our actual legislative jurisdiction) encompasses “laws, programs, and Government activities relating to nonmilitary research and development.”²² Note that the capitalization of the word “Government” gives the word the meaning “Federal Government.” Nowhere in our jurisdiction - legislative or oversight - can one find justification for our Committee’s oversight of state police powers. The elected officials that serve as state attorney generals are answerable to their respective constituents and the courts, but not to the U.S. Congress. As my colleagues from Virginia, the District of Columbia, and Maryland pointed out:

States’ rights long being a central pillar of conservative philosophy, the Letter’s effort to meddle directly in the self-governance and prosecutorial discretion of 17 U.S. state and territories is not lacking for irony.²³

The Majority’s Investigation of NGOs’ Exercise of Free Speech is Unconstitutional

The First Amendment to the U.S. Constitution reads, in whole:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.²⁴

While the First Amendment prohibits government interference with the free speech rights of individuals, that prohibition is not absolute. One relevant example is that fraudulent speech is not protected by the First Amendment.²⁵ Moreover, the First amendment does not provide an absolute shield against legitimate Congressional oversight. In that regard, you state in your June 17 letter to the various NGOs:

In *Barenblatt v. United States*, the Supreme Court stated “where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.” Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held “the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness.” These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving

²² House Rule X(3)(k).

²³ Letter from Hon. Donald S. Beyer Jr., to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 2, 2016, pg. 2.

²⁴ U.S. Const. amend. I.

²⁵ See, *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003).

organizations similar to yours. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.²⁶

Since this is the only real legal authority you cite as justification for investigating Americans' constitutionally protected speech, I think it is worth scrutinizing.

First, I would like to point out the context of these cases. Both of these cases involved the notorious House Un-American Activities Committee (HUAC), and investigations that committee conducted into the private lives of American citizens. If ever there was an example of a "witch hunt" in the history of the United States Congress, the HUAC investigations best fit the bill. For that reason, it is more than a little disconcerting that you think those cases' fact patterns so closely resemble your own investigation.

I would also like to point to an error in your statement. You state that both of these cases are important because "they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to yours."²⁷ This statement is false. In *Watkins v. United States*, the Supreme Court overturned a conviction under 2 U.S.C. 192 against an individual who refused to provide certain testimony to HUAC.²⁸ The *Watkins* Court held that the conviction was invalid under the Due Process Clause of the Fifth Amendment.

Rather than supporting the legal grounds of your investigation, the *Watkins* decision is actually an indictment against it. The *Watkins* court noted that:

The Court recognized the restraints of the Bill of Rights upon congressional investigations in *United States v. Rumely*, 345 U.S. 41... It was concluded that, when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter.²⁹

The *Watkins* Court went on to state:

Kilbourn v. Thompson teaches that such an investigation into individual affairs is invalid if unrelated to any legislative purpose. That is beyond the powers conferred upon the Congress in the Constitution. *United States v. Rumely* makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights.³⁰

As I noted earlier, it is clear that our Committee doesn't even have a semblance of a legislative purpose that would justify this investigation. It is inconceivable that our

²⁶ Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Richard Heede, Climate Accountability Institute, June 17, 2016, pg. 4 (citations omitted).

²⁷ *Id.* emphasis added.

²⁸ *Watkins v. United States*, 354 U.S. 178 (1957).

²⁹ *Id.* at 198.

³⁰ *Id.*

Committee, based on our House Rule X jurisdiction, could legislate on any topic related to state law enforcement, private speech, private citizens exercising their First Amendment right to petition their government, or fraud. In fact, the only plausible legislative action that Congress as a whole could take in this instance would be in altering Federal fraud and RICO Act statutes to inappropriately help big oil avoid potential liability. However, even in that instance, such a bill would not come anywhere near the jurisdiction of the Committee on Science, Space, and Technology.

Your June 17 letter claims legislative jurisdiction over this “investigation” because we oversee \$31.8 billion in annual federal government research expenditures. Somehow you link the Committee’s specific jurisdiction to fund federal scientific research to being the science police for the United States. Even if we had such expansive jurisdiction (and we do not), it would still fall far short of having jurisdiction over state police powers or fraud laws, which are the true subject matters of this “investigation.” Thus, based on the legal authorities you yourself have cited, this “investigation” violates the Constitution.

This “Investigation” is Illegitimate

In the foregoing, I have pointed out the many factual and legal shortcomings and mischaracterizations contained in your May 18 and June 17 letters. Sadly, despite having these shortcomings previously noted to you, this misguided effort is continuing. In reality, this overreach is simply the culmination of three years of “oversight” run amuck. When you assumed the Chairmanship of this Committee, Members were promised an ambitious and bipartisan legislative agenda. That did not materialize. What has taken its place is a series of increasingly disturbing “fishing expeditions” masquerading as oversight.

I noted your May and June letters contain a great deal of unintentional irony. I’ll note one more example. In your June 17 letter, as a justification for your current investigation you say:

[C]ongress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change.³¹

Here, you could just as well be referring to your own misguided investigation into eminent NOAA climate scientists last year. In that “investigation” you actually subpoenaed NOAA Administrator, former astronaut, and authentic American hero Dr. Kathy Sullivan in an attempt to obtain the email communications of world renowned NOAA climate scientists.³² What was the purpose of this investigation? It was simply a fishing expedition against scientists who reached a scientific conclusion with which you

³¹ Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Richard Heede, Climate Accountability Institute, June 17, 2016, pg. 3.

³² Committee on Science, Space, and Technology Subpoena Duces Tecum issued by Hon. Lamar Smith, Chairman, to Hon. Kathryn Sullivan, 114th Cong., October 13, 2015.

personally disagreed. In the end, your investigation, like so many recent Science Committee investigations, found nothing.

I have served on the Committee on Science for more than two decades, and during that time this Committee has accomplished great things. We've overseen the completion of the International Space Station and the sequencing of the human genome, and we've undertaken serious investigations, ranging from the Space Shuttle Challenger accident to the environmental crimes at the Rocky Flats nuclear site. However, lately the Committee on Science has seemed more like a Committee on Harassment. The Committee's prolific, aimless, and jurisdictionally questionable oversight activities have grown increasingly mean-spirited and meaningless. They frequently appear to be designed primarily to generate press releases. However, none of these recent investigations has rushed head long into a serious Constitutional crisis like we are about to face. We are moving into dangerous and uncharted territory.

At the beginning of this Congress I swore an oath to uphold the Constitution. I take that oath seriously. As evidenced by the letters you have received from Democratic Members from New York, California, Virginia, Maryland, and the District of Columbia, the Democratic Members of the Committee also take this oath seriously. We will not sit idly by while the powers of the Committee are used to trample on the Bill of Rights of the U.S. Constitution. I implore you to cease your current actions before they do lasting institutional damage to the Committee on Science, Space, and Technology and the Congress as a whole.

Thank you for your attention to this matter.

Sincerely,



EDDIE BERNICE JOHNSON
Ranking Member
Committee on Science, Space, and Technology

Cc: Members of the Committee on Science, Space, and Technology

California, Connecticut, District of Columbia, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Mexico, New York, Oregon, Rhode Island, U.S. Virgin Islands, Virginia, Vermont, Washington Attorneys General and 350.org, Climate Accountability Institute, The Climate Reality Project, Greenpeace, Pawa Law Group, P.C., The Rockefeller Brothers Fund, Rockefeller Family Fund, Union of Concerned Scientists