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

MAURA HEALEY
ATTORNEY GENERAL

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

July 26, 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 am Chief Legal Counsel for Massachusetts Attorney General Maura Healey, and I write in response to the July 13, 2016, subpoena issued to her by the House Committee on Science, Space, and Technology (the "Committee"). The subpoena is sweeping in its scope and completely unprecedented in its intended interference with an ongoing regulatory investigation by a state's attorney general. The subpoena seeks "all documents and communications between any officer or employee of the Office of the Attorney General of Massachusetts" (the "Office") and nine non-profit organizations and other groups, "any other state attorney general office," and "any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President," "referring or relating to the [Office's] investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change."[1]

Attorney General Healey hereby objects to the subpoena as an unconstitutional and unwarranted interference with a legitimate ongoing state investigation. The subpoena is a dangerous overreach by the Committee and an affront to states' rights. The Committee's majority members (the "Majority") arranged for the subpoena in disregard of the detailed letters from Attorney General Healey and the Ranking Member of the Committee setting forth why the Committee has no legal authority to tamper with a state attorney general's investigation into possible violations of state law by Exxon Mobil Corporation ("Exxon"). The Majority also disregarded Attorney General Healey's objection that most of the documents being requested are either attorney-client privileged documents or protected from disclosure as attorney work product. The Majority delivered the subpoena without even acknowledging Attorney General Healey's offers to discuss her objections in a conference call with the Chairman and/or Committee staff. This sequence of events suggests that the Majority had no intention of considering the substance of Attorney General Healey's objections.[2]

---

[1] Subpoena, July 13, 2016, pg. 2.

[2] We remain willing to confer by telephone with you as Chairman and/or your staff to discuss Attorney General Healey's objections to the subpoena, as outlined in this letter, provided that the Ranking Member and/or her staff are invited and permitted to participate.

You, Mr. Chairman, yourself reportedly have conceded that the subpoena of a state attorney general is unprecedented in the history of Congress.[3] None of the cases cited by the Committee in any of its correspondence with Attorney General Healey provides authority for the proposition that a Congressional committee can subpoena a sitting state attorney general about a pending investigation by his or her office. Congressional and Committee rules provide no such explicit power, the courts have never recognized such power, and the few legal decisions that the Majority's letters mention relate to quite different situations and therefore provide no authority for the Committee's subpoena. Because the subpoena is unconstitutional and otherwise unlawful, Attorney General Healey respectfully objects to its issuance and declines to produce to the Committee documents related to the Office's ongoing investigation of Exxon.

BACKGROUND FACTS

The Attorney General Is the Chief Law Enforcement Officer in Massachusetts and Has Broad Powers of Investigation.

Attorney General Healey is an elected constitutional officer in the state of Massachusetts and is the highest ranking law enforcement official. Mass. Gen. L. c. 12 § 3. The Attorney General determines legal policy for the state and brings legal actions on behalf of the state. *Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977); Mass. Gen. L. c. 12 § 5. Attorney General Healey also has various enumerated statutory powers, including the prevention or remedy of damage to the environment, Mass. Gen. L. c. 12 § 11D, and enforcement of the state's consumer protection law, Chapter 93A of the Massachusetts General Laws ("Chapter 93A"), which proscribes unfair and deceptive practices in the conduct of business. In Massachusetts the Attorney General is authorized to protect investors, consumers, and other persons in the state against unfair and deceptive business practices through such mechanisms as promulgating regulations, conducting investigations through civil investigative demands ("CID"), and instituting litigation.[4]

CIDs under Chapter 93A are a crucial tool for gaining information regarding whether an entity under investigation has violated the statute. Since the beginning of 2013, the Office has issued several hundred CIDs pursuant to Chapter 93A to or regarding companies or individuals suspected of committing unfair and deceptive business practices or other illegal conduct. These Chapter 93A investigations have addressed, among other things, foreclosure practices of banks, business practices in the pharmaceutical industry, and marketing of other products and services sold in the state. The Office issued some CIDs as part of joint investigations with other regulators: about 25 CIDs were issued in connection with joint investigations with other states, about 30 were issued in connection with joint investigations involving the federal government, and several involved joint investigations with other states as well as the federal government.

Attorney General Healey's office routinely issues CIDs to large publicly traded companies with business dealings in the state but with principal places of business outside of Massachusetts. Examples since 2013 which have become public through settlement with the target companies

---

[3] Amanda Reilly, *Smith subpoenas AGs, enviro groups in escalating fight*, Energy & Environment Daily, July 14, 2016, http://www.eenews.net/eedaily/2016/07/14/stories/1060040258.

[4] Mass. Gen. L. c. 93 §§ 8, 9; Mass. Gen. L. c. 93A §§ 4, 6.

include: a joint investigation with federal authorities (targeting Oppenheimer[5]); three investigations in which the Office worked with the U.S. government and a small group of states (Citigroup,[6] JPMorgan,[7] and Chase Bank[8]); three which the Office undertook with a large multistate enforcement group (Ocwen,[9] Moneygram,[10] and HSBC[11]); and one investigation with one other state attorney general as a partner (LPL Financial[12]). A very recent, visible example is the Office's 2016 participation in a joint multistate investigation into Volkswagen's "clean diesel" deception, which resulted in a partial settlement providing Massachusetts with nearly $100 million in Chapter 93A civil penalties and environmental mitigation payments.[13]

Nearly every other state attorney general has CID or similar investigative authority.[14]

The Office's Longstanding Efforts on Climate Change.

---

[5] Press Release, Commonwealth of Massachusetts Office of the Attorney General, Oppenheimer to Pay $2.8 Million to Settle Allegations of Misrepresenting Performance of Fund to Investors (Mar. 11, 2013), http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-03-11-oppenheimer-settlement.html.

[6] Press Release, Commonwealth of Massachusetts Office of the Attorney General, CitiGroup to Pay $7 Billion in Federal-State Deal Over Mortgage Backed Securities (July 14, 2014), http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-07-14-citigroup-settlement.html.

[7] Press Release, Commonwealth of Massachusetts Office of the Attorney General, JPMorgan to Pay $13 Billion in Federal-State Deal Over Mortgage Backed Securities (Nov. 19, 2013), http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-11-19-jpmorgan-settlement.html.

[8] Press Release, Commonwealth of Massachusetts Office of the Attorney General, Chase Bank to Pay $136 Million in Nationwide Settlement Over Unlawful Credit Card Debt Collection Practices (July 8, 2015), http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-07-08-chase-settlement.html.

[9] Press Release, Commonwealth of Massachusetts Office of the Attorney General, Ocwen to Provide $2.1 Billion in Relief to Homeowners in State-Federal Settlement Over Loan Servicing Misconduct (Dec. 19, 2013), http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-12-19-ocwen-settlement.html.

[10] Press Release, Commonwealth of Massachusetts Office of the Attorney General, MoneyGram to Pay $13 Million in Multistate Settlement Over Wire Transfer Scams, AG Healey Offers Tips for Consumers (Feb. 11, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2016/2016-02-11-moneygram-settlement.html.

[11] Press Release, Commonwealth of Massachusetts Office of the Attorney General, $470 Million State-Federal Settlement Reached with HSBC Over Unlawful Foreclosures, Loan Servicing (Feb. 5, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2016/470-million-state-federal-settlement-reached-with-hsbc-over-unlawful-foreclosures-loan-servicing.html.

[12] Press Release, Commonwealth of Massachusetts Office of the Attorney General, Boston Firm to Pay $1.8 Million for Selling Unsuitable Investments to Consumers (Sept. 23, 2015), http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-09-23-lpl-financial-aod.html.

[13] Press Release, Volkswagen of America, Inc., Volkswagen Reaches Settlement Agreement with U.S. Federal Regulators, Private Plaintiffs and 44 U.S. States on TDI Diesel Engine Vehicles (June 28, 2016), http://media.vw.com/release/1214/. On July 19, 2016, Massachusetts announced the filing of an additional state suit against Volkswagen for matters not covered under the settlement. Press Release, N.Y. State Office of the Attorney General, NY A.G. Schneiderman, Massachusetts A.G. Healey, Maryland A.G. Frosh Announce Suits Against Volkswagen, Audi And Porsche Alleging They Knowingly Sold Over 53,000 Illegally Polluting Cars And SUVs, Violating State Environmental Laws (July 19, 2016), http://www.ag.ny.gov/press-release/ny-ag-schneiderman-massachusetts-ag-healey-maryland-ag-frosh-announce-suits-against.

[14] *See, e.g.*, Fla. Stat. Ann. Fla. Stat. Ann. § 542.28 (West 2016); 740 Ill. Comp. Stat. Ann. 10/7.2 (West 2016); Minn. Stat. Ann. § 8.31 (West 2016); N.Y. Exec. Law § 63 (McKinney 2016); N.Y. Gen. Bus. Law §§ 343, 352 (McKinney 2016); Ohio Rev. Code Ann §§ 1331.16, 1345.06 (West 2016); S.C. Code Ann. §39-5-70 (2016); Tex. Bus. & Com. Code Ann. §15.10 (West 2015); Wash. Rev. Code Ann. §19.86.110 (West 2016).

For years the Office has been a leader in addressing the threat of climate change, often in collaboration with other state attorneys general. The Office led the federal litigation that resulted in the United States Supreme Court's determination in *Massachusetts v. EPA* that greenhouse gases are pollutants warranting regulation under the federal Clean Air Act. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). In the intervening decade, Massachusetts's injuries from climate change—and the scientific predictions of future injuries—have only grown more devastating.[15] In subsequent litigation, the Office has worked closely with other states to advocate for and defend federal findings and regulations addressing climate change under the Clean Air Act, including the EPA's Clean Power Plan regulations to reduce power plant greenhouse gas emissions and the EPA's recent regulations regarding methane emissions from oil and gas facilities. Massachusetts has itself enacted laws that require reductions in greenhouse gas emissions and encourage strategies to reduce reliance on fossil fuels, including the Global Warming Solutions Act, Mass. Gen. L. c. 21N, and the Green Communities Act, 2008 Mass. Legis. Serv. Ch. 169 (S.B. 2768) (West).

We understand, that you, Mr. Chairman, have raised questions about the causes of climate change and the extent to which human activity versus other factors such as "natural cycles" and "sun spots" contribute to this problem.[16] Nevertheless, as state and federal law recognize, the overwhelming scientific evidence indicates that human activity, and the burning of fossil fuels in particular, are key drivers of climate change. *See, e.g.*, Intergovernmental Panel on Climate Change, 2014 Synthesis Report, Summary for Policymakers at 2-5 ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on humans and natural systems. . . . Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and oceans have warmed, the amounts of snow and ice have diminished, and sea level has risen. . . . Emissions of CO2 from fossil fuel combustion and industrial processes contributed about 78% of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010. Globally, economic and population growth continued to be the most important drivers of increases in CO2 emissions from fossil fuel combustion.") (internal citations omitted).[17]

The Investigation into Exxon.

Exxon is the largest publicly-traded oil and gas corporation in the world.[18] In 2015, *The Los Angeles Times,* in cooperation with the Columbia University School of Journalism[19] and the news

---

[15] *See, e.g.*, Jess Bigood, *At a Cape Cod Landmark, a Strategic Retreat From the Ocean*, N. Y. Times, July 6, 2016, http://www.nytimes.com/2016/07/07/us/at-a-cape-cod-landmark-a-strategic-retreat-from-the-ocean.html?_r=3 ("managed retreat" implemented on Cape Cod beaches); David Abel, *Climate change could be even worse for Boston than previously thought*, Boston Globe, June 22, 2016, https://www.bostonglobe.com/metro/2016/06/22/climate-change-could-have-even-worse-impact-boston-than-previously-expected/S6hZ4nDPeUWNyTsx6ZckuL/story.html.

[16] Bill Lambrecht, *Smith tries to take NASA out of climate research*, San Antonio Express News, May 16, 2015, http://www.expressnews.com/news/local/article/Smith-tries-to-take-NASA-out-of-climate-research-6268551.php.

[17] IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp.

[18] ExxonMobil, *About us*, http://corporate.exxonmobil.com/en/company/about-us (last visited July 25, 2016).

[19] Sara Jerving, Katie Jennings, Masako Melissa Hirsch, and Susanne Rust, *What Exxon knew about the Earth's melting Arctic*, Los Angeles Times, Oct. 9, 2015, http://graphics.latimes.com/exxon-arctic/.

organization InsideClimate News,[20] published a series of investigative reports and internal Exxon and other documents establishing that Exxon had a robust climate change scientific research program in the late 1970s into the 1980s that documented the serious potential for climate change, the likely contribution of fossil fuels (the company's chief product) to climate change, and the risks of climate change to the world's natural and economic systems, including Exxon's own assets and businesses.[21] 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."[22] 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, "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration."[23] Exxon's scientists advised Exxon management that it would be possible to "avoid the problem by sharply curtailing the use of fossil fuels."[24] 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)."[25]

Exxon's scientists understood that doubling of atmospheric carbon dioxide would occur "sometime in the latter half of the 21st century," and that "CO2-induced climate changes should be observable well before doubling."[26] Exxon's own scientists agreed with the scientific consensus that "a doubling of atmospheric CO2 from its pre-industrial revolution value would result in an average global temperature rise of (3.0 ± 1.5) [degrees Celsius]."[27] Exxon also knew what that would mean for humanity and ecological systems: "There is unanimous agreement in the scientific community that a temperature increase of this magnitude would bring about significant changes in the earth's climate, including rainfall distribution and alternations in the biosphere."[28] Nevertheless, even as of

---

[20] https://insideclimatenews.org/content/Exxon-The-Road-Not-Taken; InsideClimate News was nominated for a Pulitzer Prize for its work on the Exxon investigation and the Road Not Taken Series. *See* https://insideclimatenews.org/news/18042016/insideclimate-news-pulitzer-prize-finalist-exxon-investigation.

[21] According to InsideClimate News, its "reporters interviewed former Exxon employees, scientists, and federal officials, and consulted hundreds of pages of internal Exxon documents, many of them written between 1977 and 1986." Neela Banerjee, et al., *Exxon: The Road Not Taken* (InsideClimate News 2015) at 2. InsideClimate News also reviewed "thousands of documents from archives including those held at the University of Texas-Austin, the Massachusetts Institute of Technology and the American Association for the Advancement of Science." *Id.*

[22] 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, http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/.

[23] Henry Shaw, *CO2 Greenhouse and Climate Issues* (March 28, 1984), https://insideclimatenews.org/sites/default/files/documents/Shaw%20Climate%20Presentation%20%281984%29.pdf.

[24] *Id.*

[25] Roger W. Cohen, Interoffice Memorandum to W. Glass (Aug, 18, 1981), http://insideclimatenews.org/sites/default/files/documents/%2522Catastrophic%2522%20Effects%20Letter%20%281981%29.pdf.

[26] Letter from Exxon scientist Roger W. Cohen to A.M. Natkin, Exxon Office of Science and Technology (Sept. 2, 1982), https://insideclimatenews.org/sites/default/files/documents/%2522Consensus%2522%20on%20CO2%20Impacts%20%281982%29.pdf

[27] *Id.*

[28] *Id.*

this year, 2016, Exxon continues to tell its investors that "[w]e are confident that none of our hydrocarbon reserves are now or will become stranded,"[29] and maintains that, "[w]hile most scientists agree climate change poses risks related to extreme weather, sea-level rise, temperature extremes, and precipitation changes, current scientific understanding provides limited guidance on the likelihood, magnitude, or time frame of these events."[30]

Additionally, Exxon made statements in 1980 at an American Petroleum Institute AQ-9 Task Force meeting that demonstrated its knowledge of the fact that as fossil fuels continue to be burned, a "global average 2.5 C rise [is] expected by 2038," which would cause "major economic consequences."[31] They further projected that at a "3% per annum growth rate of CO2, a 2.5 C rise brings world economic growth to a halt in about 2025," and that a "5 C rise" by 2067 will have "globally catastrophic effects."[32] In a 1982 memo to Exxon management, a manager at the Exxon Research and Engineering Company Environmental Affairs Program showed concern and predicted that climate change would cause "disturbances in the existing global water distribution balance" and would have "a dramatic impact on soil moisture, and in turn, on agriculture," stating "there are some potentially catastrophic events that must be considered," including the melting of the Antarctic ice sheet causing a 5 meter sea level rise, and "flooding much of the U.S. East Coast, including the State of Florida and Washington D.C."[33] At an environmental conference presentation in 1984, another Exxon scientist stated "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[34] These statements contrast sharply to statements made by Exxon in 2014 ("[w]e are confident that none of our hydrocarbon reserves are now or will become stranded."[35]) and 2016 ("[o]il will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place."[36]). These recent statements fail to mention any of the previous research, projections, or concerns that were expressed by Exxon's own scientists and disseminated within the company and industry in the 1980s; they instead portray, to a public unaware of this research, a bright future for the Exxon and the oil industry.

---

[29] *Energy and Carbon—Managing the Risks* (Exxon, 2014) at 1.
[30] ExxonMobil website, Meeting global needs—managing climate business risks, *available at* http://corporate.exxonmobil.com/en/current-issues/climate-policy/climate-perspectives/managing-climate-change-business-risks.
[31] Minutes of the Feb. 29, 1980 meeting of the American Petroleum Institute AQ-9 Task Force (of which Exxon is a member) (Mar. 18, 1980), *available at* https://insideclimatenews.org/sites/default/files/documents/AQ-9%20Task%20Force%20Meeting%20%281980%29.pdf.
[32] *Id.*
[33] Memorandum from M.B. Glaser, Manager, Exxon Research and Engineering Company Environmental Affairs Program, to a broad distribution list of Exxon management, attaching a summary of the CO2 "Greenhouse Effect" and CO2 Greenhouse Effect Technical Review (Nov. 12, 1982), available at https://insideclimatenews.org/sites/default/files/documents/1982%20Exxon%20Primer%20on%20CO2%20Greenhouse%20Effect.pdf.
[34] Henry Shaw, "CO2 Greenhouse and Climate Issues" (Mar. 28, 1984), *available at* https://insideclimatenews.org/sites/default/files/documents/Shaw%20Climate%20Presentation%20%281984%29.pdf
[35] Energy and Carbon—Managing the Risks (Exxon, 2014) at 1.
[36] Press Release, ExxonMobil, ExxonMobil's Energy Outlook Projects Energy Demand Increase and Decline in Carbon Intensity (Jan. 25, 2016), http://news.exxonmobil.com/press-release/exxonmobils-energy-outlook-projects-energy-demand-increase-and-decline-carbon-intensit.

Despite its research and knowledge, Exxon appears to have engaged with other fossil fuel interests in a campaign from at least the 1990s onward to prevent government action to reduce greenhouse gas emissions.[37] In 1998, Exxon's Randy Randol participated as a member of the "Global Climate Science Communications Team," which engaged in a concerted effort to challenge the "scientific underpinning of the global climate change theory" in the media, and which took the position that "[i]n fact, it [sic] not known for sure whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it."[38] A draft plan prepared by that team noted that "[u]nless 'climate change' becomes a non-issue, meaning that the Kyoto proposal is defeated and there are no further initiatives to thwart the threat of climate change, there may be no moment when we can declare victory for our efforts."[39]

In addition to undertaking efforts to forestall government action on climate change that would reduce the use of fossil fuel products in the United States, Exxon seemingly failed to disclose its knowledge of climate change threats in a fully candid way to investors in its securities and to consumers to whom it continued to market and sell such products.

Concerns that Exxon has not adequately disclosed climate risk to Massachusetts investors in its securities appear to be reflected in recent actions by Exxon shareholders (including Massachusetts-based shareholders) to compel the company to more fully assess and respond to climate risks. In the past year Exxon shareholders came close to passing resolutions that would have required Exxon to implement "stress tests" to ascertain more specifically the climate-driven risks to Exxon's businesses. As the Wall Street Journal reported, the proposals "drew more support than any contested climate-related votes" in Exxon's history, and indicate that "more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously" the effects on Exxon of a "global weaning from fossil fuels."[40]

Following the publication of the investigative reports and documents by the Los Angeles Times and others, on or about November 5, 2015, New York Attorney General Eric Schneiderman issued a subpoena to Exxon under New York's Martin Act, seeking documents regarding Exxon's climate research and its communications to investors and consumers about the risks of climate change and the effect of those risks on Exxon's business.[41] According to press statements by the New York

---

[37] *See, e.g.*, Draft Global Climate Science Communications Action Plan (Apr. 3, 1998), https://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf.
[38] *Id.*
[39] *Id.*
[40] Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016 http://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192; s*ee also, e.g.,* Natasha Lamb & Bob Litterman, *Really? Exxon left the risk out of its climate risk report*, GreenBiz, Mar. 28, 2014, https://www.greenbiz.com/blog/2014/05/28/exxonmobil-left-risk-out-climate-risk-report (coauthored by executive at Massachusetts-based Exxon shareholder Arjuna Captial).
[41] Justin Gillisand Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times, Nov. 5, 2015, http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html.

Attorney General, Exxon is cooperating with the subpoena and has produced more than 700,000 pages of documents so far.[42]

In January 2016, at the request of members of Congress, the Department of Justice asked the Federal Bureau of Investigation to investigate whether Exxon should be prosecuted under the federal Racketeer Influenced and Corrupt Organizations Act, based on the documents released by journalists.[43] United States Attorney General Lynch recently confirmed that the investigation is ongoing.[44]

And in early July 2016, nineteen members of the Senate called for an end to fossil fuel companies', including Exxon's, climate change "misinformation campaign to mislead the public and cast doubt in order to protect their financial interest,"[45] and offered support for a resolution urging fossil fuel companies to cooperate with "active or future investigation into (A) their climate-change related activities; (B) what they knew about climate change and when they knew that information; (C) what they knew about the harmful effects of fossil fuels on the climate; and (D) any activities to mislead the public about climate change."[46]

Given the obligations of the Office to prevent damage to the state's environment and protect Massachusetts investors and consumers against unfair and deceptive business practices, the history of the Office's efforts on climate change, the press revelations about Exxon's apparent undisclosed knowledge about the impact of fossil fuel use on climate change, and the various investigations by other state and federal officials, the Office began looking into Exxon-related issues and determined that an investigation pursuant to Chapter 93A would be warranted. A critical issue under Massachusetts law is whether Exxon told investors and consumers, or led them to believe, that it was appropriate and safe for Exxon to utilize its substantial fossil fuel reserves for the manufacture and sale of petroleum products with knowledge, based on its extensive research, that such practices would cause significant climate change and harm to the world.

In March 2016 the New York Attorney General, Attorney General Healey, and several other attorneys general met in New York and discussed at a press conference their cooperation on a number of national environmental issues.[47] Attorney General Healey announced that her office also would be investigating Exxon's climate change research and public communications to investors

---

[42] Phil McKenna, *Virgin Islands and Exxon Agree to Uneasy Truce Over to Climate Probe*, InsideClimate News, July 7, 2016, https://insideclimatenews.org/news/06072016/virgin-islands-exxon-agree-climate-probe-subpoena-claude-walker-schneiderman-healey.

[43] https://www.documentcloud.org/documents/2730475-DOJ-RESPONSE.html; http://www.rollingstone.com/politics/news/did-exxon-lie-about-global-warming-20160630.

[44] Amanda Reilly, *Fossil fuel backers accused of 'calculated disinformation,'* Energy and Environment Daily, June 23, 2016, http://www.eenews.net/eedaily/2016/06/23/stories/1060039264.

[45] James Osborne, *19 Senate Democrats call out Exxon, fossil fuel industry on climate change denial,* FuelFix, July 11, 2016, http://fuelfix.com/blog/2016/07/11/19-senate-democrats-call-out-exxon-fossil-fuel-industry-on-climate-change-denial/.

[46] S. Con. Res. 45, 114th Cong. (2016).

[47] Press Release, N.Y. State Office of the Attorney General, A.G. Schneiderman, Former Vice President Al Gore And A Coalition Of Attorneys General From Across The Country Announce Historic State-Based Effort To Combat Climate Change (Mar. 29, 2016), http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across.

and consumers. This press conference was not unusual; multi-state attorney general investigations, litigation, amicus briefs, and other collaborative efforts often have been accompanied by press announcements.[48]

The Office initiated an investigation of Exxon's potential liability for violations of Chapter 93A with respect to statements to investors and consumers. On April 19, 2016, the Office served Exxon's Massachusetts registered agent with its CID. The CID sought documents from Exxon on such topics as "Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions"; research on how the effects of climate change will affect Exxon's costs, marketability, and future profits; and how this information was communicated to consumers and investors.[49]

The Majority's Attempted Interference with State Investigations.

It appears that the issuance of the New York subpoena and the Massachusetts CID prompted the Committee to attempt an intervention into state attorneys' general investigations of Exxon. On May 18, 2016, Attorney General Healey received a letter from Chairman Smith and other Majority members of the Committee requesting that the Office produce "documents and communications between or among employees of the Office" and various non-profit organizations, other state attorneys general, and federal governmental bodies.[50] In its letter, the Majority attempted to justify the request on the grounds that the Office's investigation was an effort "to silence speech," coordinated through "[c]ollusion between the New York Attorney General and [e]xtremist [e]nvironmental [g]roups," and "may even amount to an abuse of prosecutorial discretion."[51] Attorney General Healey responded by letter on June 2, 2016, respectfully declining to produce the requested documents.[52] Attorney General Healey's response pointed out that the Committee mischaracterized the investigation because its true focus is on protecting consumers in the state; that under the Constitution, the Committee has no power to interfere with a state investigation because it

---

[48] *See, e.g.,* Press Release, N.Y. State Office of the Attorney General, NY A.G. Schneiderman, Massachusetts A.G. Healey, Maryland A.G. Frosh Announce Suits Against Volkswagen, Audi And Porsche Alleging They Knowingly Sold Over 53,000 Illegally Polluting Cars And SUVs, Violating State Environmental Laws (July 19, 2016), http://www.ag.ny.gov/press-release/ny-ag-schneiderman-massachusetts-ag-healey-maryland-ag-frosh-announce-suits-against; Press Release, Commonwealth of Massachusetts Office of the Attorney General, AG Healey Joins Multistate Effort to Question Use of On-Call Shifts at Retail Stores (Apr. 13, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2016/2016-04-13-multistate-retail.html; Press Release, Commonwealth of Massachusetts Office of the Attorney General, AG Healey Joins Federal-State Crackdown on Four Cancer Charities Charged with Bilking $187 Million From Donors (May 19, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-05-19-ftc-cancer-fund.html; Amici Curiae Brief in Support of Mississippi's Interlocutory Appeal, Google, Inc. v. Hood, 822 F.3d 212 (2016), 2015 WL 4094982 (C.A.5) (Appellate Brief).

[49] Civil Investigative Demand 2016-DPF-36, *ExxonMobil Corp. v. Healey*, No. 4:16-cv-469, ECF No. 1 (Apr. 29, 2016), pg. 12-20.

[50] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General (May 18, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/sst-committee-request-for-information.pdf.

[51] *Id.*

[52] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 2, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/ma-letter-to-sst-committee.pdf.

is not a valid federal legislative purpose; and that the Majority had not identified any Congressional authorization to undertake an investigation into the enforcement activities of the Office.[53]

The Majority members reiterated their requests in a second letter sent on June 17, 2016.[54] This time, the Majority claimed that the Office's investigation had the potential "to chill scientific research" and referred to various House of Representatives' rules and a number of investigations that Congress had conducted in both international and domestic matters. None of the cited rules or prior investigations, however, involved Congressional investigation into the activities of a state attorney general to enforce state laws. Consequently, Attorney General Healey responded to the letter on June 24, 2016, reiterating her declination to produce documents to the Committee.[55] Ranking Committee Member Eddie Bernice Johnson wrote to you as Chairman as well, urging the cessation of "this abuse of authority" and the end of the "exceptionally unusual" document requests.[56]

The Majority members sent Attorney General Healey a third letter on July 6, 2016, threatening to use compulsory process.[57] This time the Majority referenced the importance of protecting scientific research and the similarities between Office's CID and the subpoena issued by the Attorney General of the Virgin Islands to Exxon and also cited three court decisions, none of which involved Congressional interference with a state attorney general's investigatory or enforcement powers under state law.[58] The next day, Ranking Member Johnson issued a statement condemning the "abuse of power" and "harassment" of the attorneys general and non-profit organizations to which the Majority members had issued such letters.[59] Attorney General Healey responded to this third letter in a letter sent July 13, 2016, stating that the Majority still had not furnished any valid legal authority for its requests for documents, and that she "continues respectfully to decline to provide the requested materials to the Committee." Attorney General Healey nevertheless indicated that she was "willing to confer by telephone" with Chairman Smith or his staff about objections to producing documents to the Committee, provided that Ranking Member Johnson and her staff were

---

[53] *Id.*

[54] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General (June 17, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/sst-letter-to-ag-healey-06-17-2016.pdf.

[55] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 24, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/letter-lamarsmith-june24.pdf.

[56] Letter from Hon. Eddie Bernice Johnson, Ranking Member, H. Comm. on Science, Space, & Tech. to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 23, 2016) pg. 1, 5, http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/06.23.16%20-%20LTR%20to%20Smith%20re%20AG%20and%20Enviro%20Groups%20Oversight_0.pdf.

[57] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General (July 6, 2016) pg. 3, http://www.mass.gov/ago/docs/energy-utilities/exxon/07-06-16-sst-letter-to-ma-ag.pdf.

[58] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General (July 6, 2016) pg. 3.

[59] Press Release, H. Comm. on Science, Space, & Tech. Democrats, Ranking Member Johnson Response to the Chairman's Subpoena Threat (July 7, 2016), http://democrats.science.house.gov/press-release/ranking-member-johnson-response-chairman%E2%80%99s-subpoena-threat.

also invited and permitted to participate.[60] The Majority did not respond to Attorney General Healey's offer of a telephone conference.

Instead, a few hours after receiving Attorney General Healey's third letter (and a similar letter from the New York Attorney General), Committee staff sent a subpoena to Attorney General Healey,[61] and you as Chairman proceeded to hold a press conference announcing subpoenas to the New York Attorney General, Attorney General Healey, and several non-profit organizations. After the issuance of the subpoenas, Ranking Member Johnson, joined by Committee Member Congresswoman Clark and Congressmen Beyer and Tonko, issued a statement condemning the "unlawful subpoenas" issued by the Committee, which had the effect of creating the "Committee's unfortunate new reputation as a committee of witch hunts."[62]

On another front, on June 15, 2016, Exxon filed a civil complaint against Attorney General Healey in the United States District Court for the Northern District of Texas under 42 U.S.C. § 1983, alleging that the Office's investigation violated its constitutional rights, along with a motion for a preliminary injunction to enjoin Attorney General Healey from enforcing the CID issued to the company.[63] The following day, June 16, 2016, Exxon filed a petition in Massachusetts state court to set aside or modify the CID, along with an emergency motion seeking the same relief, and a request to stay the Massachusetts proceeding pending the outcome of the Texas proceeding. Those actions are still pending.[64] Exxon has not produced any documents in response to the Massachusetts CID.

LEGAL OBJECTIONS TO THE SUBPOENA

The Committee's subpoena—demanding access to privileged and protected documents relating to an on-going state investigation into a private party—is an unprecedented and unconstitutional attempt to interfere in Attorney General Healey's exercise of her authority to investigate violations of state law.

---

[60] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (July 13, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/ltr-to-congressman-lamar-smith-7-13-16.pdf.

[61] Press Release, H. Comm. on Science, Space, & Tech., Smith Subpoenas MA, NY Attorneys General (July 13, 2016), https://science.house.gov/news/press-releases/smith-subpoenas-ma-ny-attorneys-general-environmental-groups.

[62] Press Release, H. Comm. on Science, Space, & Tech. Democrats, Statement in Response to the Committee's Issuance of Subpoena (July 13, 2016), http://democrats.science.house.gov/press-release/statement-response-committee%E2%80%99s-issuance-subpoena.

[63] Complaint, *ExxonMobil Corp. v. Healey*, No. 4:16-cv-469, ECF No. 1 (June 15, 2016); Motion for Preliminary Injunction filed by Exxon Mobil Corporation, *ExxonMobil Corp. v. Healey*, No. 4:16-cv-469, ECF No. 8 (June 16, 2016).

[64] Petition of ExxonMobil Corp. to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, No. 16-1888F (June 16, 2016); Emergency Motion of ExxonMobil Corp. to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, No. 16-1888F (June 16, 2016).

A. Attorney General Healey Objects to Producing Privileged and Protected Investigatory Documents, Because to Do So Would Compromise the Investigation and the Independence of Her Office.

As discussed further below, the Committee's subpoena is unconstitutional simply because it has no basis in any valid legislative purpose. But the subpoena is particularly egregious for attempting to compel production of documents that are plainly subject to a sovereign state's attorney-client privilege, work product protection, and deliberative process protection. Indeed, most of the Office's documents that would be responsive to the subpoena are covered by these or similar protections under Massachusetts law.

In her third letter in response to the Committee's demands, delivered just prior to issuance of the subpoena, Attorney General Healey advised the Majority that Exxon had filed two lawsuits in an effort to stop the investigation and had not produced any documents in response to the CID. Even if Exxon had produced documents to the Office, or in the future does, the Office is prohibited from making publicly available documents produced by a CID, except in court filings. Mass. Gen. L. c. 93A § 6(6). Consequently, as her letter stated, most of the responsive documents in her possession would be privileged as attorney-client documents or protected as attorney work product.

Moreover, Massachusetts law protects privileged documents in which attorneys within the Office discuss their bases for conducting an investigation into Exxon, as well as work product documents such as Office communications with sources of information about Exxon's business conduct.[65] And since Massachusetts law protects documents covered by the common interest doctrine, the Committee should not be permitted to see communications between the Office and federal investigators or attorneys general from other states, which are protected by a common interest privilege in the context of a potential multi-state investigation.[66]

Compliance with the subpoena would eviscerate Attorney General Healey's ability to conduct an ordinary and lawful investigation, shielded by long-established privileges and protections for its internal communications, work product, and strategic discussions with allied state attorneys general. Attorney General Healey therefore declines to produce the documents.

B. The Committee Has No Constitutional Right to Interfere with a Lawful State Investigation into Possible Violations of Massachusetts Law by Exxon.

The Committee has no right to obtain documents from Attorney General Healey—whether or not protected by recognized privileges—for several important reasons. Attorney General Healey's

---

[65] Mass. R. Evid. § 502; Mass. R. Civ. P. 26.

[66] *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 449 Mass. 609, 612, 870 N.E.2d 1105, 1109 (Mass. 2007) ("Broadly stated, the common interest doctrine 'extend[s] the attorney-client privilege to any privileged communication shared with another represented party's counsel in a confidential manner for the purpose of furthering a common legal interest.'"); Restatement (Third) of the Law Governing Lawyers § 76(1) (2000) ("If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.").

investigation is an ordinary and lawful investigation under Massachusetts law. The Committee's attempted interference with that investigation is a violation of states' rights and constitutional principles of federalism. The Majority has not cited any rules of either Congress or the Committee itself that support this attempted intrusion into a sovereign state's investigation. None of the court decisions cited by the Majority even discusses Congressional subpoenas to state attorneys general, let alone authorizes them.

1. **Attorney General Healey's investigation arises out of discrepancies in Exxon documents relating to climate change and a concern that Exxon misled Massachusetts investors and consumers with its public representations and omissions about climate change.**

The Committee's subpoena is a deliberate interference with Attorney General Healey's ordinary and lawful investigation of Exxon's possible violation of Massachusetts law. As indicated above, the Office regularly investigates violations of Chapter 93A, which proscribes unfair and deceptive practices toward investors and consumers, among others. Mass. Gen. L. c. 93A. Attorney General Healey is authorized under Chapter 93A to represent the interests of the state and its citizens, as well as to investigate corporate and other wrongdoing, including violations of laws protecting investors and consumers. *See id.* Based on the Office's review of a number of publicly available Exxon documents and public statements by Exxon, Attorney General Healey determined to investigate whether Exxon made false or misleading statements, in violation of Massachusetts law, to investors and consumers regarding the risks of climate change and the effect of those risks on Exxon's products and business.[67]

The recently-published Exxon documents cited above appear to demonstrate that Exxon knew by at least July 1977 from its own scientists that the continued burning of fossil fuels was causing global temperatures to increase, that the impacts could be catastrophic, and that changes in energy strategies would be needed. Nevertheless, it appears that Exxon continued to advise investors that its business model, heavily reliant on continued burning of fossil fuels, was sound, and continued to market its fossil fuel products to consumers without adequately disclosing the climate risks to the public.

The Office is in the preliminary stages of its investigation. Exxon is the first entity or person to receive a CID. Attorney General Healey has made no determinations as to whether the Office will institute litigation against Exxon pursuant to Chapter 93A or other laws. However, given the apparent discrepancies between what Exxon knew from its own internal scientific research about impacts on global warming and what Exxon both affirmatively represented and failed to tell investors and consumers about its research, she is entitled under Massachusetts law to investigate Exxon's conduct. Given that the Office's investigation is in the ordinary course of powers vested in Attorney General Healey by state law, there is no basis whatsoever for the U.S. Congress to interfere in the investigation.

---

[67] *See* Civil Investigative Demand 2016-DPF-36, *ExxonMobil Corp. v. Healey*, No. 4:16-cv-469, ECF No. 1 (Apr. 19, 2016).

2. Fundamental constitutional principles preclude a Congressional committee from interfering with a state attorney general's lawful investigation.

As far as Attorney General Healey is aware, no committee of Congress in the history of the country has issued a subpoena to a sitting state attorney general with respect to his or her exercise of official duties. We have found no such instance in our research. Nor has the Committee brought any such instance to our attention. Indeed, you as Chairman reportedly stated that "[t]his may be the first time any Congressional committee has subpoenaed state attorneys general."[68]

There is a reason that Congress has refrained: The Constitution precludes such interference. The state of Massachusetts has a sovereign interest in the protection of its residents, including in their capacities as investors and consumers. As the Supreme Court has explained, the "Constitution created a Federal Government of limited powers. '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.' U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). And the States retain significant sovereign powers—"powers with which Congress does not readily interfere." *Id.* at 461. As already made clear to the Committee by the New York Attorney General, "[i]nvestigations and other law enforcement actions by a state Attorney General for potential violations of state law, as here, involve the exercise of police powers reserved to the States under the 10th Amendment," and thus "are not the appropriate subject of federal legislation, oversight, or interference."[69]

Further, while Congress, through committees, has power to investigate in furtherance of its power to legislate, that power may not be used to investigate matters "unrelated to a valid legislative purpose," *Quinn v. United States*, 349 U.S. 155, 161 (1955), and a broad and general authorization from Congress to a committee must, when necessary, be narrowly construed to avoid transgressing constitutional federal-state boundaries, *Tobin v. United States*, 306 F.2d 270, 274-75 (D.C. Cir. 1962). Monitoring or impeding a state attorney general's investigation or prosecution of a state-law enforcement action is not related to a valid federal legislative purpose. *See New York v. United States*, 505 U.S. 144, 162 (1992) (Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions.").

The *Tobin* case well illustrates the limits on a committee's subpoena power. In *Tobin*, the D.C. Circuit reversed a Port of New York Authority official's criminal conviction for contempt of Congress for refusing to comply with a subpoena in a House subcommittee's investigation into whether Congress should "alter, amend or repeal" its consent to the interstate compact between New York and New Jersey that created the Port Authority. 306 F.2d at 272-76. The subpoena sought a broad range of documents concerning the Port Authority's internal affairs, including, among other things, "[a]ll communications in [its] files . . . including correspondence, interoffice and other memoranda and reports relating to" a wide array of topics. *Id.* at 276 n.2. The Port Authority refused to comply with these demands on the two grounds that the request violated the

---

[68] Amanda Reilly, *Smith subpoenas AGs, enviro groups in escalating fight*, Energy & Environment Daily, July 14, 2016, http://www.eenews.net/eedaily/2016/07/14/stories/1060040258.

[69] 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. 2.

Tenth Amendment, and that the Compact Clause of the U.S. Constitution did not actually permit Congress to "alter, amend or repeal" its consent to a compact. *Id.* at 272. Although the court recognized that the committee had "jurisdiction over 'interstate compacts generally,' and the power 'to conduct full and complete investigations and studies relating to . . . the activities and operations of interstate compacts,'" the court also recognized that "when Congress authorizes a committee to conduct an investigation, the courts have adopted the policy of construing such resolutions of authority narrowly, in order to obviate the necessity of passing on serious constitutional questions." *Id.* at 274-75. And the court found that "the very fact that Congress had never before attempted such an expansive investigation of an interstate compact agency—an investigation, by its very nature, sure to provoke the serious and difficult constitutional questions involved here—leads to the conclusion that if Congress had intended the Judiciary Committee to conduct such a novel investigation it would have spelled out this intention in words more explicit than the[se] general terms[.]" *Id.* at 275. Accordingly, the court concluded that the subpoena fell outside the committee's authority. *Id.* at 276.

Here, the Majority has not identified in its three letters to Attorney General Healey in support of its own "novel" subpoena any explicit Congressional authorization to investigate this Office's enforcement activities. This lacuna is not surprising: Any such purported authorization would violate the fundamental principles of federalism that are manifest in our Constitution as a whole and are safeguarded by the Tenth Amendment. As the New York Attorney General has aptly stated, "Congress does not have jurisdiction to demand documents and communications from a state law enforcement official regarding the exercise of a State's sovereign police powers."[70]

Thus, as Attorney General Healey already has explained to the Majority in her several prior communications on this matter prior to the unlawful issuance of the subpoena, Massachusetts law empowers her office to conduct an investigation into potential unfair and deceptive business practices on the part of Exxon, and the Committee cannot interfere in the investigation without violating the fundamental federal structure of our Constitution. The subpoena constitutes an unauthorized and unconstitutional invasion of the rights of the state of Massachusetts as a sovereign state.

3. The Committee's evolving rationales for its subpoena are untenable.

The Majority's rationales for interfering with Attorney General Healey's investigation have shifted over time both legally and factually, demonstrating the unstable ground on which this unprecedented subpoena rests.[71] The bottom line is that the Majority has never provided a valid

---

[70] 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. 2.

[71] In the Committee's first letter, on May 18, the Majority alleged that Attorney General Healey was restricting free speech, colluding with extremist groups, and abusing prosecutorial discretion. Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General, May 18, 2016. In their second letter, on June 17, the Majority cited their supposedly "broad investigatory power" and charge to protect scientific research and development as justification for their document requests. Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General, June 17, 2016. And their third letter, on July 6, focused on the similarities between the Virgin Islands subpoena and the Massachusetts CID, attempting to use the similar language as evidence of "a deliberate attempt to

legislative purpose for its action. Nor has the Majority cited a single Congressional rule or judicial decision that remotely suggests that the Committee has authority to interfere with an ongoing state investigation or to subpoena the files of a sitting state attorney general.

a. Congressional and Committee Rules do not provide for investigating purely state matters.

Although the Majority's letters have cited several Congressional rules in an effort to justify its request for investigatory files from Attorney General Healey, none of these provisions in fact provides any support for the Majority's effort. Neither the Rules of the House of Representatives[72] ("House Rules"), the Science, Space, and Technology Committee's own rules[73] ("Committee Rules"), nor the Committee's Oversight Plan[74] ("Plan") authorizes 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, whose 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.

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

---

mask the true purpose of [the Office's] investigation. Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General, July 6, 2016.

[72] Rules of the House of Representatives, 114th Cong. (Jan. 6, 2015), http://clerk.house.gov/legislative/house-rules.pdf.

[73] Rules of the Science, Space, and Technology Committee, 114th Cong., https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Committee%20on%20Science%2C%20Space%2C%20and%20Technology%20Rules%20114th%20Congress%20v2_0.pdf.

[74] Science, Space, and Technology Committee Oversight Plan for 114th Congress, https://science.house.gov/sites/republicans.science.house.gov/files/documents/SST%20Oversight%20Plan%20for%20the%20114th%20Congress.pdf.

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" (emphasis supplied)); *see also id.* (The Committee will develop and implement "scientific integrity principles within the *Executive Branch*." (emphasis supplied)). 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.

The Committee therefore was not delegated "any oversight authority concerning the investigations of state attorneys general regarding violations of state securities, consumer, or business laws"[75] by Congress. The Ranking Member of the Committee has also recognized this lack of authority, stating that "nowhere in our jurisdiction—legislative or oversight—can one find justification for our Committee's oversight of state police powers."[76]

b. No judicial decision has sanctioned Congressional subpoenas of state attorneys general.

In addition to the lack of authority under Congressional rules, none of the judicial decisions cited in the Majority's second and third letters to Attorney General Healey (there were no decisions cited in the first such letter) suggests that the Committee may interfere with her statutory power to investigate possible violations of Massachusetts law by Exxon.

The June 17 Letter referenced several decisions in footnotes, none of which involved a Congressional investigation into enforcement activities of a state attorney general. *McGrain v. Daughtery* involved a subpoena to a private individual, 273 U.S. 135 (1927), and *Eastland v. U.S. Servicemen's Fund* involved a subpoena to a bank, 421 U.S. 491 (1975). *Barenblatt v. United States* and *Shelton v. United States* concerned subpoenas issued by the infamous House Committee on Un-American Activities to a university professor and a Klan member, respectively. 360 U.S. 109 (1959); 404 F.2d 1292 (D.C. Cir. 1968). Finally, *Hutcheson v. United States* concerned a subpoena issued to a union officer, 369 U.S. 599 (1962).

The July 6 Letter is similarly devoid of any court decisions supporting interference by a Congressional committee with a state attorney general's enforcements activities. *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" or the attorney general's actions in his official capacity. 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 Ass'n*, 452 U.S. 264 (1981). *Frelich v. Bd. of Directors of Upper Chesapeake Health, Inc.*, 142 F.Supp. 2d 679, 696 (D. Md. 2001). *Michigan Department. of Community Health*

---

[75] 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. 2.

[76] Letter from Hon. Eddie Bernice Johnson, Ranking Member, H. Comm. on Science, Space, & Tech., to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 23, 2016) pg. 7.

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 United States v. Michigan Dep't of Cmty. Health*, No. 1:10-MC-109, 2011 WL 2412602 (W.D. Mich. June 9, 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 *14.

Put simply, none of the cases which the Committee has cited in any of its letters to Attorney General Healey provides that a Congressional committee can force a state Attorney General to disclose to the committee the substance or results of an official investigation into possible violations of state law by a private company.

c. *Attorney General Healey is not infringing on Exxon's rights of free speech, because the First Amendment does not protect false and misleading statements.*

The Majority's letters to Attorney General Healey and the Chairman's comments at a press conference announcing the subpoena suggest that the Majority is concerned that this Office's investigation threatens free speech rights. That concern is misplaced.

As the Chairman and members of this Committee know, the First Amendment does not protect false and misleading statements in the marketplace. *See, e.g.*, *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) ("[I]t is well settled that the First Amendment does not protect fraud."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357(1995) ("[The government] may, and does, punish fraud directly."); *In re R. M. J.*, 455 U.S. 191, 203 (1982) ("[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely."); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 593 (1980) ("[F]alse and misleading commercial speech is not entitled to any First Amendment protection."); *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) ("[R]estrictions on false, deceptive, and misleading commercial speech" are "permissible."); *Giboney v. Empire Storage & Ice Co.*,336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."); *Massachusetts Ass'n of Private Career Sch. v. Healey*, No. CV 14-13706-FDS, 2016 WL 308776 at *18 (D. Mass. Jan. 25, 2016) ("[T]he government may place an outright ban on speech that is misleading on its face—that is, speech that is more likely to deceive the public than to inform it.").

Just as the courts rejected claims by the tobacco industry that the First Amendment protected its knowingly false statements that cigarette smoking did not cause lung cancer, Exxon may not use the First Amendment to shield its statements and non-disclosures with respect to the relationship between fossil fuel use and climate change. Businesses are not permitted to make false statements to the public and then claim that the First Amendment protects them from the consequences of state laws prohibiting false statements in business affairs. As the Oregon Attorney General's Office wrote to you:

> Your letter also incorrectly accuses this office of investigating entities based on their speech or beliefs concerning climate change. Please be advised this office 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.").[77]

Because Exxon appears to have made many statements to the public, including investors and consumers, about the impact of fossil fuels on climate change that appear to contradict its own internal documents, Attorney General Healey is entitled to investigate what Exxon knew and said to others about these issues—in order to determine whether a cause of action exists for violation of Massachusetts law. Attorney General Healey is not seeking to stifle Exxon's scientific research; to the contrary, the Office is looking into whether Exxon properly represented to the public, in accordance with Massachusetts law, what it knew first-hand from its detailed internal scientific research.

Furthermore, because the Office has not sent CIDs to any entities or individuals other than Exxon, the Majority's professed concern about chilling third-party research is also misplaced. To the extent that the Office's CID to Exxon seeks communications between Exxon and other entities or individuals about climate change, those documents are relevant to a determination whether Exxon was telling the public, including investors and consumers, a different story about climate change than it was discussing internally and privately with select third parties. If so, the outside communications would be relevant to potential claims that Exxon violated Chapter 93A by misleading investors and consumers.

4. If the Committee's action goes unchallenged, it could jeopardize states' rights and, in particular, the independence of state attorneys general to conduct investigations into violations of state law.

A substantial portion of Attorney General Healey's work is to conduct investigations into various types of illegal behavior, including unfair and deceptive business practices. As stated above, the Office has issued several hundred CIDs under Chapter 93A since 2013. Some of those investigations result in settlements or assurances of discontinuance, some result in civil enforcement actions or other litigation, and some are closed for lack of sufficient evidence of wrongdoing. Attorney General Healey, like most other state attorneys general, also participates regularly in multi-state investigations in which attorneys general collaborate on strategy, discovery, and sometimes litigation. If the Committee is permitted to obtain the privileged and otherwise protected investigatory files of the Office as well as other offices of state attorneys general, the longstanding independence of states to enforce state laws against businesses will be compromised. The states'

---

[77] Letter from Hon. Eddie Bernice Johnson, Ranking Member, H. Comm. on Science, Space, & Tech. to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 23, 2016) pg. 3-4 (quoting Letter from Frederick M. Boss, Deputy Attorney General, Ore. Dep't of Justice to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 1, 2016) pg. 2).

prerogative to conduct their own investigations into violations of state law is a bedrock of states' rights.

As stated above, there has been an unbroken recognition for over 200 years that states are empowered to investigate wrongdoing against their residents, without interference by the federal government and in particular Congress. As a result, state attorneys general succeed in obtaining favorable results for their residents every day of the year, in matters ranging from fraudulent unfair and deceptive mortgage lending practices on the part of large national banks and others, to Volkswagen's fraudulent schemes with respect to environmental emissions systems. The Committee's subpoena threatens this entire fabric of independent state investigations.

Exxon has already seized for itself two different opportunities to present legal arguments to two separate courts as to why this Office's investigation should not proceed. As described above, Exxon has filed lawsuits in both federal court in Texas and state court in Massachusetts in an effort to stop Attorney General Healey's investigation. Under existing court discovery rules, Exxon would not be entitled in the course of those lawsuits to obtain most of the attorney-client, work product, and deliberative documents that the Committee has subpoenaed. Yet the Committee apparently seeks to provide Exxon with yet another, third venue to challenge the investigation and to obtain materials to which Exxon has no right.

There is simply no legitimate legislative or constitutional basis for the Committee to meddle in a state investigation of state-law violations. Attorney General Healey will not yield to this blatant attempt to chill her investigation into Exxon's conduct.

CONCLUSION

For these reasons, including those contained in the attached letters to the Majority, Attorney General Healey objects to the subpoena and respectfully declines to produce any documents. Attorney General Healey submits that the Majority should withdraw the subpoena and cease its interference with a lawful Massachusetts state investigation. In the event the Majority seeks to pursue the subpoena notwithstanding these objections, Attorney General Healey submits that the subpoena and the objections should be referred to the entire Committee for its review.

Respectfully,

Richard A. Johnston
Chief Legal Counsel

cc: Honorable Eddie Bernice Johnson, Ranking Member, House Committee on Science, Space, and Technology

Honorable Katherine Clark, Member, House Committee on Science, Space, and Technology

Enclosure

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

MAURA HEALEY
ATTORNEY GENERAL

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

June 2, 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 the May 18, 2016, letter ("Letter") signed by you and several other members of the House Committee on Science, Space, and Technology ("Committee") seeking certain 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's consumer protection and securities laws by ExxonMobil Corporation ("Exxon").

At the outset, the Committee's characterization of MA AGO's investigative activities is inaccurate. The Committee's assertion that the MA AGO is engaged in a "coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution," is absolutely incorrect, and the Committee's intimation that the MA AGO's actions "may even amount to an abuse of prosecutorial discretion" is without basis.

The MA AGO is authorized under Massachusetts law to represent the interests of the Commonwealth and its citizens, as well as to investigate corporate and other wrongdoing, including violations of laws protecting investors and consumers. Based on MA AGO's review of a number of publicly available Exxon documents and public statements by Exxon, MA AGO determined to investigate whether Exxon made false or misleading statements, in violation of Massachusetts law, to investors and consumers regarding the risks of climate change and the effect of those risks on Exxon's business.

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."[1] Publicly available Exxon 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."[2] Exxon's scientists counseled Exxon management that it would be possible to "avoid the problem by sharply curtailing the use of fossil fuels."[3] 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)."[4] 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.[5]

Exxon's shareholders are taking very seriously concerns about the nature and extent of Exxon's disclosures regarding the impacts of climate change on Exxon's business; just last week, on May 25, Exxon shareholders came close to passing resolutions that would have required Exxon to implement "stress tests" to ascertain more specifically the climate-driven risks to Exxon's business.[6] As The Wall Street Journal reported, the proposals "drew more support than any contested climate-related votes" in Exxon's history, and indicate that "more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously" the effects on Exxon of a "global weaning from fossil fuels."[7]

---

[1] 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/

[2] Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984), *available at* http://insideclimatenews.org/sites/default/files/documents/Shaw%20Climate%20Presentation%20%281984%29.pdf

[3] *Id.*

[4] Roger W. Cohen, Interoffice Memorandum to W. Glass (Aug. 18, 1981), *available at* http://insideclimatenews.org/sites/default/files/documents/%2522Catastrophic%2522%20Effects%20Letter%20%281981%29.pdf

[5] *See, e.g.*, Draft Global Climate Science Communications Action Plan (est. 1998), available at http://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf (noting "[v]ictory will be achieved when . . . those promoting the Kyoto treaty on the basis of extant science appear to be out of touch with reality," and "[u]nless 'climate change' becomes a non-issue, meaning that the Kyoto proposal is defeated and there are no further initiatives to thwart the threat of climate change, there may be no moment when we can declare victory for our efforts.").

[6] Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016, *available at* http://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192

[7] *Id.*

As the Chairman and members of this Committee know, the First Amendment does not protect false and misleading statements in the marketplace. *See, e.g., United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009). Because Exxon appears to have made many statements to investors and consumers about the impact of fossil fuels on climate change which appear to contradict its own internal documents, the MA AGO is entitled to investigate what Exxon knew and said to others about these issues.

The Commonwealth has a sovereign interest in the protection of its investors and consumers. As the U.S. Supreme Court has explained, the "Constitution created a Federal Government of limited powers. '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.' U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). States, therefore, retain significant sovereign powers—"powers with which Congress does not readily interfere." *Id.* at 2401.

Further, while Congress, through committees, has power to investigate in furtherance of its power to legislate, that power is limited: 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), and must be narrowly tailored to avoid transgressing constitutional federal-state boundaries. *Tobin v. U.S.*, 306 F.2d 270, 275 (D.C. Cir. 1962), *cert denied*, 371 U.S. 902 (1962). An investigation by a state attorney general, and any related prosecution of a state law enforcement action, is not related 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"). The Committee does not identify in its Letter any congressional authorization to undertake an investigation into the enforcement activities of this Office, and any such purported authorization would violate long-standing principles of federalism.

Moreover, most of the materials that the Committee has requested from the MA AGO, which include investigatory and deliberative process materials, attorney work product, and attorney-client and/or common interest privileged materials, would be protected from disclosure under established state and federal law.

For all of these reasons, the MA AGO respectfully declines to provide the requested materials.

Sincerely,

Richard A. Johnston
Chief Legal Counsel

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

MAURA HEALEY
ATTORNEY GENERAL

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

June 24, 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:

We have reviewed your letter of June 17, 2016, also signed by certain other members of the Committee. Your letter does not lead us to alter our conclusion that the Committee lacks authority to interfere with an investigation by the Massachusetts Attorney General's Office into possible violations of Massachusetts law by ExxonMobil Corporation, as set out in detail in our letter of June 2, 2016. Consequently, as indicated in our prior letter, we will not be providing the Committee with the documents requested in your letters to our office.

Sincerely,

Richard A. Johnston
Chief Legal Counsel

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

MAURA HEALEY
ATTORNEY GENERAL

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 CO_2 will double in 100 years if fossil fuels grow at 1.4%/a," and that such a doubling of CO_2 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 Representatives[4] ("House Rules"), the Science, Space and Technology Committee's own rules[5] ("Committee Rules"), nor the Committee's Oversight Plan[6] ("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%2C%20Space%2C%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 Frelilich 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.

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

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

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 Congress[2] 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 generals 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. Kathyrn 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

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