

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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August 24, 2016

The Honorable Maura Healey
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108-1518

Dear Attorney General Healey,

The Science, Space, and Technology Committee (“Committee”) is in receipt of your July 26, 2016, letter refusing to produce documents and information pursuant to a validly-issued congressional subpoena on July 13, 2016, and accepted on July 14, 2016. Your office’s objections to the July 13 subpoena include issues related to the Committee’s authority, jurisdiction, and pertinence, as well as concerns regarding the Tenth Amendment of the Constitution. In addition, you have raised several common law and statutory privileges as a purported basis for your non-compliance. As explained in more detail below, the Committee finds these objections without merit and rejects your claims of privilege.

I. The Committee’s Investigation Is Legally Sufficient.

The Committee is conducting an investigation to determine whether the actions of your office are having an adverse impact on federally-funded scientific research. If such an adverse impact is discovered, the Committee may consider changes to federal law and/or the amount and allocation of federal funding for scientific research. The Committee’s goal is to maximize the efficient and effective use of federal tax dollars intended to advance the progress of science without regard to non-scientific considerations such as a fear that certain types of scientifically justified research may lead to costly state investigations and adverse political pressure.

Your office, after reading numerous press reports,¹ is investigating alleged fraud by Exxon and others, and to that end has issued subpoenas demanding the production of documents and communications between, among others, Exxon and scientists, both internal and external, who conducted research relevant to the issue of climate change. This research is funded by a variety of public and private sources, including the federal government. Although you have not made your subpoena to Exxon publically available, it is likely that your demands will include the work product of federally funded researchers. Why won’t you make your subpoena public? What are you hiding?

¹ Letter from Richard A. Johnston to Hon. Lamar Smith 14 (July 26, 2016) [hereinafter July 26 Response].

The Supreme Court, in *Wilkinson v. United States*,² established a three prong test for determining the legal sufficiency of a congressional subpoena. First, the Committee's investigation of the broad subject matter must be authorized by Congress.³ Second, *Wilkinson* requires that the Committee have a "valid legislative purpose." Finally, *Wilkinson* requires that the demand – in this case, the subpoena – be pertinent to a subject matter authorized by Congress.⁴ As we now explain, the Committee clearly satisfies all three of the *Wilkinson* parameters for a legitimate and constitutionally authorized legislative investigation.

A. The Committee's Investigation Is Authorized.

First, with respect to authorization, this Committee is charged by the House with ensuring that the United States remains the world leader in scientific discovery, research, and innovation. The Committee furthers this goal by authorizing the use of federal funds, adopting legislation establishing federal policy regarding science and scientific research and conducting of its oversight and investigative activities. In the Committee's view, ensuring that scientists are free to pursue research and intellectual inquiry in accordance with scientific principles without fear of reprisal, harassment, or undue burden is necessary for the American scientific enterprise to remain successful and for federal funding of scientific research to be most effective. Accordingly, the Committee has an interest in ensuring that scientific research is not stifled by legal inquiries such as the investigation launched by your office.

As the House's chief authorizing body for research and development activities, the Committee's interest in the U.S. scientific enterprise is well established. Pursuant to House Rule X, the Committee has legislative and oversight responsibility over "[a]ll energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy labs; Environmental research and development; Marine research; Commercial application of energy technology; and Scientific research, development, and demonstration, and projects therefor."⁵ House Rule X is explicit in stating that "all bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees . . . shall be referred to those committees."⁶

The Committee has a long history of exercising both legislative and oversight functions within its research and development ("R&D") jurisdiction. In the 114th Congress, the Committee reported, and the House passed H.R. 1806, the America COMPETES Reauthorization Act of 2015, which authorized funds for research and development at the Department of Energy ("DOE"), National Science Foundation ("NSF"), and the National Institute of Standards and Technology ("NIST").⁷ The Committee was the source of similar legislation in 2007 and 2010.⁸

² *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961).

³ *Id.*

⁴ *Id.* at 409.

⁵ Clause 1(p) of Rule X.

⁶ Clause 1 of Rule X.

⁷ H.R. 1806, America COMPETES Reauthorization Act of 2015 (introduced Apr. 15, 2015, passed by the U.S. House of Representatives on May 20, 2015) (emphasis added).

⁸ H.R. 2272, America COMPETES Act (P.L. 110-69) 2007; H.R. 5116, America COMPETES Reauthorization Act of 2010 (P.L. 111-358) 2011.

This Congress, the Committee has been referred legislation on topics including low-dose radiation research, harmful algal blooms, the Environmental Protection Agency's ("EPA") Science Advisory Board, DOE labs, ocean acidification, and marine hydrokinetic renewable energy. To date, 163 bills or resolutions have been referred to the Committee.

Similarly, the Committee's oversight history is equally robust, with recent oversight inquiries and investigations into subjects ranging from NSF and DOE research grant-making procedures to EPA permitting processes. Two recent examples of the Committee's oversight work related to protecting scientists and researchers involve two cases in which a DOE scientist and a Food and Drug Administration scientist were separately targeted for communicating with Congress. Cases such as these are extremely troubling, and the Committee has a duty to ensure that *all* scientists are able to conduct research free from interference and intimidation and without having the conduct of their scientific inquiries affected by political or ideological pressures or fear of reprisal.

B. The Committee Has a "Valid Legislative Purpose."

Second, the Committee clearly satisfies *Wilkinson's* requirement that a "valid legislative purpose" exists. For instance, under Rule X, this Committee authorizes all federal research and development funding that is not military or medical. Accordingly, should your investigative actions cause or threaten to cause an imbalance in scientific inquiry for non-scientific reasons, the Committee could seek to correct such an imbalance through its authorization power by (i) directing certain research be federally funded, (ii) redirecting current federal scientific research, or (iii) authorizing federal funds for more targeted research at the agencies under the Committee's jurisdiction. The documents and information compelled by the July 13 subpoena directly bear on whether such corrective action by the Committee is necessary.

In addition, the Committee has a responsibility to ensure that taxpayer dollars authorized and appropriated by Congress are not being misspent. The Committee has had a longstanding interest in grants funded by NSF, including those awarded to universities and private companies. Given the Committee's jurisdiction over NSF, the Committee also has an interest in the research funded by NSF grants. Most research is funded by a combination of private and government sources.⁹ Like many other large energy companies, researchers employed by Exxon have received grant awards from federal sources. Additionally, NSF and Exxon jointly fund projects and programs such as Research Experiences in Solid Earth Science for Students, and the American Mathematical Society Task Force on Excellence. Furthermore, Exxon partners with universities, themselves recipients of millions of dollars in federal funds, to conduct research. If, as a result of your investigation, the private sector feels pressure to make research funding decisions based in part on a desire to avoid burdensome state investigations and political or ideological coercion rather than on the basis of pure scientific merit, it is this Committee's responsibility to identify that imbalance and correct it by directing funding elsewhere. The

⁹ Science & Engineering Indicators 2016 Report, Chapter 4, <https://nsf.gov/statistics/2016/nsb20161/##/report/front-matter> (last visited Aug. 16, 2016).

documents and information being sought by the Committee subpoena will help determine whether any such imbalance or chilling has occurred.

The NSF's *Science & Engineering Indicators 2016* delineates total U.S. R&D expenditures by source of funds: Business: 65.2%; Federal government: 26.7%; Universities and colleges: 3.3%; Nonfederal government 0.9%; Other nonprofit organizations: 3.9%. Any disincentive to industry maintaining its position as the dominant source of funding for R&D will have a detrimental impact on the nation's scientific enterprise. If businesses believe that the research they fund can be mischaracterized for political or ideological reasons and used to build cases of fraud against the company, they will have a powerful incentive to cease funding that research and instead to direct their funds elsewhere. This, in fact, may be your goal. Similarly, if scientists believe that their industry-sponsored research, or discussions with industry about research funded by other sources, will be subpoenaed if it is in disagreement with the beliefs and preferences of state officials or advocacy groups, they will have a powerful incentive to cease conducting that research or disseminating the results of their research to all interested parties. Maybe this is your goal, too. This Committee has an interest in informing itself of these trends and effects and potentially offsetting any trends or effects that would skew research in one direction or another on the basis of non-scientific considerations like these.

Either of these scenarios could result in dramatic cuts to or misdirection of research funding by non-federal sources. If that occurs, the Committee may be forced to take a host of legislative actions, including authorizing increases in federal funding for scientific research to make up for the reduction in or misdirection of funding from other sources. The documents and information demanded in the July 13 subpoena will help inform the Committee if such actions are warranted and necessary.

C. The Committee's Inquiry Is Pertinent.

Finally, The Committee's inquiry satisfies *Wilkinson's* pertinence requirement. Federal courts have interpreted pertinence broadly, requiring "only that the specific inquiries be reasonably related to the subject matter under investigation."¹⁰ The documents and information requested in the subpoena served on July 13, 2016, will allow the Committee to assess the effects of your investigation on the research of climate change scientists. Since the Committee has sole jurisdiction over research and development ("R&D") authorizations or funding measures with the exception of military and medical, this Committee could most certainly prepare legislation as noted above that would direct or divert funding to offset or correct any harmful effects your investigation may have on the overall funding and progress of our nation's scientific R&D enterprise.

The Committee's inquiry plainly satisfies the requirements of *Wilkinson*: it is authorized, has a valid legislative purpose, and is pertinent. As such, the Committee's investigation is

¹⁰ Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, & Pragmatics of Legislative Inquiry*, The Constitution Project, <http://www.constitutionproject.org/wp-content/uploads/2009/07/WhenCongressComesCalling.pdf> (last visited Aug. 15, 2016).

lawful, and the Committee has the authority and jurisdiction to issue the July 13 subpoena and enforce its compliance.

II. The Committee's Inquiry Is Faithful to and Consistent with the Tenth Amendment and Longstanding Federalism Principles.

As you note, the Tenth Amendment limits federal powers to those delegated through the Constitution, but the Committee's inquiry is well within those limits and, as discussed above, is duly authorized pursuant to its core legislative function.¹¹ Contrary to your assertions, the Committee's inquiry infringes on no sovereign state "right" because it commandeers no state regulatory or legislative function on its behalf. Unlike attempts to conscript state executive branch officials¹² or commandeer state legislative processes,¹³ the Committee here seeks only information pertaining to the *effects* of a state investigation – information that bears directly on subject matters within the Committee's jurisdiction. The Committee is not, as you suggest, attempting to "[m]onitor[] or imped[e] a state attorney general's investigation or prosecution of a state-law enforcement action."¹⁴ There is no attempt to commandeer or otherwise compel or forbid the execution of state law enforcement functions; the Committee seeks neither to regulate or direct the Attorney General's investigation, nor to influence its conclusion. As noted above, far from imposing congressional prerogatives on state law enforcement functions, the Committee's investigation exists separate of the Attorney General's.

Federal courts have spoken directly to the application of federalism principles to state compliance with federal subpoenas. In denying a state attorney general's motion to quash a federal subpoena on the grounds that it violated the Tenth Amendment, a federal appeals court announced that "the impact of a subpoena on state functions is markedly different from... [a] direct system of regulation that requires a reallocation of state resources."¹⁵ And where, for example, "the [federal] government is asking the states to provide information" regarding state programs, such action "has never been held to violate the Tenth Amendment."¹⁶ Case law has time-and-again vindicated the federal government's ability to issue subpoenas to state officials as consistent with federalism principles; that your office is of the opinion that "no committee of Congress in the history of the country has issued a subpoena to a sitting state attorney general"¹⁷ has no bearing on the Committee's valid power to issue such a subpoena pursuant to its jurisdictional authority under House rules and the Constitution.

Your July 26, 2016, letter cites *Tobin v. United States* as an example of a court requiring that Congress' inquiries be "narrowly construed to avoid transgressing constitutional federal-

¹¹ The Supreme Court announced as much by describing the Tenth Amendment's corollary: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States..." *New York v. United States*, 505 U.S. 144, 156 (1992).

¹² *Printz v. United States*, 521 U.S. 898 (1997).

¹³ 505 U.S. 144 (1992).

¹⁴ July 26 Response at 14.

¹⁵ *In re Special April 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir. 1978).

¹⁶ *Freilich v. Bd. of Dirs. Of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 697 (D. Md. 2001), *aff'd sub nom.*, *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002).

¹⁷ July 26 Response at 14.

state boundaries.”¹⁸ *Tobin*, however, is clearly not relevant. It involved a criminal prosecution for contempt for failure to respond to portions of a subpoena seeking documents that, the court concluded, were not within the scope of the committee’s investigative authorization and related to a subject that the House may well have lacked constitutional authority to address legislatively.¹⁹ None of those concerns is applicable here. Moreover, the state agency in *Tobin* actually did produce documents in response to the congressional subpoena, which your office has unlawfully refused to do.²⁰

III. Congress Has No Obligation to Accept Assertions of Common Law and State Statutory Privileges.

To support your refusal to comply with the Committee’s subpoena, you assert that “most of the Office’s documents that would be responsive to the subpoena are covered by [privileges] under Massachusetts law,”²¹ including attorney-client privilege, work product protection, deliberative process protection, and the common interest privilege.²² Your failure to identify with particularity those documents and communications you claim are covered by each privilege means that you are making a blanket assertion of privilege in an attempt to shield all responsive documents from disclosure to Congress. You make this blanket assertion even though, by your own admission, only “most” of the responsive documents would be covered by these privileges even if they were applicable. In addition, you fail to acknowledge that even on their own terms some of these privileges are not absolute bars to disclosure and, therefore, may not preclude disclosure of some responsive documents and communications. For example, the work-product privilege has been held to be a qualified privilege that can be overcome by demonstrating sufficient need.²³ Since the burden of establishing the existence of a privilege rests with the party asserting the privilege,²⁴ such an assertion, on the information provided in your letter, would utterly fail in any event.

More importantly, however, Congress has a constitutional prerogative to deny claims of state law and common law privilege typically recognized in courts of law. While Congress recognizes constitutional claims of privilege in all of its investigations, it is not required to acknowledge common law or state statutory privileges. In fact, acceptance or rejection of claims such as attorney-client privilege has been the longstanding prerogative of each committee²⁵ and, as the Supreme Court has recognized, since 1960, “only infrequently have witnesses appearing before congressional committees been afforded procedural rights normally associated with an adjudicative proceeding.”²⁶ Indeed, separation of powers principles require that Congress

¹⁸ *Id.* at 14.

¹⁹ *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962).

²⁰ *Id.*

²¹ July 26 Response at 12.

²² *Id.*

²³ See, e.g., *United States v. Nobles*, 422 U.S. 225, 239 (1975); *Hickman v. Taylor*, 329 U.S. 495, 511 (1974); *City of Philadelphia v. Westinghouse Corp.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962).

²⁴ See, e.g., *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *Weil v. Investment/Indicators, Research & Mgmt.*, 647 F.2d 18, 25 (9th Cir. 1981).

²⁵ See S. Rept. No. 2, 84th Cong., 1st Sess. 27-28 (1954).

²⁶ *Hannah v. Larche*, 363 U.S. 420, 425 (1960).

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remain unrestrained by judicially-developed common law privileges, and the Supremacy Clause deprives state-law privileges of any binding force as a basis for resisting a House Committee's request for information pursuant to the powers vested in the House by Article I of the Constitution.²⁷ Accordingly, recognition of your claims of privilege is not a matter of right, but is at the sole discretion of the Committee. Absent a significantly more robust showing of a good faith basis for the invocation of privilege, including identifying with particularity the responsive documents that could implicate attorney-client, work product, or deliberative process sensitivities, the Committee rejects your privilege assertions in full.

In conclusion, the Committee rejects your insinuation that we are "provid[ing] Exxon with yet another, third venue to challenge the investigation and to obtain materials to which Exxon has no right."²⁸ Please be assured that this Committee and its Members act independently and with the primary purpose of ensuring the stability of America's scientific enterprise.

As always, the Committee welcomes the opportunity to discuss the scope of the subpoena with you or your staff. To arrange a meeting or discuss matters over the phone, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,



Rep. Lamar Smith
Chairman

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

²⁷ See U.S. Const. art. VI, cl. 2.

²⁸ July 26 Response at 20.