

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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June 17, 2016

The Honorable Hector Balderas
Attorney General
State of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501

Dear Attorney General Balderas,

Thank you for your May 30, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the 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. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.¹ The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."² 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."³ However, Congress' investigatory power is not without limits.⁴ Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

¹ See generally U.S. Constitution, Art. I; *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).

² Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.

³ *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).

⁴ *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the “potential” for a legislative solution.⁵ According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.⁶ In *Eastland*, the Supreme Court went even further, holding that “[t]o be a valid legislative inquiry there need be no predictable end result.”⁷ The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and “the essential function of informing itself in matters of national concern.”⁸ Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,⁹ organizations that violate the civil rights of individuals,¹⁰ state agencies involved in the Hurricane Katrina response,¹¹ and Major League Baseball.

Specific Basis for the Committee’s Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated “jurisdiction and related functions” including “general oversight responsibilities,” to aid the House in “its formulation, consideration, and enactment of changes in Federal laws.” Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: “Environmental research and development” as well as “Scientific research, development, and demonstrations, and projects therefor.” In addition, House Rule X states that the Science Committee, “shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development.”

In fiscal year 2015, the federal government spent approximately \$138 billion to fund research and development.¹² Of that total federal spending, approximately \$40 billion is allocated by departments and agencies under the Science Committee’s jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

⁵ *McGrain* at 177, 181-182.

⁶ *See McGrain*, 273 U.S. at 177, 181-182.

⁷ *Eastland* at 509.

⁸ CRS Report at 26.

⁹ *Hutcheson v. U.S.*, 369 U.S. 599 (1962).

¹⁰ *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969)).

¹¹ The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).

¹² John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

So we're very interested in seeing what science Exxon has been using for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...¹³

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his 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.

Additionally, Congress 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. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."¹⁴ In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

¹³ *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, available at <http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research> (last visited June 7, 2016).

¹⁴ Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of New Mexico and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.
2. All documents and communications between or among employees of the Office of the Attorney General of New Mexico and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.
3. All documents and communications between or among employees of the Office of the Attorney General of New Mexico 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 your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,



Rep. Lamar Smith
Chairman



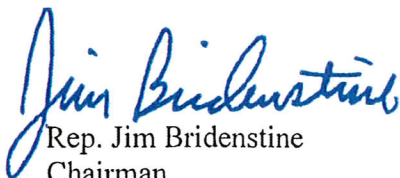
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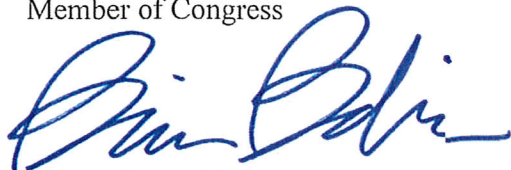
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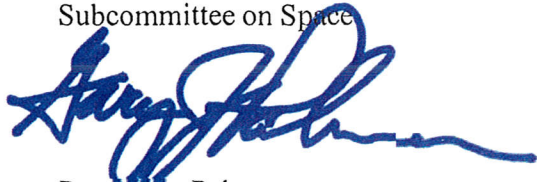
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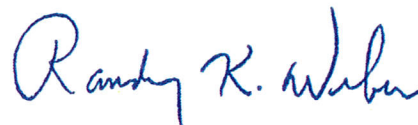
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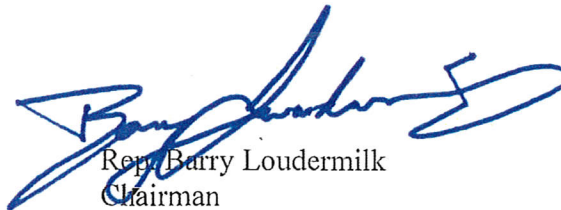
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Chairman
Subcommittee on Oversight

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Rep. Ralph Lee Abraham
Member of Congress



Rep. Darin LaHood
Member of Congress



Rep. Warren Davidson
Member of Congress

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

Enclosure