Written Statement

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"*Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*."

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I. INTRODUCTION

Chairman Smith, Ranking Member Johnson, and members of the Committee, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the current conflict between Congress and various state attorneys general over the subpoena power of the Committee.

At the outset, I believe that it is incumbent upon me to say that I have been a long advocate for action in combating climate change and that I believe the failure to take such action will have dire consequences for our country. Indeed, I agree with President Barack Obama in his effort to pursue remedial measures on climate change and voted for him in 2008 in part due to his position on this issue. However, I have not been called as a scientific but as a constitutional expert. Accordingly, my view of the merits of this policy dispute are ultimately immaterial, and the question of the authority of this Committee should not be dependent on how one views the ultimate wisdom or purpose of the exercise of its authority. Frankly, principle often demands conclusions that conflict with our personal preferences. This is one such case.

The use of the subpoena authority to compel the disclosure of information from state attorneys general raises a number of novel constitutional issues, and the objections raised by the attorneys general are not frivolous, particularly with regard to federalism and free speech concerns. However, in my view, their threshold challenge of congressional authority to force such disclosure is fundamentally flawed, and this Committee clearly has the authority under Article I of the Constitution to demand compliance with its subpoenas.[1] Indeed, those who are arguing for the curtailment of that authority should consider the implications of their arguments for the future. The

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[1] The Committee has also subpoenaed public interest groups like Greenpeace, which I believe raise different and more problematic applications of congressional authority. Such subpoenas would likely become moot if the state attorneys general are compelled to comply with the duly issued subpoenas of this Committee.

sweeping claims of the attorneys general and public interest groups would create a gaping hole in the authority of Congress to seek legislative solutions to problems, including problems like climate change. In this sense, the arguments opposing these subpoenas amount to sawing off the very branch upon which advocates are sitting. Indeed, the actions taken by the state attorneys general (with the support of these environmental groups) raise the very same concerns over free speech, associational rights, and academic freedom. As I discuss below, the subpoenas issued by the state attorneys general are broader in scope and more menacing in application for conservative public interest organizations. As an academic, I find the demands of these state investigations to be chilling in their implications for experts and academics alike. The moral high ground for environmental groups in objecting to the congressional subpoena is rather illusory given the sweeping demands covering dozens of conservative groups and experts.

As in most conflicts over congressional investigations, this is a matter that should ideally end in a compromise without forcing the parties into the courts. Congress has oversight authority that cannot be denied. These state attorneys general have compelling concerns over their right to pursue their own investigations. The solution would seem to be an accommodation in both the scope and the form of discovery to respect both the institutional interests of Congress and the states. However, if such a compromise is not possible (and we are certainly living in a period of conflict rather than compromise), my analysis below reflects the relative strengths of the rivaling claims made in this controversy. In the end, I believe that it is Congress that holds the advantage in such disputes and that the threshold bar on subpoena powers suggested by the attorneys general would fall short under constitutional scrutiny.

II. CONGRESSIONAL OVERSIGHT AND SUBPOENA AUTHORITY.

The subpoena authority of Congress is an implied rather than express power within Article I of the Constitution. Nevertheless, it is a power that is essential to the functioning of any legislative body based on representative democratic values. Indeed, John Stuart Mill famously wrote:

> [T]he proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts: to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust … to expel them from office, and either expressly or virtually appoint their successors.[2]

Legislative authority means nothing without the ability to understand, and at times uncover, the insular actions of the institutions and organizations that influence public policies and programs. It is for that reason that the Supreme Court readily recognized that the scope of legislative investigatory powers must be commensurate with the scope of legislative jurisdiction. Thus, in *McGrain v. Daugherty*,[3] the Supreme Court was

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[2] John Stuart Mill, Considerations on Representative Government, 42 (1861).

[3] *See generally* McGrain v. Daugherty, 273 U.S. 135 (1927).

faced with a dispute rising from the Teapot Dome scandal under President Warren Harding. The scandal was a classic matter of legislative investigation. Secretary of the Interior Albert Bacon Fall stood accused of bribery after he leased Navy petroleum reserves at Teapot Dome in Wyoming and two other locations at bargain rates and did not put up the leases for competitive bidding. During this period, Congress pursued a wider range of alleged fraud and exercised oversight over the failure of the Administration to prosecute powerful figures and companies for violations under the Sherman and Clayton Acts. That investigation ultimately turned to the role of Attorney General Harry M. Daugherty and his brother (and Ohio bank president) Mally S. Daugherty. Mally Daugherty refused to comply with a subpoena to testify and was arrested. In referencing the "ample warrant for thinking, as we do,"[4] the Supreme Court issued a resounding defense of congressional investigative authority, including compelling testimony from individuals and companies. The Court held that "the power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function."[5] The Court emphasized that congressional authority to compel disclosures is necessary for committees to have a complete understanding of "the conditions which the legislation is intended to affect or change."[6]

The limiting principle for this power was set by the scope of legislative jurisdiction. However, even on this limiting principle, the Supreme Court has recognized a minimal threshold test: exercise of oversight power must be undertaken with some "valid legislative purpose" in mind."[7] Indeed, even with the questionable uses of subpoena authority as during the Red Scare period, the Court maintained that it would not assume bad motivations in the exercise of congressional power.

Thus, in *Wilkinson v. United States*,[8] the Court faced what was in my view an abusive use of congressional authority in pursuit of political dissidents and civil libertarians. In that case, the target was a Frank Wilkinson who (like Carl Braden) was a civil libertarian and campaigned against the work of the House Committee on Un-American Activities. It is clear that the men were targeted for the exercise of their free speech. The Court, however, separated the question of the motivation from the means of congressional investigations. It decided both *Wilkinson v. United States* and *Braden v. United States*[1] on the same day in 1961. It dismissed the free speech elements in the cases and affirmed the congressional authority to demand such testimony. In *McGrain*, the Court noted that Congress is often seeking to force information from opposing or reluctant parties but that such information is essential to determining what, if any, legislative actions is needed:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information-which not infrequently is true-recourse must be had to others who

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4 *Id*. at 175

5 *Id*. at 174

6 *Id*. at 175.

7 Barenblatt v. United States, 360 U.S. 109, 126(1959).

8 *See generally* Wilkinson v. United States, 365 U.S. 399 (1961).

> possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate-indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.[9]

In so holding, the Court not only reaffirmed the power of Congress to compel testimony but also rejected the notion that it would evaluate the motivations or wisdom of the use of that inherent power. The *Wilkinson* Court saw the matter of whether Congress could compel testimony in the area and held:

> it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As was said in Watkins, supra, "a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served.[10]

That position is in line with other holdings, including *Braden.*[11] Thus, the analysis turns on the scope of congressional jurisdiction, not congressional motivation, in these cases.

I will confess a high degree of unease with these decisions from the McCarthy period. The Supreme Court at the time had a narrower view of free speech protections and indeed reaffirmed the authority to pursue communists simply because of their beliefs (though, as discussed below, the Court did limit some congressional actions). In *Barenblatt v. United States*, the Court described the crackdown on communists as a public policy that was "hardly debatable."[12] The Court's acquiescence to such crackdowns on free speech is of course highly "debatable" and in my view reprehensible. It was one of the lowest points in the Court's history. Moreover, the Court appeared in a transitional period on free speech and associational cases. For example, see *NAACP v. Alabama*,[13] where the Court required a showing of a compelling state interest in a state agency forcing the disclosure of NAACP membership rolls. Likewise, in *Sweezy v. New Hampshire*,[14] the Court curtailed investigations of academics to protect academic freedom and free speech. *Sweezy* is particularly interesting because it involved Paul Sweezy who was being investigated for un-American and communist activities in New

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9 McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

10 Wilkinson v. United States, 365 U.S. 399, 412 (1961).

11 *See generally* Braden v. United States, 365 U.S. 431 (1961).

12 Barenblatt v. United States, 360 U.S. 109, 127 (1959).

13 *See generally* NAACP v. Alabama, 357 U.S. 449 (1963).

14 *See generally* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

Hampshire. He appeared under subpoena in New Hampshire and testified. However, he drew a line at questions regarding his lectures at the University of New Hampshire. The state supreme court ultimately agreed that his free speech and associational rights were being abridged, but the court upheld the contempt order based on his being declared a subversive by the New Hampshire Attorney General. A plurality of the United States Supreme Court reversed on the grounds that the questions violated Sweezy's First Amendment rights.

The reconciliation of these cases can be found in the narrowing of the question in *Wilkinson* to the validity of the subpoena itself and clarity of the scope of the investigation. Congress is allowed to gather information. It is constrained, however, in punishing citizens on the basis of their exercise of free speech. This obviously creates a gray zone where the disclosure of information can chill speech and associational speech – a line that Congress is wise to avoid. However, it is also worth noting the difficulty that Congress can face with such objections. Congressional inquiries often touch upon political decisions and associational ties of a witness. Even cases of fraud routinely raise political alliances and a myriad of institutional and organizational relationships. While courts should draw "bright line rules" to curtail efforts to censor or punish the exercise of free speech, it is more difficult to draw such a line with regard to testimony before a court or Congress where the demand is only for information. That is why the main basis for refusing to give such information remains the privilege against self-incrimination, where the disclosure would put the person at legal jeopardy based on that person's own words. Like a grand jury proceeding (which is designed to secure information rather than adjudicate a final verdict of guilt), a congressional committee seeks information that may or may not lead to collateral consequences or congressional action.

Ironically, the current controversy demonstrates how the free speech line can shift with one's perspective. From the perspective of those who question climate change, these attorneys general (and supporting organizations) are the ones curtailing free speech and chilling academics and researchers. These investigations are pursuing those who hold opposing scientific views, and these investigations will necessarily intrude upon the very same interests raised in opposition to the congressional subpoenas. Which then is the scourge of free speech: the state investigation into climate change critics or the congressional investigation into those pursuing those critics? As an academic, I view the effort of the state attorneys general to be highly intrusive into academic freedom and free speech much like the inquiry in *Sweezy*. Indeed, just as Sweezy was targeted after criticizing the McCarthy era investigations, conservative groups have raised the same concern in this controversy. For example, there is legitimate concern over the targeting of opposing groups like the Competitive Enterprise Institute, which was previously critical of the criminal investigation.[15]

I fail to see the principled basis for investigating those who hold an opposing view

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[15] In fairness to these groups, they clearly believe that Exxon and others are intentionally misleading the public and it is not uncommon for prosecutors to reach out to experts in a field to establish the foundation for an investigation. Groups like the Union of Concerned Scientists have science-based objections to the representations made by industry. As stated, however, I find the investigation of conservative groups to be highly problematic on free speech and academic freedom grounds.

on this issue. I also fail to see the analogy with the tobacco cases where companies long denied the dangers of cigarette smoking. The causal link between smoking and cancer has long been supported by direct scientific evidence. More importantly, I believe that it is still be protected speech for companies or individuals to maintain questions about that linkage. I would be equally aggrieved by efforts to harass academics who are questioning aspects of the causal link between tobacco and particular cancers. That does not however insulate companies from liability for products that kill many thousands of people every year.

Climate change is still a relatively new field of study with a great array of scientific variables. While I believe the evidence to be overwhelming and conclusive, there are clearly some academics who hold doubts over different aspects of the linkage between human conduct and climate change. Those views are varied with many accepting the fact of climate change while questioning either the role of human activity or the ability to arrest the climatic trend. Other scientists believe there are other contributing factors or that nature goes through periods of adjustment or flux. That is far different from the more linear question of how the inhalation of cigarette smoke causes carcinogenic responses.

The point is not to validate this minority view of climate change but to recognize that these scientists are engaging in protected speech and academic freedom in pursuing their research. From their prospective, the state attorneys general are making climate change critics the new communists. The effort to threaten, harass, or punish such critics should be anathema to any academic and, frankly, to any American. As I indicated previously, I have the same concerns for the environmental organizations being forced to reveal communications, even though I do not agree with their efforts in seeking the investigation of these scientists or companies for their opposing views. The point is that it is hard to claim the moral high ground on free speech when the controversy began with an effort to explore criminal charges against corporate or academic figures for maintaining a minority scientific view. Without getting into a schoolyard fight of who "started it," this controversy from the start implicated core free speech and associational rights. As discussed below, Congress clearly has the authority to investigate whether there is an effort to harass or chill opposing research in this area.

III. THE AUTHORITY OF CONGRESS TO INVESTIGATE OR COMPEL TESTIMONY AND DISCLOSURES.

As discussed above, the Court continues to decline inquiries into the motivation as opposed to the means of congressional investigations – the same position that it has applied in other areas such as police stops.[16] The *Wilkinson* factors continue to guide this analysis. The Court established a standard for whether the congressional investigatory authority is properly used: (1) whether the Committee's investigation of the broad subject matter area is authorized by Congress, (2) whether the investigation is pursuant to "a valid legislative purpose," and (3) whether the specific inquiries involved are pertinent to

[16] *See, e.g.,* Whren v. United States, 517 U.S. 806, 813 (1996) ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

the broad subject matter areas which have been authorized by Congress.[17] Before addressing whether there is some fundamental barrier to congressional investigations of state agencies, it is useful to first address the *Wilkinson* factors as to the authority of Congress to issue any subpoenas in this area – the core inquiry in past federal cases.

A. Authorized Subject Matter Jurisdiction

The first inquiry is whether the Committee is exercising sufficiently broad authorized subject matter jurisdiction over the area in question. In my view, the Committee has such authorization. The scope of the authority of the House Committee on Science, Space, and Technology is stated under House Rule X and on the Committee's website to cover:

> (1) All energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy laboratories.
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> (2) Astronautical research and development, including resources, personnel, equipment, and facilities.
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> (3) Civil aviation research and development.
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> (4) Environmental research and development.
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> (5) Marine research.
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> (6) Commercial application of energy technology.
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> (7) National Institute of Standards and Technology, standardization of weights and measures, and the metric system.
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> (8) National Aeronautics and Space Administration.
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> (9) National Space Council.
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> (10) National Science Foundation.
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> (11) National Weather Service.
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> (12) Outer space, including exploration and control thereof.
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> (13) Science scholarships.

[17] Wilkinson v. United States, 365 U.S. 399, 409 (1961).

(14) Scientific research, development, and demonstration, and projects therefor.[18]

In its general authorization to all committees, the rule also commits to the Committee's authority "all bills, resolutions, and other matters relating to subjects within [its] jurisdiction."[19] That is a remarkably broad authorization covering a massive amount of scientific research and institutions, including institutions with joint state and federal funding. It also covers funding that benefits state agencies. The House rules expressly give the Committee authority to conduct investigations with subpoena authority under House Rule XI.[20] In exercising that broad jurisdiction, Committee Rule XI, gives the Chair of the Committee the power to authorize subpoenas. Finally, the House Committee on Science, Space, and Technology has recognized oversight authority, which it has exercised in the past. This has included investigations into the retaliation against experts at the DOE and FDA as well as legislation designed to ensure free and uninhibited scientific research in areas like drug development.[21]

In its June 1, 2016 letter, Greenpeace asks "[w]hile the Committee surely could investigate the fossil fuel companies . . . how does Rule X(p) extend to review the work and especially the law enforcement activities of state attorneys general?"[22] First, it is entirely unclear why Greenpeace views this list as clearly allowing the investigation of corporations but not non-for-profit corporations or state agencies. Rule X states broad jurisdiction over this field and does not limit it to for-profit companies or one side of a controversy like climate change. Second, the climate change debate clearly falls under this Committee's jurisdiction of questions related to fossil fuels, scientific research, and environmental development. Greenpeace also insists that the controversy is clearly left to the Committee on the Judiciary since it entails questions of federalism and states' rights. This objection is also unfounded in my view. Most committees have overlapping areas with one or more sister committees. Indeed, if this matter were to be taken up by the House Judiciary Committee, one could easily expect others to ask why it is not more properly before the House Science Committee due to the issues of scientific judgment and research. Virtually any question before a congressional committee will raise constitutional or legal issues, including federalism questions. If all such questions belong

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[18] *Jurisdiction*, science.house.gov, https://science.house.gov/about/jurisdiction (last visited Sept. 11, 2016).

[19] Staff of H.R. Comm. on Science, Space, and Tech., 113th Cong., Oversight Plan for the 113th Cong. (Comm. Print 2013).

[20] Staff of H.R. Comm. on Science, Space, and Tech., 112th Cong., Rules Governing Proc. (Comm. Print 2012).

[21] One such recent measure came in the area of drug labeling and scientific research and conferences. *See* David C. Gibbons & Jeffrey N. Wasserstein, *First the Courts, Now Congress*. . ., fdalawblog.net, http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2016/06/hpm-blog-first-the-courts-now-congress-house-committee-throws-its-weight-behind-evolving-legal-lands.html (last visited Sept. 11, 2016).

[22] Letter from Abbe David Lowell, Partner, Chadbourne & Parke LLP, to Hon. Lamar S. Smith, Chairman, Comm. on Science, Space, and Tech. (June 1, 2016).

exclusively to the House and Senate Judiciary Committees, there would be only one effective committee with dozens of subcommittees.

The House Science Committee has opened an investigation into the possible harassment and coercion of corporate scientists and experts researching climate change. Clearly, climate change is one of the biggest issues facing Congress and the issue of the science on both sides of the controversy has remained a central focus of the congressional debate. At a time when billions have been invested in research and regulations in the area, the House Science Committee clearly has the necessary authority to meet this first criterion.

B. Valid Legislative Purpose

The most obvious attack under the *Wilkinson* factors would likely be over the valid legislative purpose element. Critics have charged that the House Science Committee is pursuing an anti-climate change agenda in issuing the subpoenas. This type of argument would be problematic in a court of law for the reasons discussed earlier. The courts rarely delve into the motivations of investigations if the government can cite objective criteria for its actions. Moreover, this argument becomes as circular as the free speech argument. Critics in Congress view the state attorneys general as using their power to enforce an official or approved scientific viewpoint. Thus, Congress is responding to what it sees as retaliation against experts questioning climate change. Again, this comes a matter of perspective. The question for the courts is whether there is an objective legislative purpose – not whether that purpose is the true motivation of some or even all members.

Congressional investigations will often produce negative collateral consequences for witnesses that can range from job terminations to divorces to criminal charges. The Court, however, has been consistent in not treating consequences or motivations as the determinative factors. For example, in *Sinclair v. United States*,[23] the Senate pursued testimony from Harry F. Sinclair who refused to answer because he was facing a criminal trial on the allegations, stating "I shall reserve any evidence I may be able to give for those courts."[24] His counsel objected that the Senate was trying to elicit testimony and evidence outside of the court system. The concern was a legitimate one for a criminal defense. However, it is not a legitimate objection to a subpoena, though invoking the privilege against self-incrimination would have been available absent a grant of immunity. The Court considered the collateral consequences to the trial as entirely immaterial because lawsuits or trials do not "operate[] to divest the Senate or the committee of power further to investigate the actual administration of the land laws."[25] The Court has spoken honestly about its disinclination to judge the propriety or wisdom of broad committee functions:

> It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees.

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23 *See generally* Sinclair v. United States, 279 U.S. 263 (1929).

24 *Id*. at 270.

25 *Id.* at 272.

> That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected. An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures."[26]

Thus, neither motivational questions nor collateral consequences have proven to be valid grounds to refuse subpoenas.

In this case, Congress has a variety of interests that could sustain the subpoena in a challenge. First, it has jurisdiction over scientific research, including the important field of climate change. Various members of Congress have objected to the pressure placed on academics to follow the overwhelming consensus of scientists regarding the role of human activities affecting climate change. Some of the scientists associated with Exxon are either eligible or possible recipients of federal grants for research. Second, the state investigations would chill scientists working outside of Exxon if the criticism of climate research can now be viewed as part of a criminal conspiracy. Third, these individual states are taking a position on research that is important to interstate commerce through universities, conferences, and ultimately investments. Finally, members can claim (as previously noted) that individual states are pursuing researchers and businesses to harass them for their exercise of academic freedom and free speech. Not only are academics likely to fear being called agents of fraud or crimes, but their universities (which depend in part on state and federal grants) are likely to increase pressure on those academics who might be deemed climate change deniers. From that perspective, it is the state investigation that raise McCarthy-like concerns in the effective investigation of "Un-Environmental Activities." The notion of "are you or have you ever been a climate change denier" does not seem so absurd when state prosecutors are exploring scientific views as the basis for criminal fraud allegations. Clearly, one can challenge such concerns, but courts are not tasked with judging merits but only means in such cases. Congress clearly has the means to pursue any of these legitimate legislative purposes.

The state prosecutors and public interest organizations have undermined their case against Congress through their public statements. Indeed, Attorney General Schneiderman seemed to go out of his way to suggest that his criminal investigation was a response to political deadlock in Washington. After a meeting with environmental and advocacy groups, Schneiderman directly referred to the failure of Congress to act on climate change as the impetus for his office's initiative into the area: "With gridlock and dysfunction gripping Washington, it is up to the states to lead on the generation-defining

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[26] Watkins v. United States, 354 U.S. 178, 205-06 (1957).

issue of climate change. We stand ready to defend the next president's climate change agenda, and vow to fight any efforts to roll-back the meaningful progress we've made over the past eight years."[27] He is also quoted as saying that, in light of the position of Congress, he has assembled a "group of state actors [intended] to send the message that [they were] prepared to step into this [legislative] breach."[28] He noted as part of this new effort that he "had served a subpoena on ExxonMobil," to investigate "theories relating to consumer and securities fraud."[29] With such direct references to congressional efforts (or lack thereof), Schneiderman and his counterparts in the other states only reaffirm that the litigation is being shaped by (and seeks to respond to) congressional efforts. Given the broad scope of the discovery sought from Exxon, including communications with experts and academics, Congress can satisfythe standard of a legitimate legislative purpose.

C. Pertinence

The final prong under *Wilkinson* is that the congressional demand for testimony or documents is pertinent and reasonably related to the matter under investigation. Assuming that the Committee's interest in the investigation of climate change critics is legitimate, it is hard to see how the general demand for information on the investigation would not be pertinent. While I am not aware of the specific documents and evidence involved in this dispute, the general demand for information is pertinent in my view.

Pertinence is a standard component for reviewing the obligation of witnesses and was articulated by the Supreme Court in *Watkins v. United States*:

> [C]ommittees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority.[30]

In *Watkins*[31], the Court reversed a conviction of a witness who refused to give testimony before the House on Un-American Activities Committee. The Committee's purpose was to investigate the Communist infiltration of organized labor. However, roughly one-quarter of the individuals that labor leader John Thomas Watkins was asked about were unconnected to labor. The questions that he refused to answer were outside of the

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27 Press Release, 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-vicepresident-al-gore-and-coalition-attorneys-general-across.

28 Client Alert, State AGs Announce Climate Change Investigations, King & Spalding LLP (Apr. 18, 2016).

29 Exxon Mobil's Complaint for Declaratory and Injunctive Relief at 9, *Exxon Mobil Corp. v. Healey*, NO. 4:16-CV-469, 2016 WL 4501347 (N.D. Tex. Aug. 8, 2016).

30 Watkins v. United States, 354 U.S. 178, 206 (1957).

31 *See generally* Watkins v. United States, 354 U.S. 178 (1957).

legislative purpose stated by the Committee. The same result occurred in *Sacher v. United States*,[32] where the Court ordered the dismissal of an indictment by a witness who refused to answer questions that were not pertinent to the authorized subject matter of the Subcommittee on Internal Security of the Senate Judiciary Committee.

While expressing great deference to congressional investigation within proper authorizations, the Court in *Watkins* stressed that "broad as is this power of inquiry, it is not unlimited."[33] As important as those limitations are, however, they are generally stated and relatively easily satisfied for any good-faith investigation. The Court has stressed that Congress has "no general authority to expose private affairs of individuals without justification in terms of the functions of the Congress." Moreover,"[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[34]

Given the abusive character of the McCarthy-era hearings, we will hopefully never come close to that line again in Congress. Congress, like any governmental institution, is not exempt from respecting the Bill of Rights. The danger of majoritarian tyranny lurks like a dormant virus in any democratic system, a lethal condition that erupts like a fever in the midst of political passions. In Federalist No. 10, James Madison expressly warned "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."[35] Thus, specific questions can be objected to as outside of the subject matter or ambiguity in a congressional order[36] or questions about the very subject matter under investigation.[37] However, the Court has also recognized that:

> "The wisdom of congressional approach or methodology is not open to judicial veto. . . . Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function - like any research - is that

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32 *See generally* Sacher v. United States, 356 U.S. 576 (1958); see also Knowles v. United States, 280 F.2d 696, 696 (D.C. Cir. 1960) (finding subcommittee failed to establish pertinency of the questions for the witness); Bowers v. United States, 202 F.2d 447, 447 (D.C. Cir. 1953) (lack of demonstrated pertinency to sustain charge).

33 Watkins v. United States, 354 U.S. 178, 187 (1957).

34 *Id*.

35 James Madison, The Federalist No. 10 60-61 (Jacob E. Cooke ed., 1961).

36 Flaxer v. United States, 358 U.S. 147, 151 (1958) (overturning the conviction based on ambiguity of the order to turn over list containing names and addresses to Senate Committee) ("We stated in *Watkins* v. *United States*, . . . in reference to prosecutions for contempt under this Act that 'the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases.').

37 Russell v. United States, 369 U.S. 749, 767-78 (1962) (finding indictment invalid for failure to clearly state the subject matter of the questions) ("It is difficult to imagine a case in which an indictment's insufficiency resulted so clearly in the indictment's failure to fulfill its primary office -- to inform the defendant of the nature of the accusation against him. Price refused to answer some questions of a Senate subcommittee. He was not told at the time what subject the subcommittee was investigating.")

it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."[38]

The Court has distinguished cases like *Watkins* on the basis that they involved prior violations that resulted in criminal prosecutions. In cases of refusals to supply information and obstruction to congressional investigations, the Court has maintained that no balancing of the first amendment interests is warranted.[39]

The *Watkins* conditions are met so long as there is continuity between the stated and legitimate purpose of the hearing and the questions posed to witnesses.[40] While investigations of this kind can drift into troublesome areas, the general demand for information on the state investigations would seem to be clearly pertinent to the authorized subject matter of this Committee. If Congress believes that scientists, experts, or companies are being coerced or threatened to change their views of climate change, there is an obvious nexus to the demand information on the scope, motivations, and impact of criminal investigations. Beyond a scope challenge (which is normally handled though counsel-to-counsel discussions), the only remaining question is whether there is a threshold bar on congressional demands directed against state agencies or specifically state attorneys general.

IV. THE ABILITY OF CONGRESS TO SUBPOENA STATE ACTORS OR PUBLIC INTEREST ORGANIZATIONS.

It has been suggested that there is a constitutional bar on the ability of Congress to subpoena state attorneys general or public interest groups. While some of these concerns are clearly compelling and worthy of consideration, I do not believe that there is a threshold barrier to such congressional demands under existing case law.[41]

A. State Attorneys General

The state attorneys general have raised ill-defined objections to the congressional subpoenas based on federalism and privilege concerns. The threshold issue for Tenth Amendment analysis is whether there is a bar on congressional investigations of state agencies as a whole. The answer is clearly no. State agencies can curtail federal laws or

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38 Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975).

39 *Id.* at 511.

40 Braden v. United States, 365 U.S. 431, 431 (1961) (upholding Braden's conviction for refusing to answer questions before subcommittee of the House Un-American Activities Committee); Barenblatt v. United States, 360 U.S. 109, 109 (1958) (upholding conviction for contempt of Congress for refusing to answer whether petitioner was or had ever been a member of the Communist Party).

41 This is not to cast aspirations on counsel for these groups who are legitimately asserting all possible privileges and rights on behalf of their clients. *See* D.C. Bar Leg. Ethics Comm., Ethics Op. 288 ("a lawyer has an obligation in the legislative process to raise all available, legitimate objections to a Congressional subpoena for confidential client information.").

policies as well as impair civil liberties. Federal and state agencies share jurisdictions in many areas ranging from the environment to criminal enforcement to commerce. Indeed, many state agencies receive considerable federal support from grants, appropriations, and other sources. While the Tenth Amendment reserves any powers not given to the federal government to the citizens and the states, it does not preclude Congress from seeking information from states on how their activities are affecting federal policies or legislative concerns.

A bar on congressional investigations of state agencies would produce highly dysfunctional, even dangerous results. The same barrier, if it existed, would bar federal agencies, which investigate possible crimes and federal violations like the federal investigation of Arizona Sheriff Joe Arpaio.[42] For example, what if a state agency were suppressing minority voting or denying protections to homosexuals or inhibiting abortion clinics or committing state environmental violations? Most relevant to the current controversy, what if state agencies were seeking to penalize those who support the theories of climate change? There are a myriad of ways that states can negate federal policies, deny individual rights, or frustrate federal laws. Congress has the inherent right to seek out information on the actions and impact of state programs.

In *Printz v. United States*, the Supreme Court struck down parts of the Brady Act that required state officials to perform background-check requirements to execute federal laws.[43] The distinction drawn in that case is precisely the distinction missed by many of the state attorneys general. The late Justice Antonin Scalia was joined by four other justices in maintaining that "Congress cannot compel the States to enact or enforce a federal regulatory program."[44] Some federal laws can also "commandeer" state officials in a way that intrudes upon state authority.[45] However, these cases involved regular acts of administration or enforcement of federal laws. It is certainly possible for federal laws to cross this line in requiring states to perform information gathering or analysis functions. The current controversy is different. This is not a statutory or regulatory program imposing a function on a state agency as part of a federal policy. Rather, it is a congressional committee seeking information from a target state office or agency to address a specific controversy.

The Fourth Circuit drew this same distinction in *Freilich v. Upper Chesapeake Health, Inc.*, where it faced a challenge to the Health Care Quality Improvement Act

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[42] Dennis Wagner, *Justice Department to Decide on Sheriff Joe Arpaio Criminal Contempt Charges*, The Arizona Republic, http://www.azcentral.com/story/news/local/phoenix/2016/08/26/justice-department-probe-sheriff-joe-arpaio/89443454/ (last visited Sept. 11, 2016).

[43] Printz v. United States, 521 U.S. 898, 935 (1997); *see also* Reno v. Condon, 528 U.S. 141, 151 (2000) ("It does not require the [Maryland] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.").

[44] Printz v. United States, 521 U.S. 898, 935 (1997)

[45] Some seven justices also have taken the view against federal laws that effectively commandeer state officials or programs. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2566 (Scalia, Kennedy, Thomas & Alito, J., dissenting); *see also* Hodel v. Va.Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).

(HCQIA)[46] and its requirement for the submission of reports to the Board of Medical Examiners. The Fourth Circuit rejected this claim, stressing that "[a]ll that the HCQIA requires of states is the forwarding of information."[47] It is worth noting that this submission of information was an ongoing administrative program – not a congressional subpoena requiring the submission of responses to insular investigatory inquiries.

Greenpeace quotes *Printz* as warning that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[48] The quote from *Printz* actually comes from *New York v. United States,*[49] where the Court was speaking of direct compulsion or regulation of the states. Thus, the quote goes on to say "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[50] However, the Court discusses how Congress can influence state choices and programs through various means that are "short of outright coercion."[51] This includes the very powers supporting instant subpoenas over grants and research. As a necessary predicate to such powers, Congress must be able to acquire information on the scope of the problem or controversy at issue.

If state agencies are not immune from federal subpoenas, the next question is whether there is something specific about state prosecuting offices that would bar this subpoena. For example, the New York Attorney General has raised the Tenth Amendment and claimed that, by demanding information, Congress is seeking to "install[] individual members of Congress as overseers of New York's local law enforcement decisions."[52] For the foregoing reasons, the Tenth Amendment challenge falls significantly short of existing case law and doctrine. Mr. Schneiderman's claim of some type of hostile takeover of his office is clearly hyperbolic. Congress is not asserting any decision-making or control over state prosecutorial decisions. It is inquiring into a very public alliance between prosecutors and environmental advocates to target a company and an insular group of scientists and experts. There may be material that is subject to collateral limitations under grand jury rules or confidentiality agreements. However, as a general proposition, there is no constitutional, *sui generis* distinction that exempts state attorneys general from congressional subpoenas. Schneiderman and his

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46 *See generally* Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205 (4th Cir. 2002). The HCQIA is codified in 42 U.S.C. § 11101 *et seq.*.

47 Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 214 (4th Cir. 2002); *see also* City of New York v. United States, 179 F.3d 29, 34-35 (2d Cir. 1999) (rejecting claim of the required submission of immigration data to federal agencies as unconstitutional).

48 Letter from Faith E. Gay, Partner, Quinn Emanuel Urquhart & Sullivan LLP, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech. (June 1, 2016); Printz v. United States, 521 U.S. 898, 924 (1997).

49 New York v. United States, 505 U.S. 144, 166 (1992).

50 *Id.*

51 *Id.*

52 Letter from Leslie B. Dubeck, Counsel for A.G. Eric T. Schneiderman, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech. (July 26, 2016).

counterparts in other states openly discussed their efforts as a response to the action or inaction of Congress. Given the public character of this campaign and the calls to overcome congressional opposition to deal with climate change, a blanket refusal to comply with duly executed subpoenas of Congress would be ill conceived. I understand that the attorneys general are looking at possible false representations made by Exxon. However, the scope of its discovery is quite broad, and its impact on academic and corporate research could be chilling. Any objections will have to be made to specific productions and whether alternatives like redacted or summarized material can be used by agreement.

B. Public Interest Organizations

As I previously noted, I am most concerned about the congressional subpoenas targeting environmental groups like Greenpeace. Critics have charged that the state attorneys general investigation are part of a coordinated effort with some groups to target political opponents and to harass dissenting experts in the field. Yet, targeting public interest groups has an obvious chilling effect on free speech and association. As a prudential matter, Congress should avoid the investigation of public interest organizations in their advocacy efforts. Once again, however, I have been called upon to address the constitutional barriers, if any, to subjecting public interest organizations to congressional subpoenas. There is no such threshold protection that would attach to a public interest organization as opposed to any other organization. Indeed, few members would want such a bar when Congress routinely seeks information from the not-for-profit industry and advocacy groups on a variety of issues. Public interest organizations like Planned Parenthood and church-based groups receive federal and state funding. They also can be an active component in violating federal laws or in denying basic rights to citizens. Additionally, we have seen an explosion of different types of corporate structures created to shield political donations and carry out political agendas. Regardless of whether a target is a for-profit or a not-for-profit corporation, there is no threshold constitutional barrier to compelled testimony or production of information. There may be heightened first speech or associational interests involved in such demands, but those are highly case-specific (and evidence-specific) controversies.

In its letters to the House Science Committee, Greenpeace cites the right to free speech (*Synder v. Phelps*),[53] the right to association (*Knox v. Serv. Emp. Int'l Union Local 1000*),[54] and the right to petition (*United Mine Workers of Am., Dist, 12, v. Ill. State Bar Ass'n*).[55] These cases represent the broad statement of rights but do not include any direct authority to bar any subpoenas in our case. Greenpeace does cite *United States v. Rumely*,[56] where the Court upheld the reversal of a conviction of an activist who refused to answer questions from the House Select Committee on Lobbying Activities.

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[53] Snyder v. Phelps, 562 U.S. 443 (2011).

[54] Knox v. Serv. Emp. Int'l Union, Local 1000, 132 S. Ct. 2277 (2012).

[55] United Mine Workers of Am., Dist, 12, v. Ill. State Bar Ass'n, 389 U.S. 217 (1967).

[56] *See generally* United States v. Rumely, 345 U.S. 41 (1953).

However, the asserted scope of the demand by the Committee in that 1953 case was absurdly and abusively broad:

> "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."[57]

Notably, the Court elected not to consider a later narrowing of the demand since it would only judge the refusal on the facts and scope that existed at the time. Greenpeace also cited *Watkins*,[58] but, as previously noted, *Watkins* involved demands for information on individuals wholly unconnected to the authorized purpose of the investigation. In this case, the inquiry is tailored to address the specific effort to criminally investigate a company and its supporting experts due to their position on climate change.

Greenpeace certainly raises core concerns in its citation of *NAACP v. Alabama*,[59] where the Court prevented a state from forcing the disclosure of the membership rolls of the NAACP – an act that the Court agreed could expose its members to violence and retribution.[60] The 1958 case does support the argument that some disclosures within the scope of the congressional subpoena could intrude upon core First Amendment rights. However, as a general matter, the subpoena is tied directly to the campaign against Exxon and its supporting experts. The two demands were:

1. All documents and communications between employees of [Greenpeace] and office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.
2. All documents and communications between employees of [Greenpeace] and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 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 the investigation, *subpoenas duces tecum*,

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57 *Id.* at 46.

58 Letter from Faith E. Gay, Partner, Quinn Emanuel Urquhart & Sullivan LLP, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech. (June 1, 2016).

59 *Id*.

60 *See generally* NAACP v. Alabama, 357 U.S. 449 (1958); see also *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) ("[i]nquiries about the identity of persons with whom the witnesses were associated on the newspaper and in the Black Panther Party . . . infringed the right of associational privacy").

> or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.[61]

The first demand covers communications with a government agency, which are generally public records or public disclosures absent a confidential agreement or recognized privilege. It is worth noting that the subpoena expressly states that the Committee does not recognize privilege barriers to production like attorney-client privilege or deliberative process privilege.[62] While there has long been a debate over the applicability of non-constitutionally based privileges in congressional proceedings, the long-standing practice has been that it is up to each committee to decide whether the need for information outweighs a claim under attorney-client privilege, deliberative process, or other privileges.[63]

The constitutional claims under free speech and association are also weakest with regard to the first demand on the subpoena schedule. First and foremost, the First Amendment has not been recognized as creating an absolute defense to testimony or production before Congress. Rather, as the Court stated in *Barenblatt v. United States*, "[w]here 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."[64] In this case, environmental groups were open about their working with this coalition of state prosecutors and public interest advocates. Greenpeace's support for this effort was not a secret. It was a communication outside of the organization with public employees. While Greenpeace cites the D.C. Circuit decision in *AFL-CIO v. FEC*, a communication with a government agency is not "an association's confidential internal material."[65] Indeed, at least one group has reported that it obtained many of the documents and correspondence refused to Congress under the Vermont Public Records Law.[66] I recently testified in June before the

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61 Letter from House of Representatives Comm. on Science, Space, and Tech. to Annie Leonard, Executive Director, Greenpeace (May 18, 2016).

62 The subpoena states "In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements." Subpoena from House of Representatives Comm. on Science, Space, and Tech. issued to Greenpeace USA (July 13, 2016).

63 Todd Garvey & Alissa M. Dolan, Cong. Research Serv., RL34114, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure 58-62 (May 8, 2014).

64 Barenblatt v. United States, 360 U.S. 109, 126 (1959).

65 Letter from Faith E. Gay, Partner, Quinn Emanuel Urquhart & Sullivan LLP, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech. (June 1, 2016); AFL-CIO v. FEC, 333 F.3d 168, 177 (D.C. Cir. 2003).

66 The Energy & Environmental Legal Institute has posted statements contained in such communications back in April 2015. *See* Energy & Environmental Legal Institute,

House Judiciary Committee on how the legislative authority has steadily eroded with the rise of a type of "fourth branch" of federal agencies, which now routinely defy congressional demands for documents and information. I noted that

> What is most notable, and alarming, about the current state of our government is that private litigants like Judicial Watch have been more successful in securing information from the Administration than the United States Congress. Thus, the relatively weak Freedom of Information Act (FOIA) has proven more effective than Article I of the Constitution in forcing disclosures about alleged governmental misconduct. That is a state of affairs that the Framers would never have anticipated, nor condoned.[67]

Now, it would appear that citizens and advocacy groups can secure more information from a state public records law than a committee with oversight authority. That would be a rather curious result in a system that relies so centrally on legislative oversight.

At most, a court would perform a balancing test in considering a challenge to these subpoenas. The Court applied such a balancing test in *Gibson v. Florida Legislative Investigation Committee*.[68] The Florida legislature targeted Theodore R. Gibson, president of the NAACP in Miami, in an abusive demand to disclose his membership and contributors. Notably, Gibson did testify and did give information to the Committee on the specific alleged communists in his organization. He denied that they had any role with the NAACP. The Court voted 5-4 that "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."[69] It found that the NAACP had shown a "strong associational interest" with only a "slender showing" from the government. *Gibson* is a good case for these groups to raise but it is worth noting that there are a couple of obvious distinctions to draw. First, this was a state legislative committee, not Congress, which has generally prevailed in such first amendment challenges. Second, and most importantly, the demand of the state legislative committee was wildly out of sync with its stated goal in the hearing:

> "the Committee was not here seeking from the petitioner or the records of which he was custodian any information as to whether he, himself, or even other persons were members of the Communist Party, Communist front or affiliated organizations, or other allegedly subversive groups; instead, the entire thrust of the demands on the petitioner was that he disclose whether other persons were

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Emails Reveal Schneiderman, Other AG's Colluding With Al Gore and Greens To Investigate Climate Skeptics, April 15, 2016, available at http://eelegal.org/2016/04/15/release-emails-reveal-schneiderman-other-ags-colluding-with-al-gore-and-greens-to-investigate-climate-skeptics/

[67] United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, *"Examining The Allegations of Misconduct of IRS Commissioner John Koskinen"* June 22, 2016. (statement of Professor Jonathan Turley).

[68] 372 U.S. 539 (1963).

[69] *Id.* at 546.

> members of the N.A.A.C.P., itself a concededly legitimate and nonsubversive organization. Compelling such an organization, engaged in the exercise of First and Fourteenth Amendment rights, to disclose its membership presents, under our cases, a question wholly different from compelling the Communist Party to disclose its own membership."[70]

That is in stark contrast to the subpoenas in this matter. The underlying subject matter clearly shapes the production demand in limiting the disclosures to the specific criminal investigation of Exxon, experts, and academics. There is a "substantial relation between the information sought and a subject of overriding and compelling [government] interest."[71] One may certainly disagree with the interest (as one can disagree with the state attorneys general investigations) but the interest of the Committee falls squarely within its authorized jurisdiction. Moreover, it is seeking documents in the custodial care of the subpoenaed groups. Finally, if a compelling interest is demanded, Congress can cite its concern over the criminalization of scientific dissent and its impact of federal research and policies. Our unparalleled research capacity is sustained by open and free debate among scientists and experts. Neither the scientific method nor the scientific culture can long be sustained if disagreements are to be handled by criminal indictments rather than academic exchanges.

Gibson does not create blanket immunities or protections for public interest groups in refusing subpoenas. Indeed, if that were so, the attorneys general could not be pursuing such groups within scope of their investigation. That does not mean that the principles and concerns articulated in *Gibson* are immaterial. If there are problematic elements, it would come with the production of specific documents rather than all production. After all, the NAACP president did testify. He did supply information. He then balked at the extraneous demands with first amendment implications for the organization. There may be some documents that raise such first amendment issues but those documents are normally identified as part of the process of creating an index and summary of documents. There can be agreements reached on redactions or limitations on scope. However, the threshold claim of the groups in refusing any production cannot be supported on the basis of *Gibson* in my view.

The second demand does raise communications that, while not *internal* to the organization, could be viewed as confidential communications between organizations. Some of this material may be deemed as effectively public due to its distribution. Moreover, unlike *NAACP v. Alabama*, Congress has specified the organizations that are known to have been involved in this campaign and the individuals subject to these organizations are presumably a matter of public record. Nevertheless, the inquiry could involve names of advocates and experts assisting these organizations and could reveal mutual strategic and tactical information. It is worth noting however that the subpoenas supported by these groups in the attorneys general investigations involved even more sweeping and threatening demands. These included a demand from Exxon to turn over "[a]ll Documents or Communications reflecting or concerning studies, research, or other reviews" questioning climate change. Dozens of scientists, advocates, and other

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70 *Id.* at 548-49.

71 *Id.* at 546.

professionals were reportedly encompassed in the subpoena demands. The communications covered by the subpoenas go back decades and would force disclosures of communications with conservative public interest groups like Heritage Foundation and the American Petroleum Institute.[72] The House subpoena is the model of brevity in comparison to some of these sweeping demands, which directly threaten free speech, academic freedom, and the right of association. In addition, these subpoenas targeting communications with conservative public interest groups were part of a criminal justice investigation seeking to support felony charges rather than a congressional investigation simply seeking possible information for legislative action. The environmental groups (which supported these intrusive demands involving other public interest groups) would need to explain how such investigatory demands are appropriate for the Executive Branch but somehow barred to the Legislative Branch.

The ruling in *Eastland v. United States*[73] is instructive on this point. In that case, a political group was subjected to a congressional subpoena that would have disclosed many of its members. This included a committee subpoena to a bank to provide information related to the membership. The case bears obvious analogies to the instant controversy as well as NAACP v. Alabama. The Court stressed that "[w]here we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part."[74] While the Court focused on the interaction o the Speech and Debate Clause, it expressly rejected the claim (and position of the appellate court) that, because the group alleges a desire to harass or chill speech, "once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights."[75] Once again, the Court reaffirmed that "Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."[76]

Most recently, a district court also rejected the same arguments raised in this controversy in *Senate Permanent Subcom. On Investigations v. Ferrer*,[77] where the Senate Committee issued a production order to Carl Ferrer, Chief Executive Officer of Backpage.com, an online website for classified ads. The order required the disclosure of information related to users as part of an investigation into the use of the Internet for illegal sex trafficking. The court rejected the challenge on the basis of the authorization of Committee, the scope of the order, and the free speech objections. The court rejected what it viewed as absolute claims under the first amendment and noted that "enforcement

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[72] Lauren Kurtz, *Increasing Number of Investigations Into Fossil Fuel Industry's "Disinformation Campaign,"* Climate Change Blog, May 6, 2016, available at http://blogs.law.columbia.edu/climatechange/2016/05/06/increasing-number-of-investigations-into-fossil-fuel-disinformation/

[73] 421 U.S. 491 (1975).

[74] *Id.* at 511.

[75] *Id.* at 509.

[76] *Id.* at 508.

[77] 2016 U.S. Dist. LEXIS 103143 (August 5, 2016).

of the subpoena in the instant case does not impose a content-based restriction on any protected activity. However, Chief Justice John Roberts has granted a stay in the case.[78]

Various groups and advocates have submitted a well-reasoned and penetrating analysis of the legal and policy concerns over the investigation of public interest groups.[79] However, the Union admits in the letter that "there may be occasions where Congress could appropriately authorize an investigation into apparent systemic violations of constitutional rights that require a legislative response."[80] This is manifestly true. However, the scholars go on to object to this investigation by noting that "Congress is not a prosecutor and may not properly use its subpoena power simply to pursue perceived First Amendment violations."[81] It is not clear where the suggested line between "apparent systemic violations" and "perceived First Amendment violations" would be drawn or why Congress would have authority on one side of that line as opposed to the other. I assume that most people would want Congress to investigate the use of state powers to unleash a new McCarthy-like campaign or to harass experts based on their scientific judgment. The Committee has a myriad of legitimate institutional interests affected by such a campaign ranging from the interference with federal research to the impact on federal programs in the areas of energy and the environment.

Given the foregoing, it would seem unlikely that the public interest groups could prevail on a blanket refusal to comply with a congressional subpoena. There is no threshold immunity for such organizations recognized in past Supreme Court cases. Greenpeace was quite public in its advocacy for this criminal investigation and, even if non-constitutional privileges were recognized by the Committee, much of these communications would not be viewed as privileged.[82] The ubiquitous character of not-for-profit corporations makes any threshold barrier impracticable. There is a plethora of such groups set up by advocates from industry, academics, and public interest areas. Some could easily be viewed as part of a conspiracy or underlying effort to violate federal laws, as was the case with certain tobacco industry groups. Indeed, tobacco groups were subject to subpoenas to uncover the identities and activities of their sponsors

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78 The stay was issued on September 6, 2016 and is available at https://www.supremecourt.gov/orders/courtorders/090616zr_p8k0.pdf.

79 Letter to Chairman Lamar Smith Re. Subpoena Dated July 13, 2016 Issued Union of Concerned Scientists, September 12, 2016.

80 *Id.* at 4.

81 *Id.*

82 Joe Carroll & Christie Smith, *Exxon Probed by New York in Toughest U.S. Climate Crackdown Yet*, Bloomberg (Nov. 5, 2015), http://www.bloomberg.com/news/articles/2015-11-05/exxon-mobil-said-to-be-probed-by-n-y-over-climate-change.

and contributors. This included both hearings[83] in the House as well as federal investigations[84] and other litigation.[85]

In this sense, the actions of these groups and prosecutors raise the same costs in investigating climate change critics. Because many of these groups also have political interests, an alliance with some attorneys general raises equally serious concerns over (to use a paraphrase of Clausewitz) the use of prosecution as politics by another means.[86] Yet, such demands come at a high cost for the political system. The scope of the demand on public interest groups could raise specific concerns over the chilling effect on free speech and association. To be sure, there are cases where allegations necessitate the demand for communications made by not-for-profit corporations. It is for that reason that I would encourage both the attorneys general and Congress to minimize the investigation of academics and public interest groups in this controversy.

V. CONCLUSION

The dueling investigations of the state attorneys general and Congress present a novel issue of constitutional law with a maddening mix of Article I, First Amendment, Tenth Amendment, and statutory issues. My primary focus today is to simply set aside sweeping claims that seem more rhetorical and constitutional in character. Threshold claims of absolute constitutional immunities or protections from these subpoenas are, in my view, ill-conceived and poorly supported. I do not believe that such arguments would succeed under existing case law. Put simply, that dog won't hunt.

What remains are largely policy choices, though that does not reduce the gravity of this situation. The investigation of climate change critics is extremely troubling, particularly for those who value academic freedom. While I agree with President Obama on climate change and the need to act, this is another case where the means chosen by advocates are highly problematic. Indeed, these investigations will clearly pose a chilling effect on experts working in this field and add a menacing element for those who disagree with the common wisdom on climate change. Conversely, the investigation of environmental public interest groups in their dealing with each other raises equally troubling elements.

The Constitution does not protect us from bad choices, only unconstitutional ones. The superheated debate over climate change is producing increasingly extreme political

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[83] An example of such a hearing occurred under the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce under then Democratic Chairman Henry Waxman. Philip J. Hilts, *Tobacco Council's Objectivity*, New York Times, May 27, 1994, available at http://www.nytimes.com/1994/05/27/us/tobacco-council-s-objectivity-questioned.html

[84] Pierre Thomas & John Schwartz, *U.S. Widens Tobacco Investigation*, Washington Post, Sept. 8, 1996 available at https://www.washingtonpost.com/archive/politics/1996/09/08/us-widens-tobacco-investigation/e8dcda29-6813-4d79-b19e-70e9a3b1471b/

[85] *See, e.g., Sackman v. Liggett Group*, 173 F.R.D. 358, 364 (E.D.N.Y. 1997) (rejecting privilege arguments over documents from Council for Tobacco Research).

[86] *See generally* Carl von Clausewitz, On War (1832).

and legal confrontations. Conservative public interest groups and experts find themselves being swept into criminal investigations due to their views while environmental public interest organizations are called to disclose their advocacy efforts. With the addition of case law from the McCarthy period, we seem to have the perfect storm.

In the end, this is a debate that needs to happen, and those who are critics or skeptics of climate change need to be part of that debate – not only on the issue of causation but remediation. Yet, this debate will not be resolved with threats of criminal fraud prosecutions or contempt citations. If the state attorneys general insist on pursing these troubling state investigations, they will have to accept that Congress has a valid jurisdictional claim for its own investigation. Perhaps by removing much of the unsupported rhetoric, the parties can at least agree to a compromise on the scope and form of production without the necessity of litigation. Then, cooler minds might prevail in the debate over global warming.

Thank you again for the honor of addressing the Committee today. I am happy to answer any questions that you may have.

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