

# Congress of the United States

## House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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June 17, 2016

Ms. Catherine S. Duval  
Partner  
Zuckerman Spaeder LLP  
1800 M Street, NW  
Washington, DC 20036-5807

Dear Ms. Duval,

Thank you for your June 1, 2016, response. The House Science, Space, and Technology 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 the contentions in your letter. 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 your client provides the documents and information previously requested in our May 18, 2016, letter.<sup>1</sup>

### **Congress' Broad Investigatory Power**

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.<sup>2</sup> 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."<sup>3</sup> 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."<sup>4</sup> However, Congress' investigatory power is not without limits.<sup>5</sup> Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast

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<sup>1</sup> Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

<sup>2</sup> 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).

<sup>3</sup> Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23 [hereinafter CRS Report, RL30240].

<sup>4</sup> *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).

<sup>5</sup> *Watkins v. U.S.*, 354 U.S. 178 (1957).

and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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.<sup>6</sup> According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.<sup>7</sup> In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."<sup>8</sup> 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."<sup>9</sup> Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,<sup>10</sup> organizations that violate the civil rights of individuals,<sup>11</sup> state agencies involved in the Hurricane Katrina response,<sup>12</sup> 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 \$138.069 billion to fund research and development.<sup>13</sup> Of that total federal spending, \$31.8 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

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<sup>6</sup> *McGrain* at 177, 181-182.

<sup>7</sup> See *McGrain*, 273 U.S. at 177, 181-182.

<sup>8</sup> *Eastland* at 509.

<sup>9</sup> CRS Report, RL30240 at 26.

<sup>10</sup> *Hutcheson v. U.S.*, 369 U.S. 599 (1962).

<sup>11</sup> *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969)).

<sup>12</sup> 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.*, 109<sup>th</sup> Cong., Report 109-377 (Feb. 15, 2006).

<sup>13</sup> John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

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 the Science Committee that organizations such as your client's and those similarly situated should not be inciting legal action based on debatable science to undermine the First Amendment of the Constitution.

The investigative efforts supported by your client and other similar organizations 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 ...**<sup>14</sup>

This statement suggests that the Attorney General's office and those who support his actions will be deciding what science is valid and what science is invalid. In essence, the attorney general is saying that if he 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. Congress has a duty to protect scientists and researchers from the criminalization of scientific inquiry.

Accordingly, 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 these investigations, Congress can investigate the effects your client's advocacy may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."<sup>15</sup> 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 client's efforts and those of the so called "Green 20"

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<sup>14</sup> *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).

<sup>15</sup> Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your client's actions 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 website of the Union of Concerned Scientists, one of the organizations now supporting the Green 20's investigations, describes a 2010 investigation by the Virginia Attorney General of a University of Virginia scientist as "a campaign of harassment," and "a threat[] [to the] the ability of scientists in Virginia to ask tough questions about our world—and pursue contentious lines of research." The current efforts by the Green 20, supported by your client's organization, appear to be no different.<sup>16</sup>

### **The First Amendment is Not a Shield to Congressional Inquiry**

Unlike the Fifth Amendment, the First Amendment is not an impermeable shield to Congressional investigations. In *Barenblatt v. United States*, the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."<sup>17</sup> Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."<sup>18</sup> These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.

Congress frequently and rigorously has investigated private citizens and advocacy groups for various types of conduct. In almost all instances these investigations have withstood judicial scrutiny, with little, if any, restriction imposed upon them. Recently, the Democratic Chairman of the House Oversight and Government Reform Committee, Henry Waxman, investigated numerous charities benefiting veterans.<sup>19</sup> When the founder of one of the charities under investigation failed to comply with Chairman Waxman's request for documents and testimony, the Chairman issued a subpoena compelling the necessary information.<sup>20</sup> Eventually, the

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<sup>16</sup> Union of Concerned Scientists, Center for Science & Democracy, *Science under Attack: Legal Harassment of Climate Scientist Michael Mann* available at <http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.V1mpBfkrKUK> (last visited June 9, 2016).

<sup>17</sup> *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

<sup>18</sup> *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).

<sup>19</sup> Philip Rucker, *Panel Probes Spending of Veterans Charities*, WASH. POST, Dec. 14, 2007.

<sup>20</sup> Matthew Jaffe and Rhonda Schwartz, *Director of Veterans Charity in Hiding*, MILITARY.COM available at <http://www.military.com/NewsContent/0,13319,158246,00.html> (last visited June 9, 2016).



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Oversight Committee received all documents, information, and testimony as part of that congressional investigation.<sup>21</sup>

### The Committee's Document Requests


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 employees of your organization and any 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 your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 350.org, Greenpeace, the Rockefeller Brothers Fund, the Rockefeller Family Fund, or the Climate Reality Project 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.

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

  
Rep. Frank D. Lucas  
Vice Chairman

  
Rep. Dana Rohrabacher  
Member of Congress

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<sup>21</sup> Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH. POST, Jan. 18, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703620.html> (last visited June 9, 2016).



Rep. Randy Neugebauer  
Member of Congress



Rep. Michael T. McCaul  
Member of Congress



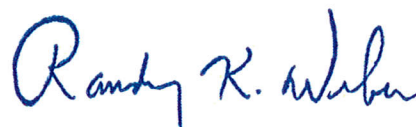
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Member of Congress



Rep. Bill Posey  
Member of Congress



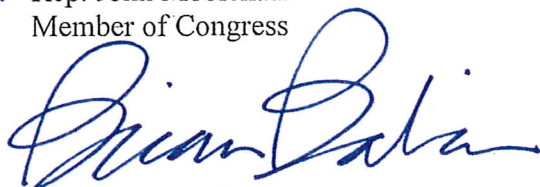
Rep. Jim Bridenstine  
Chairman  
Subcommittee on Environment



Rep. Randy Weber  
Chairman  
Subcommittee on Energy



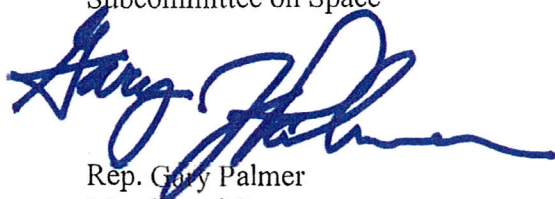
Rep. John Moolenaar  
Member of Congress



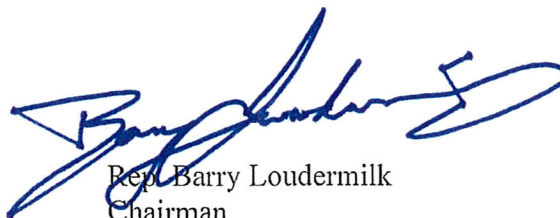
Rep. Brian Babin  
Chairman  
Subcommittee on Space



Rep. Bruce Westerman  
Member of Congress



Rep. Gary Palmer  
Member of Congress

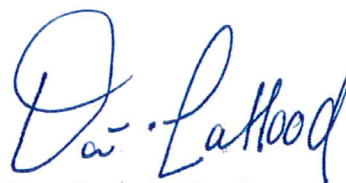


Rep. Barry Loudermilk  
Chairman  
Subcommittee on Oversight

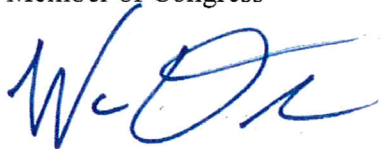
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Rep. Ralph Lee Abraham  
Member of Congress



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