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Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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October 13, 2016

Ms. Catherine S. Duval
Partner
Zuckerman Spaeder
1800 M. Street, NW Suite 1000
Washington, DC 20036

Dear Ms. Duval,

The Committee on Science, Space, and Technology is conducting oversight of your clients' roles in developing and coordinating the investigative actions of "sympathetic" state attorneys general[1] who comprise the so-called "Green 20" — actions which are likely to deprive companies, nonprofit organizations, and scientists of the ability to fund and conduct scientific research free from intimidation and threat of prosecution. These state attorneys general, perhaps at the behest of your clients, have alleged that Exxon Mobil Corporation has committed fraud and have issued subpoenas demanding the production of documents and communications between, among others, Exxon and scientists, both internal and external, who have conducted research related to climate change. This research is funded by a variety of sources, including the federal government and private industry. It is likely that the demands of the "Green 20" implicate the work product of both federally funded and private researchers.

This letter comes after multiple overtures from Committee staff to you on behalf of your clients, the Pawa Law Group, P.C. (Pawa) and the Global Warming Legal Action Project (GWLAP), in an effort to initiate compliance with the Committee's July 13, 2016, subpoenas. Though Pawa and GWLAP have questioned the Committee's jurisdiction and the validity of the subpoenas, and have asserted various defenses supporting its refusal to comply, after careful consideration of your clients' objections I have concluded that they do not provide adequate, legitimate legal bases to categorically reject complying with a congressional subpoena. Accordingly, for the reasons detailed below, Pawa's and GWLAP's objections are overruled.

This letter also serves to memorialize Committee staff's numerous attempts to engage in reasonable negotiation and accommodation with Pawa and GWLAP concerning their compliance with the Committee's subpoenas. Unfortunately, these discussions have been extremely one-sided; even when offered generous accommodations by the Committee, Pawa and GWLAP have

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[1] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

failed to make a good-faith effort to comply with the July 13 subpoenas. As your clients have shown no inclination to comply with the Committee's subpoenas, I find myself with no choice but to pursue the tools at my disposal to enforce the subpoenas and induce your clients' compliance. **This letter serves to formally notify your clients of an October 27, 2016, deadline by which to produce documents, after which the Committee will consider holding Pawa and GWLAP in contempt.**

I. *The Legal Arguments Raised by Pawa and GWLAP Do Not Provide Adequate Legal Bases on Which to Reject Complying with the Committee's Subpoena*

a. This Committee's investigation is properly authorized by the Rules of the House, has "a valid legislative purpose," and is pertinent to a subject matter within the Committee's jurisdiction

In refusing to comply with the Committee's July 13 subpoenas, you state that you are "not persuaded" of the Committee's oversight authority.[2] Let me assure you that the Committee has the authority to pursue its present inquiry; the Committee's jurisdiction is expansive and well-defined by the House of Representatives, and includes oversight of research and development (R&D) activities.[3] Moreover, the Committee's subpoenas serve a legitimate legislative interest and meet the standards set forth by the Supreme Court. Prominent constitutional law scholars have concluded that the Committee is authorized to issue and enforce its subpoenas in connection with the "Green 20" inquiry.[4]

Wilkinson v. United States lays out a three-pronged test regarding the legal sufficiency of a congressional subpoena.[5] First, the Committee's investigation of the broad subject matter must be authorized by Congress.[6] This Committee is charged with ensuring that the United States remains the world leader in scientific discovery, research, and innovation. The Committee furthers this goal through legislation, both funding and policy oriented legislation, as well as oversight activities. Ensuring that every scientist is free to engage in research advancing the theories they find most promising in light of objective scientific principles is necessary for the American scientific enterprise to remain successful. In doing so, the Committee has an interest in ensuring that scientific research is not chilled and distorted by overzealous advocates who seek to punish or criminalize scientific debate.

The Committee's interest in the U.S. scientific enterprise is well-established. The Committee is the House's chief authorizing body for R&D activities, and the Committee's jurisdiction is broad in this respect. Under the Rules of the House, the Committee has legislative and oversight responsibilities for "All energy research, development, and demonstration, and

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[2] Letter from Ms. Catherine S. Duval to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (July 13, 2016).
[3] Clause 3(k) of Rule X.
[4] *Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoena's: Hearing Before the H. of Reps. Comm. on Science, Space, & Tech.*, 114th Cong. (Sept. 14, 2016).
[5] *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961).
[6] *Id.*

projects therefor, and all federally owned or operated nonmilitary energy labs; Environmental research and development; Marine research; Commercial application of energy technology; and Scientific research, development, and demonstration, and projects therefor."[7] Essentially, under Rule X, this Committee authorizes all federal R&D funding that is not military or medical. Also, House Rule X is explicit in stating that "all bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees . . . shall be referred to those committees."[8]

Your clients' communications with the "Green 20" directly affect the research activities that are funded, in whole or in part, by the federal government and the private sector. Depending on the effects of actions taken by the "Green 20," perhaps at your clients' suggestion, this Committee could direct federal funding to certain research, redirect current research, or authorize funds for more targeted research at agencies under the Committee's jurisdiction. Should your clients' coordination with the "Green 20" investigation or advocacy cause an imbalance in scientific inquiry, the Committee could correct such an imbalance through its authorization power delegated by Rule X. The documents and information compelled by the July 13 subpoenas bear directly on whether such corrective action is necessary, and if so, the scope of any such potential legislation and funding.

Although the Committee maintains that showing the existence of an actual effect is unnecessary in order to conduct a lawful legislative inquiry, the Committee is aware of a demonstrable chilling effect as a result of zealous advocacy – the sort in which your clients routinely engage. For example, Committee staff has gathered information from the scientific community, including from a professor of science at a major research university in Florida, whose work has been negatively affected by overzealous advocates. The scientist told Committee staff that overzealous advocacy by nonprofit groups has demonized his research by cherry-picking data. Moreover, the scientist told Committee staff that scientific findings and data on controversial topics are repeatedly mischaracterized in an effort to delegitimize certain research. As a result, private industry has distanced itself from not only funding but from any communication or collaboration with scientists at many research universities. The scientist singled out public-private partnerships as so chilled as to become "frozen" as a result of investigations and advocacy like those supported by your clients, and many similarly situated scientists feel chilled by the actions of zealous advocacy groups like Pawa and GWLAP. The Committee is therefore concerned about the effect of such advocacy, especially when coordinated with state investigations, on the nation's scientific enterprise.

b. <u>This Committee's prior legislative and oversight efforts related to scientists and R&D are robust and provide a valid legislative purpose</u>

The Committee has a long history of exercising both legislative and oversight functions within its research and development jurisdiction. In the 114th Congress, the Committee reported, and the House passed H.R. 1806, the America COMPETES Reauthorization Act of 2015, which *authorized funds across the research and development enterprise*, including for the Department

[7] Clause 1(p) of Rule X.
[8] Clause 1 of Rule X.

of Energy (DOE), National Science Foundation (NSF), and the National Institute of Standards and Technology (NIST).[9] The Committee was the source of similar legislation in 2007 and 2010.[10] In this Congress, the Committee has been referred legislation on topics including low-dose radiation research, harmful algal blooms, the Environmental Protection Agency's (EPA) Science Advisory Board, DOE labs, ocean acidification, and marine hydrokinetic renewable energy. To date, 163 bills or resolutions have been referred to the Committee.

The Committee's oversight history is equally robust, with recent oversight inquiries and investigations into subjects ranging from NSF and DOE research grant-making procedures to EPA permitting processes. Two recent examples of the Committee's oversight work related to protecting scientists and researchers involve two cases in which a DOE scientist[11] and a Food and Drug Administration scientist were separately targeted for communicating with Congress. Cases such as these are extremely troubling, and the Committee has a duty to ensure that *all* scientists are able to conduct research free from interference and intimidation.

The Committee also has a responsibility to ensure that taxpayer dollars authorized and appropriated by Congress are not being misspent. The Committee has had a longstanding interest in grants funded by the NSF, including those awarded to universities and private companies. Given the Committee's jurisdiction over NSF, the Committee has a strong interest in the research funded by NSF grants. Most research is funded by a combination of private and government sources.[12] Like many other large energy companies, researchers employed by Exxon have received grant awards from federal sources. Additionally, NSF and Exxon jointly fund projects and programs such as Research Experiences in Solid Earth Science for Students (RESSESS), and the American Mathematical Society Task Force on Excellence. Further, Exxon partners with universities, themselves recipients of millions of dollars in federal funds, to conduct research. If the private sector, as a result of your clients' coordination with the "Green 20" investigations, begins funding one-sided research, it is this Committee's responsibility to identify that imbalance and correct it by directing funding elsewhere. The documents and information being sought by the Committee subpoenas will help the Committee assess the existence and magnitude of the threat that your clients' conduct poses to the unbiased and objective determination of research priorities.

The second prong of the *Wilkinson* test involves a "valid legislative purpose." Since the Committee has sole jurisdiction over R&D authorizations or funding measures with the exception of military and medical, this Committee could most certainly pass legislation as noted above that would direct or divert funding to offset or correct any effects your clients' involvement with the "Green 20" investigative efforts may have on the overall funding of our

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[9] H.R. 1806, America COMPETES Reauthorization Act of 2015 (introduced Apr. 15, 2015, passed by the U.S. House of Representatives on May 20, 2015) (emphasis added).
[10] H.R. 2272, America COMPETES Act (P.L. 110-69) 2007; H.R. 5116, America COMPETES Reauthorization Act of 2010 (P.L. 111-358) 2011.
[11] *"Examining Misconduct and Intimidation of Scientists by Senior DOE Officials": Hearing Before the H. of Reps. Comm. on Science, Space, & Tech., Subcommittees on Oversight & Energy*, 114th Cong. (Sept. 21, 2016).
[12] Science & Engineering Indicators 2016 Report, Chapter 4, https://nsf.gov/statistics/2016/nsb20161/#/report/front-matter (last visited Aug. 16, 2016).

nation's scientific R&D enterprise. This is discussed more thoroughly in the following paragraphs.

In the NSF's *Science & Engineering Indicators 2016*, total U.S. R&D expenditures are broken down by source of funds: Business: 65.2%; Federal government: 26.7%; Universities and colleges: 3.3%; Nonfederal government 0.9%; Other nonprofit organizations: 3.9%. Any disincentive to industry maintaining its position as the dominant source of funding for R&D will have a detrimental impact on the nation's scientific enterprise. If businesses believe that the research they fund can be mischaracterized and used to build cases of fraud against the company, they will have a powerful incentive to cease funding that research. If scientists believe that their industry-sponsored research, or discussions with industry about research funded by other sources, will be subpoenaed if it is in disagreement with the beliefs of state officials or advocacy groups, they will have a powerful incentive to cease conducting that research or disseminating the results of their research to all interested parties. As part of the Committee's investigation, and noted above, it has come to our attention that this may already be occurring in the scientific community. Congress, and more specifically this Committee, has an interest in informing itself of these risks, trends and effects and potentially offsetting any trends or effects that would skew research in one direction or another.

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

Finally, *Wilkinson* requires that the demand, or subpoena in this case, be pertinent to a subject matter authorized by Congress.[13] Courts have interpreted this requirement very broadly, requiring "only that the specific inquiries be reasonably related to the subject matter under investigation."[14] The documents and information requested in the subpoenas served on July 13, 2016, will allow the Committee to assess the effects of your clients' coordination with the "Green 20" investigation on climate change scientists and their research. As discussed above, this Committee has jurisdiction over the bulk of federally funded R&D and has a lengthy track record of oversight in this area. During this Congress, the Committee has received referrals of related legislation and held hearings on a broad number of weather and climate related subjects. Most recently, on July 7, 2016, the Committee examined the nation's current and next generation weather satellite programs, which are key research components for compiling weather and climate data. Further bolstering the Committee's jurisdiction is the ongoing grant-making and funding oversight conducted during my chairmanship, including hearings examining Innovation Corps, the NSF's program to leverage research investments, and the NSF's budget and research funding priorities. The Committee's inquiry easily satisfies the requirements of the *Wilkinson*

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[13] *Wilkinson*, 365 U.S. at 409.

[14] MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A PRIMER ON THE PRINCIPLES, PRACTICES, & PRAGMATICS OF LEGISLATIVE INQUIRY 10 (The Constitution Project, 2009), *available at* http://www.constitutionproject.org/wp-content/uploads/2009/07/WhenCongressComesCalling.pdf (last visited Aug. 15, 2016) [hereinafter WHEN CONGRESS COMES CALLING].

test. Once this threshold matter is established, courts then determine whether a party refusing to comply with a valid subpoena has any applicable constitutional privileges.

c. The Committee's requests for documents from Pawa and GWLAP do not imperil First Amendment rights

Your clients have argued that the Committee's subpoenas infringe on "First Amendment rights,"[15] and as such, *all* communications between Pawa or GWLAP and the "Green 20" and like-minded environmental groups must be shielded from the Committee's inquiry. This reflects a continued misapplication of the protections afforded by the First Amendment in the realm of congressional investigations. The First Amendment has never been regarded to confer blanket protection against compliance with a congressional inquiry. Instead, the Supreme Court has repeatedly applied a balancing test to determine whether groups' First Amendment rights were infringed as to specific congressional demands.[16]

Although a constitutional protection, courts have been extremely critical of refusals to comply with congressional subpoenas based on generalized First Amendment objections, and the Supreme Court never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.[17] In a series of cases decided between 1953 and 1963, the Supreme Court placed few restrictions on Congress's ability to investigate in cases implicating First Amendment concerns. In 1953, the Court decided *Rumely v. United States*, which involved Mr. Edward Rumely, the secretary of an organization known as the Committee for Constitutional Government. This group's activities included selling books "of a particular political tendentiousness."[18] In this case Congress sought the names of individuals who purchased books from the organization, and the Court held that Congress was not authorized to seek these identities.[19] In 1957, the Court decided *Watkins v. United States*. Mr. John Thomas Watkins, a private citizen, was a leader in several labor organizations.[20] *Watkins* is important for a few reasons. At the outset, the *Watkins* Court proclaimed:

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress....[21]

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[15] Letter from Ms. Catherine S. Duval to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (July 13, 2016).
[16] *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).
[17] WHEN CONGRESS COMES CALLING at 35.
[18] *U.S. v. Rumely*, 345 U.S. 41, 42 (1953).
[19] *Id.* at 42-48.
[20] *U.S. v. Watkins*, 354 U.S. 178, 181 (1957).
[21] *Id.* at 187-88.

As Professor Jonathan Turley pointed out during the Committee's September 14, 2016 hearing,[22] *Watkins* underscored that motives of the Members of the House or Senate Committee do not bear on the legality of the investigation being undertaken.[23]

Following *Watkins*, the Court decided a case involving a graduate teaching fellow at the University of Michigan, Mr. Lloyd Barenblatt, who refused to answer certain questions posed by Congress claiming these questions imperiled his First Amendment rights.[24] The Court ruled:

> However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where the First Amendment rights are asserted to bar governmental 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.[25]

The Court considered whether the governmental interest was compelling and whether there was a valid legislative purpose. On balance, in the *Barenblatt* case, the Court ruled that Congress's need to investigate possible overthrow of the United States federal government by the threat of communism outweighed Mr. Barenblatt's First Amendment privileges.[26] Here, with regard to the actions of the "Green 20" and your client, the Committee has a compelling interest in correcting, through legislation, any imbalance in our nation's scientific enterprise, which could diminish the United States' position as the world leader in scientific discovery, research, and innovation.

In 1961, the Court in *Wilkinson v. United States* reviewed the case of Mr. Frank Wilkinson, an activist private citizen who refused to answer a question posed by Congress regarding his affiliation with the Communist party.[27] The Court upheld its holding in *Barenblatt*. Going even further, the Court stated "we cannot say that, simply because the petitioner at the moment may have engaged in lawful conduct, his Communist activities in connection therewith could not be investigated."[28] In so holding, the Supreme Court expressly declined to require a criminal predicate or an allegation of wrongdoing in order for Congress to investigate.

Putting aside the wisdom underlying each of the aforementioned congressional inquiries, each subject of congressional investigations took steps to comply with the congressional demands they faced. Each gave at least some testimony or documentation in an effort to comply

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[22] *Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas: Hearing Before the H. of Reps. Comm. on Science, Space, & Tech.*, 114th Cong. 48 (Sept. 14, 2016) (citing *Wilkinson v. U.S.* 365 U.S. 399, 412 (1961); *Watkins v. U.S.*, 354 U.S. 178, 200 (1957)).
[23] *Watkins*, 354 U.S. at 200.
[24] *Barenblatt v. United States*, 360 U.S. 109, 116 (1959).
[25] *Id.* at 126.
[26] *Id.* at 134.
[27] *Wilkinson v. United States*, 365 U.S. 399, 402 (1961).
[28] *Id.* at 413.

with congressional inquiries; each ultimately objected to *specific* testimonial or documentary requests they found to be particularly obtrusive, which were then properly challenged on their merits. Pawa and GWLAP, in contrast, have made no attempt to answer any of the Committee's questions, and have failed to produce to the Committee even publicly available documents in their possession—documents that could not possibly infringe on associational or speech rights.[29] Blatantly failing to attempt to work with the Committee only serves to distinguish Pawa and GWLAP from this line of case law.

On August 5, 2016, in granting a Senate subcommittee's application to enforce its subpoena *duces tecum* against the subject of its inquiry, the U.S. District Court for the District of Columbia relied in part on *Barenblatt* and "reject[ed]" the respondent's invocations of sweeping First Amendment blanket protections stating: "the Constitution [] tells us that [the respondent] cannot use the First Amendment as an omnipotent and unbreakable shield to prevent Congress from properly exercising its constitutional authority."[30] The court continued, holding that the respondent "does not possess an absolute right to be free from government investigation when there are valid justifications for the inquiry."[31] The court found this especially to be the case where there was no good-faith effort made to collect responsive documents and file a privilege log.[32]

Because the First Amendment does not "afford a witness the right to resist inquiry in all circumstances,"[33] when an individual invokes its protections in the course of a congressional inquiry, the Supreme Court has found that "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."[34] The Court announced that "the critical element" in such a balancing test includes "the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[35] The strength of Congress' interests, in turn, relies on its authorization over the subject matter of the investigation, delegation of the power to investigate to the committee involved, and the existence of a legislative purpose[36]—or, in other words, the same considerations at play in determining whether a congressional inquiry is validly authorized, as discussed in detail above.

Generalized concerns over the effects of non-particularized First Amendment rights supposedly imperiled by a legitimate congressional inquiry are not enough to overcome a congressional subpoena. To approach compliance, Committee staff has asked your clients to

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[29] It should be noted that the legislative body and subject matter of the investigation in *Gibson* differ from the United States Congress' constitutional prerogatives and the authorities delegated to the Committee here; it would reasonable to suggest, however, that these differences, if applied to the Committee's inquiry, would weigh in the Committee's favor. U.S. Const., Art. I, § 8; Art. VI, Cl. 2.

[30] *S. Permanent Subcomm. on Investigations v. Ferrer*, 2016 U.S. Dist. LEXIS 103143, *30, *32-33 (D.D.C. Aug. 5, 2016).

[31] *Id.* at 31.

[32] "There is simply no legal or factual support for the proposition that being required to search for responsive documents would abridge [the respondent's] protected freedoms of speech or press." *Id.*

[33] *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

[34] *Id.* at 126.

[35] *Id.*

[36] *See Barenblatt*, 360 U.S. 109 (1959); *Watkins*, 354 U.S. 178 (1957); *United States v. Rumely*, 345 U.S. 41 (1953).

gather the universe of responsive documents and produce any documents you do not deem covered by the First Amendment; for those documents over which your clients assert First Amendment protections, Committee staff has repeatedly asked that you create a privilege log itemizing such objections.

d. Congress has no obligation to accept assertions of common law and state statutory privileges

To support your refusal to comply with the Committee's subpoena, you question the Committee's authority to "examine confidential or privileged communications related to the investigations by state Attorneys General."[37] Your failure to identify with particularity those documents and communications you claim are covered by any number of common law privileges means that you are making a blanket assertion of privilege in an attempt to shield all responsive documents from disclosure to Congress. Since the burden of establishing the existence of a privilege rests with the party asserting the privilege,[38] such an assertion cannot withstand scrutiny based on the scant information provided in your correspondence.

In conversation, you also seem to have suggested that by virtue of your clients' statuses as "providers of legal services," Pawa and GWLAP are shielded from producing communications by attorney-client privilege. This argument is without merit. The Committee's subpoena does not demand any documents from "clients" of Pawa or GWLAP, as commonly understood under state and federal law.[39] Niether Pawa nor GWLAP has argued that it is in the business of rendering professional legal services on behalf of the attorneys general of Massachusetts or New York, or the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, or the Climate Reality Project. These groups are not Pawa's or GWLAP's clients and are not entitled to privileged communications. Your clients cannot claim attorney-client privilege over communications with like-minded groups simply because its officers are practicing attorneys.

In any event, Congress has a constitutional prerogative to deny claims of state law and common law privilege typically recognized in courts of law. While Congress recognizes constitutional claims of privilege in all of its investigations, it is not required to acknowledge common law or state statutory privileges. In fact, acceptance or rejection of claims such as attorney-client privilege has been the longstanding prerogative of each committee[40] and, as the Supreme Court has recognized, since 1960, "only infrequently have witnesses appearing before congressional committees been afforded procedural rights normally associated with an adjudicative proceeding."[41] Indeed, separation of powers principles require that Congress

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[37] Letter from Ms. Catherine S. Duval to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (July 13, 2016).
[38] *See, e.g., United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *Weil v. Investment/Indicators, Research & Mgmt.*, 647 F.2d 18, 25 (9th Cir. 1981).
[39] *See* Massachusetts Guide to Evidence § 502.
[40] *See* S. Rept. No. 2, 84th Cong., 1st Sess. 27-28 (1954).
[41] *Hannah v. Larche*, 363 U.S. 420, 425 (1960).

remain unrestrained by judicially-developed common law privileges, and the Supremacy Clause deprives state-law privileges of any binding force as a basis for resisting a House Committee's request for information pursuant to the powers vested in the House by Article I of the Constitution.[42] Accordingly, recognition of any claim of privilege is not a matter of right, but is at the sole discretion of the Committee. Absent a significantly more robust showing of a good faith basis for the invocation of privilege, including identifying with particularity the responsive documents that could implicate attorney-client, work product, or deliberative process sensitivities, the Committee rejects your privilege assertions in full.

II. *Committee Staff Has Made Repeated, Reasonable Efforts to Induce Compliance With the Subpoenas; Pawa and GWLAP Have Been Defiant in Their Refusals to Comply With the Committee's Subpoenas, Rejecting Numerous Offers for Accommodation*

Committee staff has made numerous attempts to secure Pawa's and GWLAP's compliance with the July 13, 2016 subpoenas. This includes emails to you from Committee staff throughout July and August attempting to secure a date to discuss the subpoenas. Not until September 9, 2016, however, did you make yourself available for such a conversation with Committee staff. During that conversation, you demurred from committing to substantively respond to the Committee's subpoenas, citing routine legal matters you are undertaking for other clients as presenting insurmountable scheduling challenges for your ability to work towards compliance.[43]

After explaining the validity of the subpoenas, Committee staff has repeatedly endeavored, as a matter of grace, to extend accommodations to your clients, offering to include minority staff in conversations and discussing extended time frames where a rolling production could take place. Accommodations such as these are indicative of the Committee's reasonable efforts to bring your clients into compliance with the subpoenas. Other similarly situated organizations receiving Committee subpoenas in this investigation have not engaged in such obstructive behavior. Rather, they have engaged in good faith negotiations with the Committee and have committed to provide the Committee documents. In contrast, Pawa and GWLAP claim to only now – three months after service of the subpoena – appear to be engaging in a search for documents.[44]

Unfortunately, your clients have failed to take advantage of the Committee's reasonable negotiating posture. Failure to provide any semblance of a privilege log, or to otherwise negotiate in any meaningful way with Committee staff, leaves me no choice but to consider pursuing enforcement proceedings against your clients. This may take the form of initiating

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[42] *See* U.S. Const. art. VI, cl. 2.

[43] On July 28, 2016, for example, Committee staff attempted to secure a date to discuss the subpoenas and asked you for availabilities. *See* e-mail from Comm. staff to Catherine Duval (July 29, 2016, 5:29 PM EST). You did not meaningfully reach out to Committee staff until one month later. *See* e-mail from Catherine Duval to Comm. staff (Aug. 28, 2016, 6:09 PM EST) ("August has gotten away from me – too many depositions! Assuming it still makes sense on your end, can we set up a time to meet in September?") (on file with Committee staff).

[44] *See* email from Catherine Duval to Comm. staff (Oct. 12, 2016, 12:46 PM EST) (on file with Comm. staff).

proceedings to find your clients in contempt of Congress,[45] or compelling compliance through civil enforcement actions in federal court.[46] **This letter serves to formally notify your clients that the Committee will seek to take such action if you do not make at least a partial production before 5 p.m. on October 27, 2016.** In addition, to better understand through testimony what your clients refuse to provide through documentation, the Committee requests that you provide availabilities for a transcribed interview of Matthew Pawa in his capacities as president of Pawa and legal director of GWLAP, **no later than 5 p.m. on October 20, 2016**.

As always, the Committee welcomes the opportunity to discuss any new proposals to approach compliance with the subpoenas. To arrange a meeting or discuss matters over the phone, please contact Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith

Rep. Lamar Smith
Chairman

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

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[45] 2 U.S.C. §§ 192, 194.
[46] *See, e.g.,* H.R. Res. 706, 112th Cong. (Jun. 28, 2012); H.R. Res. 980, 110th Cong. (Feb. 14, 2008).