

October 27, 2016

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The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

Re: Response to Committee's October 13, 2016 Letter

Dear Mr. Chairman:

I write in response to your October 13, 2016, letter indicating that you intend to enforce the unilaterally issued July 13, 2016 subpoena seeking documents relating to the Union of Concerned Scientists' (UCS) constitutionally-protected advocacy. We have repeatedly stated our objections to this intrusive oversight in multiple meetings and phone calls with your staff, and in four letters dated June 1, June 27, July 13, and July 26. In all of these communications with the Committee, we have stated our well-founded objections based on the First Amendment and the Committee's lack of the jurisdiction. For the sake of convenience and efficiency, I have attached those letters for your review and incorporate our previous arguments by reference.

Your October 13 letter confirms what we have known – your oversight request is based solely on our client's advocacy work, which is squarely protected by the First Amendment to the U.S. Constitution. While we will not respond here to all eleven pages of your most recent letter and will not repeat in its entirety our legal justification for refusing to comply with this unconstitutional subpoena, two propositions are clear. First, the First Amendment unambiguously fosters and protects UCS's ability to inform and petition government officials and to work with other advocacy organization to seek governmental action related to climate change. Second, the Supreme Court has defended this bedrock principle in holding that the First Amendment is a bar to congressional inquiry when Congress fails to demonstrate an overriding compelling state interest. You have not demonstrated at any point, including in your letter of October 13, any state interest that could overcome our client's legitimate First Amendment activity.

You complain that our client has "failed to make a good-faith effort to comply with the July 13 subpoena," *October 13 letter, pp. 1-2*, and chide UCS for not producing publicly-available documents in its possession "after committing repeatedly to do so." *October 13 letter, pp. 8-9*.

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As we have stated in our extensive correspondence and to your staff, the subpoena, which requests two related categories of communications, is targeted directed at constitutionally-protected advocacy. UCS is perfectly willing, in good faith, to make a production of documents which do not impinge upon their constitutional rights; however, you have not sought any such documents. Indeed, UCS has provided an extensive set of documents in electronic format relating to ExxonMobil's role in obscuring climate change science which UCS has shared with anyone interested, including state attorneys general and with the Committee (See footnote 5 of our July 13 letter). For your convenience, we are now attaching herewith hard copies of these documents – which UCS was in fact in the middle of assembling when your letter arrived without warning on October 13, pursuant to our good-faith discussions with your staff. These total over 1300 pages of material. These materials provide the Committee the opportunity to see for itself the factual information UCS has shared with state attorneys general and many others demonstrating deception about climate science by fossil fuel companies. These materials will also help the Committee determine, in accordance with the purported purpose of this investigation, that UCS's documents and reports are not intended to, and could not have the effect of, intimidating other scientists. We have also repeatedly offered to brief the Committee on this work, and we repeat that offer now.

You claim that you have “offered generous accommodations” to UCS. In conversations with your staff subsequent to the receipt of this letter, they explained that the “generous accommodations” which you claim to have offered are limited to the three set forth on page 10 of your letter: redacting the identities of individuals in the documents, including minority staff in conversations, and extended time frames for a rolling production of documents. We must beg to differ on the “generosity” of these accommodations. In contrast to UCS's document production that accompanies this letter, the “accommodations” that you claim to have offered do not address the reason for UCS's refusal to produce; they do not address the constitutionally-protected nature of the sought-after communications, and therefore, you have not offered any accommodations consistent with the Constitution. We don't believe an “accommodation” is “generous” if it merely complies with the Constitution; constitutional fealty is a prerequisite. For example, an “extended time frame” to produce documents whose compelled production would violate the Constitution does nothing whatsoever to ameliorate the underlying constitutional violation. Secondly, redacting identities of individuals was not requested by UCS and does nothing at all to address the violation of UCS's First Amendment rights to petition the government that is one of its principal objections. And including minority staff in conversations should not be a “generous accommodation”, but should be provided as a matter of course and good committee process.

Your letter states that “Prominent constitutional law scholars have concluded that the Committee is authorized to issue and enforce its subpoenas in connection with the ‘Green 20’ [of which, we must note, UCS is not a member] inquiry,” *October 13 letter, p. 2*, and cites in support of this claim the Committee's own hearing on this matter on September 14, 2016. However, one of the hand-selected scholars you called—Jonathan Turley—expressed in his written testimony significant reservations about targeting non-profit groups such as UCS, testifying that “The Committee has also subpoenaed public interest groups like Greenpeace, which I believe raise

different and more problematic applications of congressional authority.”

<https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-114-SY-WState-JTurley-20160913.pdf>.

Moreover, your investigation is predicated on supposition, conjecture and speculation. The premise of your investigation, that our clients' advocacy efforts have somehow intimidated Exxon Mobil, a climate scientist, or some other entity, is without any factual basis. Your suspicion that someone somewhere may have been intimidated by UCS does not have any support. Your letter claims that you are aware of “a demonstrable chilling effect as a result of zealous advocacy – the sort in which your client routinely engages.” In support of this claim, you go on to cite a single person, an unidentified “professor of science at a major research university in Florida,” whose work, you claim, “has been negatively affected by overzealous advocates.” Interestingly, you justify your interest in UCS because their advocacy is apparently of a type that “chilled” the activity of this Florida-based researcher.

This argument eviscerates the First Amendment to the U.S. Constitution. Government bodies, such as the House Committee on Science, Space and Technology, should never take action against an organization because it deems the advocacy “zealous” or “overzealous.” We are unaware of a zealousness test for speech to be protected by the First Amendment.

An investigation that is based solely on the speech engaged in by UCS and its employees is an affront to the civil liberties guaranteed by the First Amendment. You cannot demonstrate the compelling government interest that is required to overcome UCS's First Amendment rights by speculating that their speech has intimidated someone. Indeed, there isn't even a scintilla of proof supporting this allegation. And even if there was some modicum of evidence in this regard, the established response to speech with which one disagrees is to respond with a rebuttal. The Supreme Court has noted that “it is our tradition that more speech, not less, is the governing rule.” *Citizens United v. FEC*, 558 U.S. 310, 361 (2010).

Your example of one scientist who claims to have been intimidated by “overzealous advocacy” does not appear to involve UCS or any of the other organizations targeted by your investigation. If you are going to rely on this one instance to justify your order to produce constitutionally-protected First Amendment communications from our client, we would greatly appreciate knowing specifically what his situation has to do with our client. In what would be a supreme irony, based on your limited explanation, We believes you have identified the case of University of Florida genetic engineering researcher Kevin Folta. UCS is an unrelenting supporter of academic freedom and independence, and has spoken out consistently in support of researchers who have been harassed because their work involves contentious topics. In furtherance of this mission, they actually criticized the use of “open records laws to harass scientists” and “encouraged governments, academic institutions, and journalists to address the challenge of balancing accountability with academic freedom,” citing Professor Folta's case. *See, Yes, We Can Defend Scientists and Increase Transparency* (<http://blog.ucsusa.org/michael-halpern/yes-we-can-defend-scientists-from-harassment-and-increase-transparency-915>) and *No Scientist*

Should Face Harassment. Period (<http://blog.ucsusa.org/gretchen-goldman/no-scientist-should-face-harassment-period-637>) and *UF biotech expert gets heat from GMO foes* (<http://www.gainesville.com/news/20150821/uf-biotech-expert-gets-heat-from-gmo-foes/1>), among others.. If your unnamed professor of science is indeed Dr. Folta, this completely undercuts your reliance upon his experience as a basis to justify your compelled production of First Amendment advocacy materials from UCS.

You assert that “the Supreme Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.” *October 13 letter, p.6*. However, in that very same paragraph you cite *Watkins v. United States*, 354 U.S. 178 (1957), in your continued reliance upon authorities related to the anti-communist witch hunt of the disgraced House Committee on Un-American Activities. (Indeed, your witness Professor Turley, in his testimony to the Committee, “confess[ed] 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 . . . It was one of the lowest points in the Court’s history.”

<https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-114-SY-WState-JTurley-20160913.pdf>.) In *Watkins* itself, the criminal contempt of Congress conviction of Mr. Watkins was overturned by the Supreme Court, because the Court found that “when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter,” 354 U.S. at 198, and because the Committee Chairman’s statement “was woefully inadequate” in explaining the pertinency of his queries of Mr. Watkins to the authority provided by the Committee’s charter, Watkins’ conviction was invalid under the Due Process Clause of the Fifth Amendment. 354 U.S. at 215. The First and Fifth Amendments thus have indeed been used to reverse contempt of Congress convictions. Moreover, the Supreme Court held a state legislative investigation into communist activity barred by the First Amendment. *Gibson v. Florida Legislative Investigative Comm.*, 372 U.S. 539, 546 (1963).

You also assert that “The documents and information requested in the subpoena served on July 13, 2016, will allow the Committee to assess the effects of your client's coordination with the "Green 20" investigation on climate change scientists and their research.” *October 13 letter, p. 5*. However, this assertion falls of its own illogical weight. The subpoena demands documents relating to UCS’ input into the state attorneys general’s investigations. It does not request any documents relating to climate change scientists themselves (other than those in UCS), which would show the effects, or output, of these investigations—investigations that were not conducted by UCS, but by the attorneys general.

You will find few organizations as dedicated to academic freedom and the pursuit of scientific truth than UCS. Since its founding in 1969 by scientists and students at the Massachusetts Institute of Technology, UCS fosters a science-based approach to build a healthy, safe and sustainable future. Throughout UCS’s history, they have followed the example set by the scientific community: they share information, seek the truth, and let scientific findings guide their conclusions. UCS has worked on climate change since 1988. Since those early days, they have set

the record straight when individuals, organizations, and corporations misled the public about climate science.

Over the past decade, and ramping up significantly in 2015, they focused on exposing climate deception by leading fossil fuel companies and worked to hold them accountable for the harm their products are causing to people and the planet. Their reports and publications document, among other things, how fossil fuel companies have downplayed scientific climate change evidence; promoted experts to undermine the scientific consensus; funded groups that worked to confuse the public; and participated in a campaign to sow doubt about climate change, as a way to block sensible reforms. UCS has shared this information with anyone who has indicated an interest in it, including state attorneys general. They are happy to provide it to the Committee.

As noted above, because of their interest in transparency and in an effort to accommodate the Committee's information needs, enclosed are 1,370 pages of UCS documents relating to the work described above. We have included a bibliography as an appendix for your easy referral. This supplements our July 13, 2016 letter drawing the Committee's attention to UCS's website containing a timeline of UCS's work on climate change. Moreover, in an effort to be responsive to the Committee, we reiterate UCS's offer, which we have discussed numerous times with your staff and made in our July 13 letter, to brief the Committee on this information and answer questions about it.

Of course, we always remain available to you and your staff to discuss this matter.

Sincerely,



Neil Quinter

cc: The Honorable Eddie Bernice Johnson,
Ranking Minority Member

Enclosures