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September 13, 2016

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

Dear Chairman Smith:

I write on behalf of the New York Office of the Attorney General (“NYOAG”) regarding your letter of August 23, 2016, and the hearing of the full House Committee on Science, Space, and Technology, scheduled for September 14, 2016, both of which relate to the Subpoena previously issued by you, as Chairman, to the NYOAG.

The August 23 letter (at 1) purports to clarify the topic of the Committee’s inquiry: to determine whether the ongoing investigations into possible state securities and consumer law violations by ExxonMobil is “having an adverse impact on federally-funded scientific research.” As the letter then alleges (*e.g.*, at 3), if the Committee uncovers such an adverse effect, the Committee may consider funding proposals to counteract any perceived “imbalance in scientific inquiry.”

These statements carry the odd suggestion that the Science Committee might allocate public resources to scientific research with a predetermined outcome to offset a so-called “imbalance.” That issue aside, the NYOAG’s objections to the Subpoena—for lack of jurisdiction, a valid legislative object, or pertinence of the requests—remain outstanding, as do the NYOAG’s claims of privilege and confidentiality over the materials sought.

While the August 23 letter purports to overrule the NYOAG’s objections on behalf of the Committee, the Committee has never met and considered our objections and there is no Committee or House rule delegating authority to the Chairman to resolve objections to a subpoena unilaterally. To the contrary, the rules delegate to the Chairman only the limited authority to make an initial determination on privilege claims asserted at a hearing, subject to an “appeal to the Committee” as a whole. Committee Rule III(d). For all other objections, where no authority has been delegated to the Chairman, the rules prescribing quorum and notice requirements for the rest of the Committee’s official business must apply. *See* Committee Rule II(a)–(d). Where a subpoena is as unusual and the objections as weighty as here, consideration

and resolution by anything other than the full body would be inappropriate. I note that official announcements for the upcoming hearing contain no such agenda item.

The hearing will do nothing to buttress a claim of authority to issue the unprecedented Subpoena. The Committee's "right to exact testimony and to call for the production of documents must be found" not in the testimony of three professors, but rather in "the controlling charter of the committee's powers." *United States v. Rumely*, 345 U.S. 41, 44 (1953). Nowhere in the Committee's grant of oversight authority over "nonmilitary research and development," House Rule X.3(k), is a delegation of power to intrude on a pending state law enforcement investigation by a State Attorney General. No committee can even purport to conduct "such a novel investigation" into state affairs without, at a minimum, "more explicit" Congressional authorization than that here. *See Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962) (construing subcommittee's authority narrowly to avoid "serious" Tenth Amendment question raised by subpoena). As a September 8, 2016 memorandum of the Congressional Research Service concludes, *Tobin* represents the *only* known instance prior to this "in which a congressional committee has issued a subpoena to a state government official."¹ Thus, the very need for a hearing to establish jurisdiction to issue the Subpoena underscores the absence of any such enforceable authority.

As stated in our prior objections, the Subpoena raises serious federalism concerns. Nothing in the Committee's "long history" of research oversight (Aug. 23, 2016 Letter at 2) supports the idea that the Committee can wield oversight over state law enforcement officials in such an unrestrained fashion. The question is whether the exercise of oversight authority, which you have confirmed "is derived from Article I of the Constitution" (July 6, 2016 Letter at 2), "violate[s] the principles of federalism contained in the Tenth Amendment," *Reno v. Condon*, 528 U.S. 141, 149 (2000). The Committee's "directive" to the New York Attorney General to produce investigative materials in his official capacity is no less than an attempt to "control the State." *Printz v. United States*, 521 U.S. 898, 931 (1997). That directive flies in the face of more than "two centuries of apparent congressional avoidance of the practice," *id.* at 918, a point recently confirmed by Congress's own research arm. Aggravating the violation, the Subpoena directly and expressly targets state enforcement activities, disrupting possible "suits by the State in its sovereign capacity." *Trainor v. Hernandez*, 431 U.S. 434, 446 (1977).

Moreover, if the Committee seeks only "information pertaining to the *effects* of a state investigation" (Aug. 23, 2016 Letter at 5), a subpoena targeting privileged and confidential state law enforcement communications seems a poor choice to serve that goal. For such information, the Chair can simply contact ExxonMobil and talk to some of its scientists. In contrast, the documents sought by the Subpoena would surely be of interest to ExxonMobil, which has made the alleged motivations behind the state investigations the crux of its defense to investigative compliance.² The abject mismatch between the Subpoena's requests and the *Committee's*

¹ Cong. Research Serv., Evaluation of Federalism Arguments Against the Subpoenas Issued to State Attorneys General by the House Science, Space, and Technology Committee at 6 (Sept. 8, 2016).

² Mem. of Law in Supp. of Plaintiff Exxon Mobil Corp.'s Mot. for Prelim. Inj. at 12, *Exxon Mobil Corp. v. Healey*, No. 16-cv-469 (N.D. Tex. June 15, 2016).

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professed object has led many observers, including a U.S. Senator, to wonder whether the Committee is engaged in an improper fishing expedition for the benefit of a private party.³

The inability to justify the unprecedented Subpoena—or the Committee’s power to issue such a subpoena—has become increasingly clear, and the NYOAG hopes that the draining of state and federal taxpayer resources on this endeavor will come to an end without bringing a wholly unnecessary constitutional conflict to a head.

Sincerely,



Leslie B. Dubeck
Counsel

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

Honorable Paul Tonko
Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 392

³ Sen. Sheldon Whitehouse, *Standoff Over a House Panel’s Subpoenas Raises Key Issue*, Nat’l L.J. (Aug. 29, 2016).