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House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Committee:

We are law professors who study administrative law, federalism, and criminal and civil law and procedure. We write to express our views on the Committee's issuance of a subpoena to state attorneys general concerning pending civil investigations under state law. Brandon L. Garrett is the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law. Margaret H. Lemos is the Robert G. Seaks LL.B. '34 Professor of Law at the Duke University School of Law. William P. Marshall is the William Rand Kenan, Jr. Distinguished Professor of Law at the University of North Carolina School of Law.

Congress's power to investigate plays an essential role in the democratic process.[1] Properly executed, the power allows Congress to obtain information necessary to pass legislation, inform the public about the key issues facing the Nation, and oversee the workings of the other federal branches.[2]

The States, as well, form an essential part of our constitutional structure. The Constitution itself is based upon principles of dual sovereignty, and respect for the States is deeply ingrained in our law.[3] Preserving state sovereignty also furthers important constitutional and democratic values. As the courts have long recognized, protecting the sovereignty of the States brings political decision-making closer to the citizenry, allows for experimentation in social policies, diffuses power throughout the system, and provides a check on federal power.[4]

For over two hundred years, Congress's investigative power and the States' sovereign authority have co-existed without substantial conflict. We are aware of only one instance in which Congress has attempted to subpoena a state government official in his official capacity.[5] To our knowledge, Congress has *never* before attempted to use its investigatory authority to interfere with an ongoing state investigation.

Congress's traditional reluctance to use its investigatory authority to subpoena state government officials concerning ongoing efforts to enforce state law is well justified. As this letter explains, the

[1] McGrain v. Daugherty, 273 U.S. 135 (1927).

[2] *See generally* William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 799.

[3] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[4] *Id.* at 458-59.

[5] Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962).

current investigation raises two sets of overlapping concerns. First, the Committee's subpoena offends notions of state sovereignty: State attorneys general are the chief legal officers of States and represent the sovereign legal interests of their respective States. Second, the Committee's demand interferes with ongoing enforcement efforts, triggering concerns expressed in the *Younger v. Harris* doctrine in the federal courts, and in Congress's own practice with respect to the federal Department of Justice. We therefore respectfully urge the Committee to reconsider its investigative demand and subpoena.

1. Subpoenaing a State Attorney General is an Unprecedented and Ill-Advised Use of Congress's Power to Investigate

Although no provision of the Constitution expressly authorizes Congressional investigations, the Supreme Court has recognized that the power to investigate is implied by the general vesting of legislative powers in Congress.[6] As the Court explained in *Eastland v. United States Serviceman's Fund*, the "scope of [Congress's] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[7]

Though Congress's investigative authority is "broad," it "is not unlimited."[8] Any investigation must be within the bounds of a legitimate legislative purpose,[9] and may not involve matters exclusively within the province of another branch.[10] As the Supreme Court noted in *Watkins v. United States*, "Congress [is not] a law enforcement or trial agency. These are functions of the executive and judicial departments of government."[11] In addition, Congressional investigations must not transgress external limitations grounded in the rights of individuals or separation of powers. Thus, Congress's power to investigate may be constrained by the First Amendment,[12] the Fifth Amendment's protection against self-incrimination,[13] and executive privilege.[14] When in doubt, the courts have construed the power to investigate narrowly to avoid such constitutional concerns.[15]

In contrast to the developed body of doctrine concerning Congressional investigations generally, there is virtually no case law addressing Congressional investigations of *state* government.[16] The absence of precedent is telling, as it suggests that Congress itself has recognized the seriousness of the constitutional issues involved. As the Court recently explained in *Noel Canning v. NLRB*, "the longstanding 'practice of the government' can inform our determination of 'what the law is.'"[17] In the

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[6] *See, e.g.,* Nixon v. Administrator of General Services, 433 U.S. 435 (1977); Barenblatt v. United States, 360 U.S. 109 (1959); McGrain v. Daugherty, 273 U.S. 135 (1927).

[7] 421 U.S. 491, 504 n.15 (internal quotation marks omitted).

[8] Watkins v. United States, 354 U.S. 178, 187 (1957).

[9] *Id.*; *see also McGrain*, 273 U.S. at 177.

[10] Killbourn v. Thompson, 103 U.S. 168, 192 (1880).

[11] *Watkins*, 354 U.S. at 187.

[12] *Id.* at 197

[13] Hutcheson v. United States, 369 U.S. 599, 610 (1962).

[14] United States v. Nixon, 418 U.S. 683 (1974).

[15] *Watkins*, 354 U.S. at 197.

[16] Our research has disclosed one case, *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962), concerning a Congressional investigation of state officials. As described in more detail in the text below, the *Tobin* decision highlights the need for restraint in this delicate area.

[17] 134 S. Ct. 2550, 2560 (2014) ("[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.");

context of Congressional investigations, Congress's traditional restraint in matters directly involving state government reflects a valuable normative convention, grounded in respect for federalism and for the unique needs of law enforcement.

We describe the federalism and law-enforcement concerns in more detail below. It bears emphasis at the outset, however, that the Committee's investigation not only represents a break from tradition, but threatens to set a particularly dangerous precedent.

Drawing on powers vested in them by state law, state attorneys general play critical roles in state government. As the Fifth Circuit has put it:

> [T]he attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.[18]

Each state attorney general represents the sovereign legal interests of his or her State. Indeed, the office of the attorney general is often the primary vehicle for enforcing state policy initiatives. Those enforcement decisions entail all the delicate and discretionary judgments that the Court has recognized in the context of federal law enforcement—and that generally bar judicial review of enforcement decisions.[19]

Allowing Congress to interfere with the ability of state attorneys general to pursue these enforcement obligations is risky business. If one Congressional Committee can use its investigative powers to interfere with a State's investigation regarding fraud with respect to the risks of climate change, another Committee could use that power to interfere with state enforcement actions on such politically sensitive matters as political corruption or voter fraud, as well as a host of other criminal and civil enforcement matters. The potential would exist for Congress and the States to be in constant conflict over the manner in which state officials are enforcing state law.

Importantly, state attorneys general also provide the first line of defense for the States against unwarranted federal government intrusion. For example, then-Texas Attorney General Greg Abbott made news a few years ago by telling supporters that his job description was simple: "I go into the office," he said. "I sue the federal government and I go home."[20] Abbott was true to his words. According to news

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see also Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2015); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

[18] Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268-69 (5th Cir. 1976).

[19] *See* Heckler v. Cheney, 470 U.S. 821, 831-32 (1985) (reasoning that judicial review of enforcement decisions would be inappropriate because such decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within [an enforcement agency's] expertise," including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resource to undertake the action at all").

[20] Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, AUSTIN AM.-STATESMAN (May 10, 2013, 5:14 PM), http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration-/. Other attorneys general describe their jobs in similar terms of "stand[ing] up . . . to Washington and say[ing] 'enough,'" "assert[ing] those [10th Amendment] rights," and so on. Republican Att'ys

reports, he sued the Obama Administration at least twenty-seven times in five years.[21] Abbott is hardly alone in this regard. State attorneys general led the charge in constitutional challenges to the Affordable Care Act,[22] and—more recently—in challenges to President Obama's "deferred action" policies for enforcement of federal immigration law.[23]

If unconstrained by federalism considerations, Congressional investigative power could be used to impede such state efforts to check federal government misfeasance or overreaching. As such, unbridled Congressional investigations of the States could serve to undermine legitimate state authority while simultaneously facilitating the ability of the federal Executive Branch to exceed its own constitutional limitations. Congress's traditional reluctance to subpoena state officials regarding pending enforcement matters should not be upset absent highly extraordinary circumstances.

2. The Subpoena Violates Principles of Federalism and Respect for State Sovereignty

The Constitution "establishes a system of dual sovereignty between the States and the Federal Government."[24] In that system, Congress's powers are limited to those enumerated in the Constitution, and the States "retain[] 'a residuary and inviolable sovereignty.'"[25] Thus, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Generally, the protection of state sovereignty can be found in the structure of the federal government itself.[26] The fact that members of Congress are elected by the people of the States according to the States' own rules for electoral qualification means that they can be assumed to act on behalf of state sovereign interests.[27] Moreover, any proposed federal statute must survive multiple procedural hurdles—or "vetogates"—that enable members to block measures that infringe on their States' interests, even if the legislation might otherwise enjoy majority support in Congress. None of these "political safeguards" of federalism exists with respect to Congressional investigations. In that context, a single Member of Congress can institute an investigation—even issue a subpoena—on his own, without vetogates and without the guarantee of any participation from the representatives of the targeted State. The reasons that

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Gen. Assoc., *Republican Attorneys General: States' Rights*, YOUTUBE (Jan. 22, 2014), http://www.youtube.com/watch?v=WCgh-tbG4S4; *see also* Michael D. Shear, *G.O.P. Turns to the Courts to Aid Agenda*, N.Y. TIMES, Jan. 4, 2015, at A1 (noting the role of attorneys general in various State-led suits against Obama-Administration initiatives).

[21] Catalina Camia, *GOP Attorneys General Push Back on Obama's Executive Actions*, USA TODAY: ON POLITICS (Jan. 28, 2014, 12:09 PM), http://onpolitics.usatoday.com/2014/01/28/gop-attorneys-general-push-back-on-obamas-executive-actions/.

[22] Pete Williams, *State Attorneys General Sue over Health Bill*, NBC News (Mar. 23, 2010, 7:44 PM), http://www.nbcnews.com/id/36001783/ns/politics-health_care_reform/#.VkqviktjoWw ("The ink is still drying on the health care overhaul bill signed into law Tuesday by President Barack Obama, but attorneys general from at least 14 states have filed lawsuits to challenge the legislation.").

[23] United States v. Texas, 579 U.S. __ (2016).

[24] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[25] Printz v. United States, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

[26] *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550 (1985) ("Apart from the limitation on federal authority inherent in the delegated nature of Congress's Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.")

[27] *Id.* at 550-51.

lead to a presumption of constitutionality when Congress acts as a whole, therefore, do not apply to the actions of Congressional committees.

Further, even when Congress is acting as a full body and within its enumerated powers, the Tenth Amendment imposes limits on the manner in which those powers are deployed. For example, Congress may not use federal law to compel—or "commandeer"—state officials to serve federal ends. In *New York v. United States*, the Court invoked the anti-commandeering principle to invalidate a federal statute that forced States to legislate in a specified manner.[28] *Printz v. United States* applied the same principle to a statute that commanded state law enforcement officers to participate in the administration of federal law.[29] In the course of its opinion, the Court explicitly rejected the notion that Congress has the authority "to impress the state executive into its service."[30] On the contrary, the Court emphasized, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other . . . . The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[31]

The Court's emphasis on accountability in *New York* and *Printz* is directly relevant to the Committee's investigation. The Attorneys General of Massachusetts and New York—like their counterparts in most other States—are independently elected, and must face the citizens in the polls if they wish to remain in office. As the Court has explained, Congress undermines these relationships of accountability when it interposes itself between state officials and the people they serve.[32]

Given these well-established principles, it is no surprise that federalism concerns were front and center in *Tobin v. United States*, the only case that has addressed the constitutionality of subpoenaing state officials.[33] In *Tobin*, the Executive Director of the Port of New York Authority refused to turn over documents subpoenaed by a House Subcommittee, and on that basis was tried and convicted for criminal contempt of Congress. In reversing the conviction, the D.C. Circuit recognized that the Tenth Amendment stood as a potential obstacle to enforcement of the subpoena. In order to avoid reaching the constitutional issues at stake,[34] the court read the Subcommittee's authorization narrowly, concluding that the document subpoena was outside the Subcommittee's jurisdiction.[35] The D.C. Circuit's approach is wise. Although the court did not expressly reach the constitutional issue, it imparted an important lesson: Every effort should be made on all sides to avoid constitutional conflicts of this type.[36]

3. Ongoing State Enforcement Actions Receive a Special Constitutional Presumption from Non-Interference Absent Extraordinary Circumstances

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[28] 505 U.S. 144 (1992).

[29] 521 U.S. 898, 907 (1997).

[30] *Id*. at 907.

[31] *Id*. at 920 (internal quotation marks omitted).

[32] *Id*. at 924; *New York*, 505 U.S. at 168.

[33] 306 F. 2d. 270 (D.C. Cir. 1962)

[34] In addition to a possible Tenth Amendment problem, the defendant in *Tobin* also raised an independent constitutional challenge to Congress's authority to alter, amend, or repeal its consent to an interstate compact. *Id.* at 272.

[35] *Id.* at 276.

[36] *Id.*

The Committee's investigation also raises distinctive concerns related to the need for caution when dealing with pending investigations and enforcement actions. In one of the most important cases on federal-state relations ever decided, the Supreme Court ruled in *Younger v. Harris* that principles of comity, equity, and federalism require that federal courts may not enjoin pending state criminal prosecutions absent extraordinary circumstances.[37]

As the Court has explained, *Younger* abstention rests on

> the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interest of both State and National governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[38]

Although *Younger* itself was a state criminal proceeding, the principles announced in the case have been held to apply in far broader contexts. Thus, *Younger* has been extended to non-criminal cases,[39] including state civil fraud actions,[40] and even to state administrative proceedings.[41]

Further, the Court has also made clear that *Younger* principles apply even when there is not a formal state enforcement proceeding pending before a court or administrative tribunal. In *O'Shea v Littleton*, for example, the Court refused to allow federal jurisdiction to constrain an alleged pattern of discriminatory law enforcement.[42] Similarly, in *Rizzo v. Goode* the Court refused to exercise jurisdiction to enjoin an alleged pattern of discriminatory state police practices.[43] As the *Rizzo* Court explained, "the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments . . . ."[44]

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[37] Younger v. Harris, 401 U.S. 37 (1971).

[38] *Id.* at 44.

[39] Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987).

[40] Trainor v. Hernandez, 431 U.S. 434 (1977).

[41] Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986).

[42] 414 U. S. 488 (1974).

[43] 423 U.S. 362 (1976).

[44] Rizzo v. Goode, 423 U.S. 362, 380 (1976); *see also id.* at 378 ("Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law. (internal quotation marks

The notion that a federal body can freely interfere with a pending state investigation thus flies in the face of a large body of doctrine. As *Younger* and its progeny recognize, any federal interference with ongoing state enforcement proceedings should at least require a showing of "extraordinary circumstances."[45] No such showing has or could be made here. If the States' investigation does result in litigation, state courts stand ready and able to address any federal defenses. Indeed, two courts (one state, one federal) are already addressing questions concerning the validity of the States' investigations in this matter.[46] Federal courts also can play a role in overseeing state litigation once a judgment becomes final—through Supreme Court review on appeal and, in criminal cases, through federal habeas corpus. Detailed doctrine assures that the federal courts review only federal questions and permit exhaustion of state procedures. For Congress to pass over those systems, adopted in order to ensure non-interference by the federal courts in situations in which there has been no final judgment in the state courts, would represent an unwarranted break from existing law.

Notably, Congress's own practice with respect to the federal Department of Justice reflects a restraint similar to that adopted by the federal courts. After studying the history of Congressional investigations of the Department of Justice, Professor Todd David Peterson reports that "Congress seems generally to have been respectful of the need to protect material contained in open criminal investigative files. There is almost no precedent for Congress attempting to subpoena such material, and even fewer examples of the DOJ actually producing such documents."[47] Independent research by the Congressional Research Service confirms that conclusion. A 2012 CRS report states that, in contrast to closed-case investigations, "the Department rarely releases—and committees rarely subpoena—material relevant to open criminal investigations."[48] The CRS report also emphasizes that committees "normally have been restrained by prudential considerations that involve a pragmatic assessment of the costs and benefits of demanding disclosure of information."[49]

State attorneys general are, at the very least, entitled to the same level of respect. As we described above, States are coequal sovereigns in our federal system. Moreover, as Congress itself has recognized, state attorneys general serve crucial purposes in our justice system. In various statutes, Congress has explicitly authorized state attorneys general to participate in the enforcement of federal law.[50]

Here, of course, the Attorneys General of Massachusetts and New York are enforcing *state* law. The case for Congressional restraint is therefore doubly strong in this context, combining the law enforcement-related concerns that Congress has acknowledged in its investigations of the Department of

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omitted)). Congress itself has imposed similar limitations on the ability of federal courts to intervene in state proceedings. 28 U.S.C. § 2254(b), for example, prohibits a federal court from intervening in habeas cases until state appeals and post-conviction proceedings have been exhausted, even if an inmate claims constitutional violations or outright innocence. Rose v. Lundy, 455 U.S. 509, 518 (1982).

[45] *Younger*, 401 U.S. at 53.

[46] *See, e.g.*, John Schwartz, *Exxon Mobil Fights Back at State Inquiries Into Climate Change Research*, N.Y. TIMES (June 16, 2016).

[47] Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1410 (2002).

[48] Alissa M. Dolan & Todd Garvey, *CRS Report for Congress: Congressional Investigations of the Department of Justice, 1920-2012: History, Law, and Practice*, 2 (Nov. 5, 2012).

[49] *Id.*

[50] *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698 (2011).

Justice with the federalism-related concerns that the Court has emphasized in cases like *New York v. United* States, *Gregory v. Ashcroft*, *Younger v. Harris*, and countless others. Taken together, these considerations compel the conclusion that Congress should exercise great caution before interfering with ongoing state investigations or enforcement actions, particularly when state attorneys general are enforcing state law.

To date, the Committee has not articulated a persuasive reason for overcoming that presumption of restraint. Certainly no showing has been made of the sort of "extraordinary circumstances" that would justify intrusion into an ongoing state enforcement effort.

Thank you for considering our views on this subject.

Sincerely yours,

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