

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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October 23, 2015

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

Dear Chairman Smith,

On Tuesday, October 13, you unilaterally issued a subpoena to NOAA Administrator Kathryn Sullivan. This subpoena appears to be furthering a fishing expedition, rather than engaging in focused oversight with a legitimate goal in mind. Unfortunately, this is reflective of much of the Committee on Science, Space, and Technology's "oversight" work this Congress, and it is a disturbing trend for the legitimacy of this Committee.

Your October 13 subpoena seeks the following:

1. All documents and communications between or among employees of the National Oceanic and Atmospheric Administration (NOAA) referring or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. All documents and communications between or among employees of NOAA referring or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying global temperatures to the public.
3. All documents and communications between or among employees of NOAA referring or relating to the utilization and consideration of satellite bulk atmospheric temperatures for use in global temperature datasets."

Prior to this subpoena, the Committee made three written requests for information¹ relating to a peer-reviewed study conducted by Thomas Karl, NOAA's Director of the

¹ On July 14, September 10, and September 25.

National Centers for Environmental Information.² NOAA responded to the Committee's inquiries by providing the Committee with a briefing on July 16, 2015, responding by letter twice³, and through informal staff communications. Finally, NOAA provided a second briefing to Majority staff (Majority staff did not invite Minority staff to attend) on October 19.

It is important to note what is and what is not contained in this history of requests and responses. Your requests repeatedly asked for data and methodologies used in the study, and also requested that this information be made publically available. NOAA, through its two response letters, pointed the Committee to publically accessible locations where all of the underlying data and methodologies can be accessed. Moreover, NOAA attempted to explain certain aspects of the methodology about which the Majority was apparently confused.

However, obtaining all of the data and methods used in this study seemingly was not enough for the Majority. You also demanded internal communications by NOAA scientists regarding their scientific research. NOAA, rightfully, has been reluctant to waste their time and resources, not to mention break confidence with their superb research scientists by responding to this demand.

In your various demand letters you noted that the scientific study in question was of some consequence, and could potentially have an effect on policy decisions. However, it should be emphasized that the issue in question is a scientific research study, not a policy decision by a Federal agency. As such, this is not an area of delegated legislative authority by Congress to the Executive (unless you are proposing that Congress should somehow legislatively overrule peer-reviewed scientific findings). Moreover, in none of the letters do you allege any scientific misconduct, abuse of discretion, or fraud. In sum, NOAA has provided all the information necessary for the Committee to understand the scientific process at play. You have not articulated a legitimate need for anything beyond what NOAA has already provided.

Congress's oversight powers are broad, but not unlimited. Congress must have a rational basis for its demands. For instance, the Supreme Court has stated that a test of the validity of a Congressionally issued subpoena rests on there being a valid legislative purpose for the inquiry.⁴ The Court has included within this scope of inquiry "probes into departments of the Federal Government to expose corruption, inefficiency or waste."⁵ As I noted, you have not characterized your investigation as seeking to do any of these things. The Supreme Court in *Watkins v. United States* was quite clear that, "No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the

² T.R. Karl et al., Possible artifacts of data biases in the recent global surface warming hiatus. *Science* 348(6242): 1469-1472 (2015).

³ On August 20 and October 2, 2015.

⁴ *Wilkinson v. United States*, 365 U.S. 399, 409 (1961).

⁵ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to “punish” those investigated are indefensible.”⁶

Though I can find no legitimate stated purpose for your demands for these communications in any of your letters to NOAA, I am concerned that the Majority has a different and wholly illegitimate purpose for this request. I cannot help but note that your requests in this case echo the tactics of notable climate change skeptics, who frequently submit similar FOIA requests of climate scientists in both the federal government and in state universities. One of the most publicized occasions of harassment occurred when then-Virginia state Attorney General Ken Cuccinelli and the American Tradition Institute (ATI) sought email communications of former University of Virginia climate scientist Michael Mann.⁷ At the time, the *Washington Post* editorial board summed up the issue succinctly, stating:

“Going after Mr. Mann only discourages the sort of scientific inquiry that, over time, sorts out fact from speculation, good science from bad. Academics must feel comfortable sharing research, disagreeing with colleagues and proposing conclusions – not all of which will be correct – without fear that those who dislike their findings will conduct invasive fishing expeditions in search of a pretext to discredit them. That give-and-take should be unhindered by how popular a professor’s ideas are or whose ideological convictions might be hurt.”⁸

When the *Washington Post* called those efforts “invasive fishing expeditions in search of a pretext to discredit” research scientists, they could have just as well been describing the Committee Majority’s current efforts. Unsurprisingly, the ATI’s legal director was the Majority’s witness earlier this year at a hearing concerning FOIA procedures.⁹ What is surprising, and unfortunate, is that the Committee on Science, Space, and Technology appears to be adopting the discredited tactics of fossil fuel industry funded climate change denier groups. By issuing this subpoena, you have instigated a Constitutional conflict with an inquiry that seems more designed to harass climate scientists than to further any legitimate legislative purpose. This is a serious misuse of Congressional oversight powers.

Unfortunately, this is not the first time the powers of the Chair have been used to harass and second guess our nation’s preeminent research scientists. Two years ago, the EPA Administrator was subpoenaed to acquire research data from several seminal public health studies. At the time, you stated your intention in issuing the subpoena was to pass the data onto a researcher with extensive ties to the tobacco industry for reanalysis. I hesitate to ask to whom you’d like to pass the information you have demanded from NOAA. There’s certainly not enough scientific expertise on your staff or on the Member

⁶ Id.

⁷ “Science under Attack: Legal Harassment of Climate Scientist Michael Mann,” Union of Concerned Scientists. <http://www.ucsusa.org/our-work/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.ViEchk2FOcw>

⁸ “Harassing climate-change researchers,” *Washington Post*, May 29, 2011.

⁹ “Destruction of Records at EPA – When Records Must Be Kept,” Joint hearing before the Subcommittees on the Environment and Oversight, Committee on Science, Space, and Technology, March 26, 2015.

rolls to reanalyze the scientific data you have been provided. I will only note that subpoenaing information from the Executive branch for the purposes of providing it to third parties is not a legitimate exercise of Congress's oversight powers, and certainly not a valid basis for a Constitutional conflict.

The baseless conflict you have created by issuing the October 13 subpoena is representative of a disturbing pattern in your use of Congressional power since your Chairmanship began. In the past two years and ten months that you have presided as Chairman of the Committee on Science, Space, and Technology you have issued more subpoenas (six) than were issued in the prior 54 year history of the Committee. That prior Committee history is filled with extensive legitimate oversight concerning consequential events - oftentimes quite literally matters of life and death. Yet none of the prior eleven Chairs of our Committee exercised their authority with the degree of partisan brashness as is now the case on our Committee.

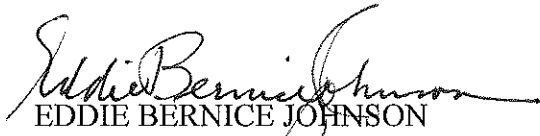
Likewise, none of the prior Chairs of the Committee ever forced the National Science Foundation to disclose the innermost details of the peer-reviews of extramural research grants, except in extreme instances where fraud was alleged. Since you became Chair of the Committee, you have forced NSF to disclose these sensitive details on scores of research grants, without any allegation of misconduct or fraud on the part of NSF or its external reviewers. You have taken these unprecedented steps because apparently you don't like the titles of the research grants.

It saddens me that I feel compelled to write this letter. However, it saddens me even more that the Majority would misuse the power of the Science Committee to attack our Nation's premier research scientists. It saddens me that the Chairman's aggressive oversight this Congress seems designed more to generate press releases and harass the Executive than to actually discover any significant waste, fraud, or abuse in the programs we oversee. In fact, despite the extreme volume of demands the Chairman has issued to our agencies this year (50 letters and subpoenas as of today), I cannot think of a single significant oversight discovery our Committee has uncovered under the current Majority. Conducting "oversight" in this fashion weakens the authority of the Committee on Science, Space, and Technology, brings disrepute to our institution, and tarnishes the legacy of the leaders who came before us.

I, along with the other Democratic Members of this Committee, stand ready to work with the Majority on legitimate issues of oversight. However, we won't be complicit in the illegitimate harassment of our Nation's research scientists.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, reading "Eddie Bernice Johnson". The signature is written in black ink and is positioned above the printed name.

EDDIE BERNICE JOHNSON

Ranking Member

Committee on Science, Space, and Technology