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Testimony Before the House Committee on Science, Space and Technology

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TESTIMONY BEFORE THE HOUSE COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY

by Professor Charles Tiefer

Re: The Committee Cannot and Should Not Try to Enforce Subpoenas Against State Attorneys General Investigating Exxon's Climate Risk Fraud

Outline of Tiefer Testimony

<u>No House Committee has ever tried, nor should try, to enforce subpoenas against state Attorneys General.</u>

I can say none has ever tried -- based on extensive first-hand-experience, the literature on investigations, and all the research for this hearing.
If committees felt AG subpoenas were legitimate, in two centuries they would have tried.
The federalism barrier is like the "executive-commandeering" principle.
There could never be enforcement by the Justice Department or by courts.

<u>The Science Committee has no authority to enforce subpoenas against state AGs.</u>

The "constitutional rights" explanation is without merit for fraud.
Committees must have clear authority. *Tobin v. United States.*
The Science Committee authority is over federal scientific "Government activities," not state AGs.
Environmental groups are protected from harassment via broad subpoena.

Thank you for the opportunity to testify today. I served in the House General Counsel's office in 1984-1995, becoming General Counsel (Acting). (Since 1995, I have

been Professor at the University of Baltimore School of Law,) So, I have lengthy full-time experience, including extensive work on Congressional subpoenas. My work takes in whether the House, or this Committee, may justifiably try to enforce subpoenas against state Attorneys General (the answer being: no). I have had more years of experience than almost anyone else in House history focused on this area. While the other professors on this panel have done various things, none has been the House General Counsel. I stood behind the dais of committees many, many times, which few did, advising Chairmen on the legitimate lawful use of Congressional oversight authority.

In 1987 I was Special Deputy Chief Counsel of the House Iran-Contra Committee and worked intensively on the most advanced of all House investigative issues. Since becoming Professor I have written extensively on investigative and related issues. Charles Tiefer, "*The Specially Investigated President*," 5 Univ. of Chicago Roundtable 143-204 (1998); see also Charles Tiefer, The Polarized Congress: The Post-Traditional Procedure of Its Current Struggles (University Press of America, 2016).

I might note that I have kept my hand in, in a bipartisan way, hearings involving matters like those here. Chairman Sensenbrenner (R-Wis.) called me as lead witness at his hearing on the FBI raid on a Member's office.[1] I was Chairman Issa's (R-Cal.) lead witness at his hearing on the demand for Justice Department materials that became the House's contempt case against Attorney General Holder.[2]

Let me say again in the plainest terms: when committees under a Republican majority sought materials to which they were entitled, I was vigorously on their side, and Chairman Issa and Sensenbrenner were glad to rely on me; when you seek material from State Attorneys General on their investigation of climate risk fraud, however, your position is without constitutional and legal merit. It is simply bogus.

I.No House Committee Has Ever Tried, Nor Should Try, To Enforce Subpoenas Against State AGs

I-A No House Committee Has Ever Tried; Look at the Majority's Testimony – Its Empty Abstractions Fail to Identify Even a Single House Subpoena Enforcement, in 200 Years, to a State AG

[1] "The Search Warrant Raid Was an Unnecessary and Radical Step," in Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?, Hearing Before the House Committee on the Judiciary (May 30, 2006).

[2] "Congressional Committee Conducting Oversight of ATF Program to Sell Weapons to Smugglers, Notwithstanding Pending Cases," in Hearing on Justice Department Response to Congressional Subpoenas: Hearing Before the House Committee on Government Oversight (June 13, 2011).

No House Committee has ever tried to enforce subpoenas against state Attorneys General. I challenge, bluntly, the majority witnesses to do what their written testimony does not do – provide written citations for any House committee, in over two hundred years of House investigations, to have ever tried to enforce a subpoena against state Attorneys General.[3]

Why can I say there have been no such subpoenas enforced against State AGs? First, from extensive first-hand experience. For my eleven years in the House Counsel's office, every House committee subpoena was examined by me. At the time I left that office, I had personally examined more than half of all the House committee subpoenas in all of history (this being more than half because the pace had picked up markedly during my years, including the high-powered House Iran-contra Committee, for which I personally drafted most of the subpoenas with document demands). And, I saw the research files for subpoenas before my time of service. I saw who those hundreds of subpoenas were directed at. The upshot: House committees did not enforce subpoenas to state Attorneys General.

Second, both to start my role in the Senate and House Counsel offices, and to stay in touch afterwards, I have read a great deal of the literature about investigations. To illustrate from the related sphere of House procedure, I authored a treatise with 1000 pages and 2000 footnotes; this year I have published a new book on the same House subject, with almost 200 pages. I had the benefit of hundreds of pages from the Congressional Research Service, as well as law review articles and the like. I was, of course, particularly interested in more striking or controversial instances, of which something about state Attorneys General would have been front and center. I studied deeply about every kind of special subpoenas from tax records to immunized witnesses. No enforcement of House committee subpoenas to state Attorneys General could be found.[4]

Third, in connection with this investigation, vast research forces have been mobilized from all direction. The Congressional Research Service looked again. So did majority witnesses. So, presumably, did majority staff. With all that research firepower, no enforcement of House committee subpoenas to state Attorneys General could be found.

Why does it matter that there have been no established examples? After all, new things do happen. But, consider the subject. New subjects may arise for which established examples would not exist. For example, an FBI raid on a House Member's office raised the relatively novel question, not long ago, of how to investigate Member

[3] I am not referring to the distinguishable *Tobin* case, discussed below, in which enforcement lost in a subpoena to a interstate compact authority, not to a state AG.

[4] Quite the opposite, in *House Practice: A Guide to the Rules, Precedents and Procedures of the House* (GPO 2011) I found: "The investigative power cannot be used to expose merely for the sake of exposure or to inquire into matters which are within the exclusive province of one of the other branches of government or which are reserved to the States." (Underlining added)

computer hard drives. On that novel subject of hard drives, the lack of historic examples is not surprising. Hard drives were unheard of awhile back.

But, for two centuries, there have been House committees, and, state Attorneys General. The explanation for the absence of precedent is hardly one of novelty. It was always a possibility, for House committees to attempt something. Suppose we assume that at least a quarter (25%) of the time, the chair of a House Committee is in the opposition party to some prominent state Attorneys General, just like this chair is for the subpoena recipients. Figure at least a half-dozen House Committees each Congress, and just one century of history (that is, 50 Congresses) to keep the numbers low, and 25% party opposition, and there are obviously many dozens of times, if not hundreds, when the incentive would have been there for House committees to subpoena state Attorneys General – that is **if** they considered it legitimate to try to enforce committee subpoenas against state AGs. Against this background, the fact that not one single solitary example of it, shows there is an overwhelming historical consensus against what Chairman Smith is trying to do.

I-B. No House Committee Should Try To Enforce Subpoenas Against State AGs

Looking particularly at these subpoenas, they concern state Attorney General law enforcement investigations of climate risk fraud. These go against the combination of mutually reinforcing aspects of resistance, namely, federalism and law enforcement.

It is not merely that in this matter, a House Committee is going into an area that is largely left to the states, like crime on school premises. Rather, a House Committee is going squarely against a key component of state sovereignty itself, namely, state Attorneys General. Could Congress abolish state Attorneys General? Could Congress put state Attorneys General under the command of the nearest U.S. Attorneys? Could Congress require state Attorneys General to investigate what does not interest them, but does interest the majority party of the House? Even to suggest these things is to see the strong barrier of state sovereignty.

An example of the cases supporting the federalism barrier is the "anti-commandeering" principle. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United Sates*, 404 U.S. 144 (1992); *compare Reno v. Condon*, 528 U.S. 141 (2000). This line of cases looks back at history and particularly at the earliest Congresses. The issue in *Printz* was whether Congress could oblige state officials to do background checks on handgun buyers. The Supreme Court said "no." Such "executive-commandeering statutes" did not appear until "very recent years." 521 U.S. at 916.

This applies with maximum force to enforcement of committee subpoenas against Attorneys General. The ban on committee subpoena enforcement against state AGs has the same powerful length of history and comparable protections of federalism. This position is expressed with great force and eloquence in the submissions by the state

Attorney Generals themselves to this committee. I will not attempt to repeat what they have said. I simply direct the Committee's attention to the state AGs' submissions.

Suppose a House Committee blundered ahead blindly, and attempted quixotically to enforce subpoenas against state Attorneys General. Suppose even the House backed the Committee and voted for enforcement, presumably along party lines, further underlining that the issue is merely political. The answer is that there could never be enforcement, only further demonstrations of the illegitimate nature of the effort.

Consider, first, that the only enforcement route is contempt of Congress under 2 USC 192. There is no civil enforcement statute for the House (in contrast to the Senate). And, this enforcement discussed in today's hearing does not involve federal executive officials invoking federal executive privilege, the special, unique justification expressed for the couple of recent trial judge House contempt decisions. 2 USC 192 is the live route for House contempt. I personally directed, at the staff level, one of the last successful 2 USC 192 efforts by the House, forcing Ferdinand Marcos's recalcitrant law firm to surrender the secrets of his hidden wealth, only after a (bipartisan) House vote of contempt. There have been many scores of House contempt votes under 2 USC 192, particularly during the red-baiting period in the 1950s and 1960s.

Second, however, it would take a decision of the Justice Department to go ahead with a 2 USC 192 case against a state Attorney General. Based on my own experience, and all I have learned from a multitude of sources about contempt, that is simply a non-starter. The Federal Justice Department sees state Attorneys General as their colleagues and partners in law enforcement. There is no aspect of this case to differentiate it as involving some personal wrongdoing of a corrupt nature. The Justice Department does not go into court seeking orders intruding into the work of the other sovereign law enforcement officers – not even injunctive orders. A contempt case under 2 USC 192 carries a sentence of a year in jail. No federal Justice Department is going to seek to declare as a criminal, and to imprison, a state Attorney General for a year just on the notion this vindicates the right of a House committee to enforce subpoenas.

Third, even making the far-out assumption that the federal Justice Department did indict a state AG to enforce a House committee subpoena, no federal judge could ever be expected to uphold such an indictment and send the state AG to prison. Federal judges see state AGs as chosen leaders of a parallel sovereign (noting again that this is not about personal wrongdoing of a corrupt nature). They rule sometimes on state AG cases, but they do not render criminal judgments against state AGs themselves. Much less would judges do so, not for some broad crusade by the federal Executive Branch on behalf of some helpless minority being grievously oppressed under a state, but rather in vindication of a House committee venturing without support to go where no committee before it has ever gone.

II. The Science Committee Has No Authority to Enforce Subpoenas Against State AGs

II-A The Supposed "Constitutional Rights" Explanation by the Majority is Without Merit.

The gravamen of the state AG investigations is: Exxon Mobil made statements to investors about (absence of established) climate risks; these Exxon statements to investors conflicted factually with the company's own extensive record of research, about the real peril of climate change. In a word, Exxon committed fraud about climate change risk. Obviously, since Exxon dominates the carbon fuel business, a conflict between what it misrepresents to investors, vs. what it actually digs into itself about that, is material.

The issue is similar to the tobacco companies being untruthful. Their statements about nicotine not being addictive, conflicted with their own research. State Attorneys General sued successfully to hold them accountable.

Now, it appears, the House Science Committee deems this state AG investigation to violate Exxon's First Amendment rights. So the Science Committee deems itself to be riding to the First Amendment rescue of Exxon, and push back against the state AGs even trying to look into fraud.

However, the supposed "constitutional rights" explanation by the majority is without merit. Fraud investigation is the legitimate bread and butter of state AG investigations. The Supreme Court holds that the First Amendment does not protect such fraud. In *Illinois ex rel. Lisa Madigan, Attorney General of Illinois, v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), the Illinois Attorney General sued professional charitable fundraisers for fraud. It is noteworthy that this was a state AG investigation of fraud, just like in our matter. It is also noteworthy that this was, as Supreme Court cases go, quite recent, and certainly one that is as solid a precedent today as the day it was handed down.

The Supreme Court cited a string of strong precedents to declare that "the First Amendment does not shield fraud." 538 U.S. at 612. As it quoted from prior cases, "the government's power 'to protect people against fraud' has 'always been recognized in this country and is firmly established." *Id.* "The 'intentional lie' is 'no essential part of any exposition of ideas.'" *Id.* That case itself shows that not only does fraud lack First Amendment protection in general, it lacks First Amendment protection vis-à-vis state AGs in particular.

II-B House Rule X(3)(k) Makes Clear the Science Committee Has No Pertinent Authority

Other committees recognize that they do not have authority to investigate State Attorneys General the way this committee seeks to. Rep. Chaffetz, Chairman of the Committee on Oversight and Government Reform recently commented to Wolf Blitzer on CNN that he would not be investigating the Florida Attorney General. He said: "Well,

I don't see the federal jurisdiction in this case. It does look to me to be a state issue. It is regarding an attorney general in Florida. I just don't see the federal jurisdiction."

Even if, *arguendo*, some committee were to march out and defend the asserted First Amendment rights of businesses to give false reports to their investors, it would not be this committee. This Committee is not the one that proposes constitutional amendments; not the one that proposes civil rights bills; and, not the one that conducts oversight over parts of the government policing civil rights.

This Committee's legislative jurisdiction is set forth in House Rule X 1.(p) and special oversight functions in X 3.(k).

The Supreme Court and the lower courts have long made clear that committee authority to enforce subpoenas, in constitutionally questionable subjects like today's hearing, must be stated with special clarity, which we will see in a moment, is not stated with respect to the Science Committee and state AGs. In *United States v. Rumely*, 345 U.S. 41 (1953), the Court considered a contempt of a House Select Committee on Lobbying Activities. Rumely was selling pamphlets described by the Court as "of a particular political tendentiousness," and the Committee was looking into bulk purchases for distribution. By ordinary language, bulk purchasing of political pamphlets could come under the Committee's stated authority. But, Justice Frankfurter, in his opinion for the Court, insisted on avoiding constitutional issues because the charter of the committee did not give it sharply clear authority over Rumely. "Certainly it does not do violence to the phrase 'lobbying activities' to give it a more restricted scope." *Id.* at 48.

This principle is particularly reinforced when dealing with state officials. As previously stated, there are no instances of subpoena enforcement against state Attorneys General. There is one case, which goes against what the Science Committee majority is trying to do, as to an interstate compact agency. This interstate compact agency, the New York – New Jersey Port Authority, came into existence (as states themselves, of course, do not) by Congressional approval of the interstate compact. And, the head of the authority, Austin Tobin, was involved in the mundane matters of transportation, not the law enforcement activity of state AGs.

A House committee tried to enforce, by contempt, a subpoena for documents from Tobin. The D.C. Circuit threw out a contempt conviction. Tobin presented as a defense that the subpoena sought internal matters from the State. The Court followed *Rumely* and found that the House Committee lacked the necessary sharply clear authority for its subpoena. As it said about Tobin, "Appellant is no criminal and no one seriously considers him one." *Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962). It would not enforce a subpoena because "To avoid such constitutional holdings is our duty, particularly in the area of the right of Congress to inform itself. *United States v. Rumely*, 345 U.S. 41 (1953)." *Id.* at 274.

What *Rumely* and *Tobin* say, about not giving broad reading to federal instruments as to their reaching into state matters, is good law today. As recently as 2014, the Supreme Court decided *Bond v. United States*, 134 S. Ct. 2077 (2014). It refuses to interpret the chemical weapons ban to apply to state-level crime, despite Justice Department advocacy of its doing so, for a conviction at the trial level affirmed at the circuit level. The ban had to be interpreted narrowly, because "The Government's reading of section 229 would alter sensitive federal-state relationships,'" and by "denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Id.* at 2092.

No one has found any other case on Congressional investigations into state-level bodies, putting aside the interstate compact agency in *Tobin* (which discarded the House committee's effort anyway). That *Tobin* House Committee's loss would be front and center at the Justice Department, and front and center in court, if the Science Committee tried to enforce its subpoena. The House Committee could not evade nor escape the question: where is its clear authority to subpoena state AGs?

Viewed in this light, the Science Committee simply has no real authority to enforce subpoenas against state AGs. Neither its legislative authority nor its oversight authority speak of state officials at all, let alone state AGs. Its legislative authority, in House Rule X.1(p) speaks of many agencies, like "federally owned or operated nonmilitary energy laboratories," and specific agencies like NASA and NSF. But, it does not speak of any state ones, let alone state AGs. Nor does it speak of constitutional rights, nor of fraud.

Its oversight functions in X.3(k) says: "The Committee on Science, Space, and Technology shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development." (Underlining added.) Throughout Rule X.3, the capitalized word "Government" is meant as Federal Government. For example, it could hardly be imagined that Rule X.3(f) is referring to states when it says that "(f) The Committee on Foreign Affairs shall review and study on a continuing basis laws, programs, and Government activities relating to customs administration, intelligence activities relating to foreign policy, international financial and monetary organizations, and international fishing agreements." It is the federal "Government," not the states, which handles customs, foreign intelligence, and international financial and monetary matters.

A separate question is raised by the Committee subpoenas to organizations advocating strong environmental beliefs and positions. In some respects, these environmental advocacy organizations are like civil rights groups during the civil rights movement. Namely, in some parts of the country, like coal or oil producing regions with intense feelings on the subject, for example, for a member of the organization or other idealistic related person to have their name published and condemned might expose them to harassment or worse for simple advocacy. It is a well-established judicial principle, going back to the era of the civil rights movement, that broad legislative subpoenas will

not be enforced that expose organizations of such vulnerable advocacy. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963).

In conclusion, the Science Committee cannot and should not try to enforce subpoenas against State Attorneys General looking into climate risk fraud.