



STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

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February 28, 2017

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

Dear Chairman Smith:

The undersigned state attorneys general respectfully ask that you withdraw the subpoenas duces tecum sent to our colleagues, the attorneys general of Massachusetts and New York. The subpoenas, which were first issued on July 13, 2016, and then reissued in an even broader form on February 16, 2017, seek the production of materials developed by the attorneys general in the course of their respective ongoing investigations into whether the ExxonMobil Corporation (“Exxon”) has violated state securities and consumer protection laws. A previous letter to you, dated August 11, 2016, explained the reasons why these unprecedented subpoenas exceed your Committee’s constitutional authority and depart from the comity, or “proper respect for state functions,” which the Supreme Court has held to be a “vital consideration” that constrains federal action and assures Americans “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.” *Younger v. Harris*, 401 U.S. 37, 44 (1971). In the period since the earlier letter, events have served not only to confirm the lawfulness of the investigations undertaken by the attorneys general in Massachusetts and New York, but also to demonstrate that your Committee’s subpoenas improperly threaten to overlap and interfere with pending court proceedings involving Exxon. Recent developments have also served to accentuate the critical importance of each state attorney general’s responsibility to enforce state laws for the protection of the people.

As you may be aware, in an order issued January 11, 2017, the Massachusetts Superior Court affirmed Attorney General Maura Healey’s authority to investigate whether Exxon engaged in unfair and deceptive acts or practices in violation of the Massachusetts investor and consumer protection statute. The court rejected Exxon’s arguments challenging the court’s jurisdiction and Attorney General Healey’s exercise of her investigative powers. In particular,

the Massachusetts Superior Court found that Attorney General Healey “assayed sufficient grounds—her concerns about Exxon’s possible misrepresentations to Massachusetts consumers—upon which to issue the [Civil Investigative Demand]” and concluded that the Attorney General is authorized to investigate whether Exxon presented to consumers “potentially misleading information about the risks of climate change, the viability of alternative energy sources, and the environmental attributes of its products and services.” The court further rejected Exxon’s argument that Attorney General Healey was biased and that remarks she made demonstrated she had predetermined the outcome of her investigation. As the court noted, remarks expressing “concerns that Exxon failed to disclose relevant information to its Massachusetts consumers . . . do not evidence any actionable bias on the part of the Attorney General; instead it seems logical that the Attorney General inform her constituents about the basis for her investigations.” A copy of the January 11, 2017 Order is attached to this letter for your convenience.

Meanwhile, in New York, Exxon has never objected to the investigative subpoena issued to it by Attorney General Eric T. Schneiderman, nor has Exxon moved to quash or modify that subpoena. Instead, as of the beginning of February 2017, Exxon has produced more than 2.5 million pages of documents it deemed responsive to the subpoena. In October 2016, Attorney General Schneiderman found it necessary to institute proceedings to compel compliance with a subpoena issued to Exxon’s external auditor, PricewaterhouseCoopers LLP, but Exxon asserted no constitutional challenge to the attorney general’s investigation or to his subpoenaing the auditor. Exxon raised only a single objection, based solely on a claim that certain unspecified documents were subject to an “accountant-client privilege” under a Texas statute, which no Texas court decision had ever construed in the way Exxon sought to apply it. At a New York state court hearing on the attorney general’s application for an order to compel, the presiding judge observed that neither Exxon nor its auditor had asserted any objection questioning whether the investigative subpoena was “reasonable and appropriate” or whether the attorney general was acting in “good faith.” Oct. 24, 2016 Hr’g Tr. 15, line 7; Tr. 64, lines 4–6. At the same hearing, Exxon’s counsel conceded that Attorney General Schneiderman has “the right to conduct the investigation.” *Id.* at 33, line 24. In December 2016, Exxon assured the court that it was “fully complying with its obligations with regard to the Subpoena” served on it by Attorney General Schneiderman. Dec. 5, 2016 letter from Theodore V. Wells, Jr., Esq. to the Honorable Barry R. Ostrager at 1.

As you can see from the history of proceedings in Massachusetts and New York, the lawfulness of these state law investigations is no longer in question in either jurisdiction, and even Exxon has essentially conceded the propriety and reasonableness of Attorney General Schneiderman’s investigation by failing to raise any such objections to the New York court.

As for the separate suit Exxon has filed in the Northern District of Texas, originally against Attorney General Healey but subsequently amended to name Attorney General Schneiderman as a defendant, both attorneys general have moved to dismiss the amended complaint on multiple grounds, including lack of personal jurisdiction.¹ Exxon has propounded extensive discovery requests, which overlap to some degree with the requests contained in the Committee's subpoena. For example, the request in paragraph no. 1 of the "Schedule" attached to the Committee's subpoena is nearly identical to certain requests numbered 8 and 9 in Exxon's First Request to Defendant Eric Schneiderman for the Production of Documents and First Request to Defendant Maura Healey for the Production of Documents. Although the district court had initially ordered discovery on the question whether *Younger* abstention should apply, and even ordered Attorney General Healey to appear for a deposition in Texas, more recently the district judge has changed course. In December 2016, after Attorney General Healey filed a petition for writ of mandamus in the U.S. Court of Appeals for the Fifth Circuit, the district judge cancelled the attorney general's deposition, directed the parties to submit supplemental briefing on the question of personal jurisdiction, and stayed all discovery pending further order of the court.

These developments further underscore the concern that Exxon may be attempting to obtain, via the Committee's subpoena, discovery that it is seeking in the court proceedings and is unable to obtain due to the stay and the pending motions to dismiss. This possibility illustrates how the Committee's subpoena not only impermissibly intrudes on the lawful authority of the attorneys general to conduct investigations into suspected violations of state laws, but also interferes with the authority of courts to oversee discovery in pending cases.

The expanded scope of the Committee's subpoenas further undermines their legitimacy. Last year, you claimed the Committee was "conducting an investigation to determine whether the actions of [the Massachusetts and New York attorneys general] are having an adverse impact on federally-funded scientific research," Aug. 23, 2016 letter from Rep. Lamar Smith to Att'y Gen. Schneiderman at 1. Yet your new subpoena to Attorney General Schneiderman, which specifically demands privileged communications, dramatically expands the scope of the documents it seeks, as it calls, for example, for the production of "[a]ll documents and communications between" any employee of either the Massachusetts or

¹ See *Walden v. Fiore*, 134 S. Ct. 1115, 1124–25 (2014) (defendant Georgia law enforcement officer lacked sufficient "minimal contacts" to support personal jurisdiction in federal District of Nevada under the Due Process Clause); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Circuit 2008) (holding that the Due Process Clause precluded federal district court in Texas from exercising personal jurisdiction over an Arizona state official sued in her official capacity).

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New York Attorney General's office and "any employee of a state attorney general office...referring or relating to...the Clean Power Plan." Feb. 16, 2017 Subpoena Schedule Instructions #13 and Schedule #2. As you well know, a coalition of 25 states, cities and counties have intervened as defendants in the Clean Power Plan litigation currently pending in the U.S. Court of Appeals for the District of Columbia. Indeed, in that litigation you have filed an *amicus* brief opposing the Clean Power Plan. Brief for Members of Congress as Amici Curiae In Support of Petitioners, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 23, 2016). You are therefore seeking to use your power as a Committee Chair to compel the production of the privileged communications of the sovereign state officers who are your adversaries in ongoing litigation. This is an inappropriate use of your purported authority as Committee Chair.

The importance of a state attorney general's ability to investigate suspected violations of state laws can hardly be doubted, but recent events have markedly increased the demand for state attorneys general to be vigilant and diligent in investigating and enforcing state laws, particularly state laws that protect consumers, their health and safety, and the environment. Perhaps more than ever, the people of the various states will be looking to their respective state attorneys general to investigate potential wrongdoing and to enforce state laws designed to prevent people from being defrauded, as well as laws that safeguard residents' health and safety and the environment. Under the Constitution and the principle of comity that has been honored by Congress and federal courts since the Nation's founding, the states' attorneys general must be free to fulfill the responsibilities they owe to the people they serve, unimpeded by interference from a committee of Congress.

We therefore, once again, urge you to withdraw your subpoenas, refrain from attempting to exercise further oversight, and allow state attorneys general and state courts to perform their constitutionally prescribed roles.

Sincerely,



Brian E. Frosh
Maryland Attorney General



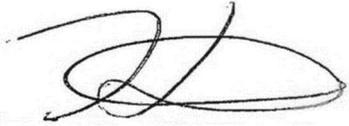
Xavier Becerra
California Attorney General



George Jepsen
Connecticut Attorney General



Matthew Denn
Delaware Attorney General



Karl A. Racine
District of Columbia Attorney General



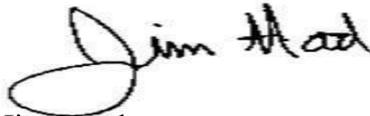
Lisa Madigan
Illinois Attorney General



Andrew Beshear
Kentucky Attorney General



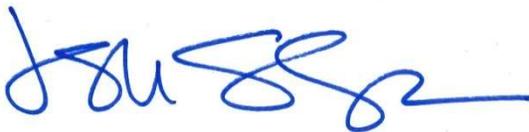
Janet T. Mills
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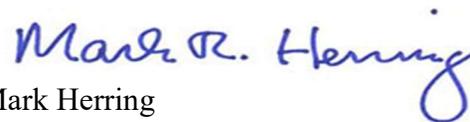
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