



“25 and Still Counting” – Congressional Committee Chair Brags About Issuing Subpoena After Subpoena. Is This Vigorous Oversight, or an Abuse of Power?

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Last week we expressed concerns we share with the Union of Concerned Scientists (UCS) and others that, as Chair of the U.S. House of Representatives Committee on Science, Space and Technology (SST), Rep. Lamar Smith (R-TX) is on a misguided, overzealous mission to discredit a set of well-established non-governmental organizations (NGOs), and state attorneys general (AGs) who are investigating the Exxon Mobil Corporation for alleged fraud. Our initial concerns remain after observing last week’s full committee hearing to address possible charges of contempt of Congress that may be filed against eight NGOs and two state AGs for refusing to comply with subpoenas Smith unilaterally issued in July. If Chairman Smith decides to seek and is eventually granted the ability to file “inherent contempt” charges (which, technically, can lead to jail time), what kind of precedent would that set, and what would be the lasting consequences for those who are working in the best interests of the public by holding corporations accountable?

The use of the word “affirming” (rather than a more neutral term like “exploring”) in the title of the hearing – “Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas” – exposes the bias, as does the choice of witnesses. Of the three witnesses invited by the majority to testify, two (Ronald Rotunda and Elizabeth Foley) have ties to the libertarian Cato Institute, and one (Rotunda) has ties to both Cato and the Heartland Institute, according to the DeSmog blog. Foley also provides her expertise to the Federalist Society. All three of these groups have taken money from fossil fuel interests, including ExxonMobil, and all three actively promote climate science denial. The third majority witness (Jonathan Turley), is also a legal scholar but has no apparent conflicts of interest. All three majority witnesses indicated that, under current rules, the SST Committee Chair has adequate jurisdiction to pursue his investigation, as well as sufficient authority to issue the subpoenas and take action to ensure their enforcement.

However, there are plenty of highly credentialed legal scholars with more objectivity than these witnesses who take issue with the opinions expressed at the hearing. Witness testimony is firmly contradicted by the findings of 14 national experts (.pdf) in constitutional law: specifically, that the subpoenas represent “misguided demands for information” the committee “has no legal right to inspect.” Further, they “violate the separation of powers, exceed the committee’s delegated authority, abridge the First Amendment, and undermine fundamental principles of federalism.” The letter was entered into the formal hearing record.

The single witness allotted to the minority (Charles Tiefer), also a law professor and a former general counsel for the U.S. House of Representatives, made the point that no congressional subpoena has been issued to a U.S. state in more than 200 years, and that exchanges among the various groups and the state attorneys general are well within their constitutional rights of free association.

The Congressman smells a conspiracy where there is none to be found. What seems to be giving Rep. Smith heartburn amounts to no more than normal communication and information-sharing between and among a handful of NGOs and two state AGs on a complex topic with a rich history. (For a true conspiracy to take place, of course, the co-conspirators must be planning something illegal or harmful; there is zero evidence of any wrongdoing, but plenty of evidence of political posturing by the Chairman.) As an aside, one could reasonably postulate that the Exxon Mobil Corp. has chronically *conspired with* the American Petroleum Institute and other fossil fuel corporate interests to hoodwink the American people on the seriousness of the climate threat, and to hide this threat from investors. In the case at hand, state prosecutors simply want to know if the Texas-based oil company has been telling a giant, multi-decadal fib to its shareholders regarding known climate change risks. If Exxon had important information that it failed to share with investors – which it clearly did – that fib would reach the level of securities fraud. This oil company has been stubborn about admitting climate change is a real problem, and secretive about its internal thinking and planning given changing climate conditions. Many want to see ExxonMobil come clean on this. Multitudes of shareholders have put forth corporate resolutions year after year asking for more transparency regarding the company's carbon dioxide emissions and plans to address them. A broad spectrum of Americans sees ExxonMobil as a corporate bad-actor and socially irresponsible for its head-in-the-sand approach to well-established climate science. Drove of consumers and average citizens worry that continued, unbridled use of the very products oil and gas companies sell is leading us down an irreversible path to a climate system inhospitable to human life.

The half-baked controversy Rep. Smith and some of his congressional colleagues have concocted, together with the associated accusations and wild assertions being flung about, make it seem as if George Orwell's novel "1984" is the committee's new playbook. Smith claims he's protecting First Amendment free speech all while attacking private organizations and public offices for engaging in such. (He would say he's protecting ExxonMobil's right to interpret climate science any way it wants and to freely express those interpretations; we would say ExxonMobil has been a champion ringleader in a massive climate science denial campaign designed to stymie regulation of greenhouse gases.) Many members of the committee claim to promote states' rights and respect federalism, yet Smith is attempting to interfere directly with legitimate state prosecutorial endeavors. (We would say the attorneys general are just doing their jobs, and the SST Committee should stick to its job.) Smith claims his committee is out to protect science from political interference, yet interfering with the work of legitimate scientists is *hismodus operandi*, and now he is subpoenaing organizations simply because they shared scientific and other relevant information with state prosecutors – in most cases, information that is publicly available. (We would say Smith has already gone on record many times as admitting to dismissing climate change science altogether, and that he has chosen simply not to "believe in" anthropogenic global warming.)

The hearing also entertained discussion of the veracity of mainstream climate science itself, in keeping with the anti-climate-science ideology held by a number of the committee members. The veracity of climate science is not what is on trial here! The key question is whether ExxonMobil executives have been holding knowledge and understanding on established climate science that differs from what they have been disclosing to investors. Nonetheless, Rep. Barry Loudermilk (R-GA) put forth the notion that state governments are using the power of law to oppose dissenting views (expressed by ExxonMobil) of the *status quo* (referring to scientific consensus on climate change), and that if we can't challenge scientific models we might still think the world is flat. Just what is it that he thinks scientists do? Then later, Rep. Brian Babin (R-TX) referenced a *Wall Street Journal* op-ed penned by majority witness Foley complaining about "how far the left will go to enforce climate change orthodoxy" (as if climate science were a religion); and that the state AG investigations will produce a "chilling of our R&D first amendment rights" – referring, presumably, to the right of ExxonMobil leaders to hold and express opinions on science contrary to the peer-reviewed findings of the vast majority of climate scientists worldwide. Obviously this isn't how science works: peer-review weeds out bad science, not corporate opinion.

Yet, we heard tones of righteous indignation indicating a presumption among some committee members that state AGs and those who help them are attempting to silence ExxonMobil and, for that matter, anyone who identifies as a "skeptic" of scientific consensus on global warming trends and associated climate impacts. The laws of physics are not up for a vote, and fraud isn't protected free speech. Congress has passed laws against fraud to protect people from being swindled.

At various points during the hearing these surreal things happened: the Committee's documented anti-science majority was likened to Galileo; ongoing state AG investigations into ExxonMobil were likened to McCarthyism; and Congressional interference in state police activity was compared with federal intervention during the heyday of desegregation and the Civil Rights movement. It was enough to make one's head explode. A moment of sanity broke out when Rep. Bill Foster (D-IL), a Ph.D. scientist and businessman, pointed out that companies need to share information with shareholders, and expressed his concerns that the Committee has strayed from its mandate to support U.S. scientists in producing the best research and technology development possible. We share that concern.

There is no doubt that Rep. Smith is on shaky legal ground here. The point is, even if he is found to be operating within his jurisdictional boundaries (doubtful) and to have adequate authority to subpoena state AGs (also doubtful), he is acting recklessly by appearing to go after targets with whom he happens to disagree on ideological grounds. Plenty of scientists and non-scientists alike became worried when the House of Representatives amended the rules in January 2015 to give the Chairman of the SST Committee the power of subpoena without obtaining the consent of the Ranking Minority Member (Rep. Eddie Bernice Johnson (D-TX) who has spoken out vehemently against these subpoenas) or even putting it to a full committee vote. Nothing freezes the work of a scientist like a Congressional subpoena.

Smith's motives for investigating state investigators (and organizations with whom they have been in communication) looking into potentially fraudulent activity at ExxonMobil can legitimately be called into question, given the heavy odor of crude oil in his campaign coffers. Watchdog groups like the Center for Responsive Politics, Greenpeace USA, and Oil Change

International have all documented significant campaign contributions to Rep. Smith from the oil and gas industries in general, and ExxonMobil in particular, which has donated a total of \$24,770 to Smith over the years. The bulk of Smith campaign contributions over the course of his tenure in Congress has come from oil and gas: he's received nearly \$685,000 from oil and gas interests since 1998.

Like a boy with a new toy, Rep. Smith has been serially issuing subpoenas, right and left, using – some would say abusing – his relatively new power that he can exercise all alone in his office without anyone's endorsement. So far, not one recipient of a Smith-issued subpoena has complied, including the National Oceanic and Atmospheric Administration, which he went after last year over a non-issue regarding the routine correction of a global temperature data set. Smith was convinced a veteran scientist at NOAA with impeccable credentials was manipulating the data to show an exaggerated warming trend (which was clearly not the case) and demanded internal communications from the agency. NOAA stood up to Smith and held its ground, shared publicly-available information appropriate for doing so under the circumstances, and protected its internal emails. Smith eventually let the issue fizzle out without formally backing down.

We wonder, has Chairman Smith been testing the waters with NOAA and others, awaiting the grand moment when, through a vote of the full House, he could actually imprison those with whom he disagrees? It seems like a stretch. But then, just a few months ago, Congressional subpoenas issued to state AGs seemed like a stretch. And, not too long ago, it was simply unthinkable that Science Committee members would opt to reject science.

The sheer frequency and volume of Smith's subpoena-slinging is alarming. At one point in the hearing, one committee member, Rep. Ed Perlmutter (D-CO), noted that between the SST Committee's inception in 1958 and 2013 when Lamar Smith took the helm, the committee had issued only one subpoena. How many subpoenas has the committee issued since then? When Rep. Perlmutter said he thought the number was 24, Chairman Smith didn't miss a beat: "It's 25 and still counting," he corrected him, smiling. There are plenty more where those came from, we are led to conclude, and the Texas Congressman who cherry-picks what areas of science he likes and believes in (*e.g.*, he's an avid champion of space exploration) and what areas of science he rejects wholesale (such as climate change science) appears ready and willing to test new boundaries of legal overreach. Just how far will this go?

The chairman is playing a high-stakes game of chicken that goes far against the grain of congressional tradition and decorum. Morton Rosenberg, a Constitution Project Fellow, in his treatise, [When Congress Comes Calling](#)(.pdf) puts forth that "inherent contempt has been described as 'unseemly,' cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial in the House or Senate chamber." Would House Speaker Paul Ryan actually entertain the idea of such a disruption of normal House business as the 114th Congress winds down? Don't bet on it. Rosenberg continues, "Because of these drawbacks, the inherent contempt process has not been used by either body since 1935." So, the ability of Congress to jail someone who refuses to comply with its orders is still on the books, but has not been utilized for over eight decades, and for good reason. The institutional reputation of Congress is already badly compromised, it does not need another stain.

Regardless, will a drastic departure from tradition, not to mention highly questionable legal grounds, deter Rep. Smith from escalating further in this standoff? After all, this Congress and several before it have become increasingly partisan, uncompromising, and dominated by those who operate ideologically rather than rationally and reasonably. Remember the 2013 government shutdown? The rhetoric among our lawmakers that has replaced honest dialogue and debate has grown increasingly rigid, confrontational, and hypocritical. The statesmanship and basic code of conduct that pervaded the halls of Congress for generations until sometime in the 1990s has steadily eroded and finally given way to flagrant posturing, name-calling, Orwellian rationalizations devoid of fact, and an overall stubborn refusal to negotiate. It is within this bitterly partisan milieu that Rep. Smith (and many like him) operates, even flourishes, while societal problems of the highest magnitude remain unsolved. Meanwhile, the climate change clock is ticking.

We hope Rep. Lamar Smith and a hand-full of his sympathetic colleagues will abandon this ugly crusade, rather than take all the embarrassing steps it would require to see to it that New York AG Eric Schneiderman and Massachusetts AG Laura Healey – and others representing the various targeted groups – are put behind bars for not handing over information that is either protected, privileged, or publicly available. We're hoping Mr. Smith went to Washington for better, more noble reasons and will decide to let the state AGs go about the business of doing their jobs, while he goes about the business of doing his: promoting and protecting the scientific prowess of the United States.

We hope sanity, sooner than later, will prevail.