



Lamar Smith invites legal scholars to tell him what he's doing is fine

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As Chair of the House Committee on Science, Space, and Technology, Rep. Lamar Smith (R-Texas) has sent a lot of subpoenas. It started with his campaign to dig up wrongdoing by NOAA climate scientists after they published a paper updating the agency's global temperature dataset—an update that happened to weaken Smith's claim that the world hadn't warmed in some number of years. When NOAA refused to start handing out the researchers' e-mails and drafts, Rep. Smith started firing off subpoenas.

More recently, subpoenas went out to several state attorneys general who have launched securities fraud investigations of ExxonMobil. The investigations followed media reports that the company had funded its own climate research in the 1970s and '80s—and that research made it clear that climate change was real and dangerous. After ExxonMobil shut down the research, it focused on fighting any climate policies by claiming that climate change was uncertain. The company never publicly disclosed the potential risks to its business, as regulations require.

Rep. Smith's subpoenas targeted both the attorneys general pursuing the investigation and a pile of environmental groups that advocated for the investigation. That's how we got to yesterday's House Science Committee hearing, entitled "Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas." In essence, Smith was seeking legal backing for his actions.

Due to a House of Representatives rule change at the start of 2015, Smith no longer needs a committee vote to issue a subpoena; he can send them on his own. But the state attorneys general and environmental groups shrugged off the latest round, saying that the committee—tasked with oversight of federal science agencies—had no authority to demand to see their e-mails.

In his opening remarks, Rep. Smith argued for a somewhat broader remit for his committee. "In fact, the Committee has a constitutional obligation to conduct oversight anytime the United States scientific enterprise is potentially impacted," Smith said. His stated (and highly ironic) concern in the ExxonMobil case is that the state investigations threaten free speech and academic freedom, with the framing that state attorneys general are pursuing criminal charges against Exxon simply because they don't like the company's scientific opinion about climate change.

The irony comes from the fact that this appears to be exactly what he's done in pursuing internal communications at NOAA.

Rep. Smith tried to link his concern to the actual work of the committee, saying, “The Committee is concerned that such investigations may have an adverse impact on federally funded scientific research. If this is the case, it would be the responsibility of the Committee to change existing law and possibly appropriate additional funds to even out any such imbalances caused as a result.”

Committee Republicans invited three law scholars to testify at the hearing, with Democrats adding one of their own. Two witnesses, Florida International University Professor Elizabeth Foley and Chapman University Professor Ronald Rotunda (both are associated with the Cato Institute), shed more heat than light. The meat of Foley’s argument was that Congress has ceded too much of its power to the Executive Branch over the years and should take it back.

She even suggested a possible new route for enforcing subpoenas. There is a mechanism by which Congress might be able to compel the Executive Branch to enforce its actions without the president’s approval. So after finding say, a state attorney general in contempt of Congress for ignoring a subpoena, they could force US Marshals to arrest that attorney general. “Anyway, that’s food for thought,” Foley said.

Ronald Rotunda, sporting a psychedelic bowtie, went on lengthy tangents about times science has been wrong before and floated the suggestion that New York Attorney General Eric Schneiderman could be “part of a corrupt deal with some of these climate groups and George Soros.” He badly misquoted Harvard sea level researcher Jerry Mitrovica, claiming that Mitrovica focuses on paleo research because he is “worried about not giving the politically correct answer” on modern climate change. In reality, Mitrovica was bemoaning the twisting of his research by climate “skeptics.”

Rotunda also trotted out the old saw that “people that refuse to comply with subpoenas have something to hide”—a sentiment Rotunda would apparently not extend to ExxonMobil. However, George Washington University professor Jonathan Turley gave a more practical defense of Rep. Smith’s subpoena powers. Although Turley explained that he strongly disagreed with Rep. Smith’s denial of climate science, he believes the subpoenaed groups in this case are legally obligated to comply.

Allowing that this was a “tough question,” Turley argued, “The suggestion that there is a threshold or barrier to the enforcement of subpoenas by this committee, I believe, is fundamentally flawed.” That is, apart from existing federal laws protecting certain kinds of documents from subpoenas, there is nothing the committee could not legally demand.

“The Constitution only protects us from unconstitutional choices, not bad choices,” Turley said. The witness invited by Committee Democrats was University of Baltimore Professor Charles Tiefer, who worked in the House of Representatives General Counsel from 1984 to 1995—meaning he was a source of legal advice for committees considering subpoenas at the time.

Tiefer argued strongly that the House Science Committee lacks the authority to subpoena state attorneys general. “The committee has failed to identify even one single House subpoena enforcement in 200 years to a state attorney general. The reason? It’s never happened. Never,” Tiefer said.

However, Jonathan Turley later countered that other state agencies *can* be subpoenaed, and attorneys general have no special protection.

Both sides appealed to supporting opinions from additional law scholars on the matter, but Congressman Don Beyer (D-Va.) also tried a very different tactic. He played a recent CNN interview with Oversight and Government Reform Committee Chair Jason Chaffetz (R-Utah) in which Chaffetz was asked whether he might subpoena Florida Attorney General Pam Bondi because of a recent controversy involving Donald Trump. Chaffetz responded, “I don’t see the federal jurisdiction in this case.”

During his turn, a noticeably irritated Rep. Ed Perlmutter (D-Colo.) opted for historical perspective. He noted that from its origin in 1958 to 2013, the House Science Committee had issued just a single subpoena, while Rep. Smith has now issued 24. Smith was quick to correct him. “I think it’s 25 and still counting,” Smith said.