

June 27, 2016

By Electronic Mail

The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

Re: Response to Committee's June 17, 2016 Letter

Dear Mr. Chairman:

I write on behalf of the Union of Concerned Scientists (UCS) in response to your June 17, 2016 letter again requesting documents relating to communications between UCS employees and state attorneys general, and communications between UCS employees and other groups or individuals "related to the issue of climate change." For the reasons set forth in our June 1 letter, and as further explained below, UCS continues to object to this request because it infringes its First Amendment rights and because the Committee lacks jurisdiction over this matter. We feel compelled to note again that you have made no allegation that UCS violated any law or regulation.

UCS has the right and responsibility to provide information to state prosecutors when it has reason to suspect corporate wrongdoing. By your letter, you are requesting the full communications of private citizens who are reporting potential fraud to state prosecutors who are charged with enforcing laws against corruption and fraud, and for consumer protection.

UCS asserts that they and several other nonprofits and news organizations have uncovered documents showing that ExxonMobil scientists conducted research dating back decades on the risks of climate change and shared their assessment of these risks with company leaders. They and others contend that subsequently, and for years, ExxonMobil downplayed these risks in communications with shareholders and the public. With this evidence, it is entirely appropriate for state prosecutors to take steps to determine whether this alleged misrepresentation of science constitutes fraud.

Committee Mischaracterizes UCS Actions

Your June 17 letter announces the Committee's intention to "continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution."¹ This mischaracterizes the work of UCS, which has not called up anyone to investigate ExxonMobil's *scientists*. UCS strongly believes and advocates for the First Amendment right of scientists, including those employed by ExxonMobil. Rather, their focus is on the inconsistency between what ExxonMobil's scientists (and most other scientists) had understood about climate change, and what the company said publicly about climate change science in an effort to mislead its investors and the public about the harm caused by its product. It is very well settled that fraud is not protected by the First Amendment.

UCS uses rigorous independent science to help inform public policy. They are deeply committed to addressing climate change, which is an urgent threat to our world. The vast majority of climate researchers and, UCS alleges, many of ExxonMobil's own scientists have understood for decades that climate change represents a significant threat. Your disagreement with UCS's understanding of the broad scientific consensus on climate change does not justify your inquiry.

In addition to pointing out how you mischaracterized UCS's work, we have two other observations related to your request. First, UCS cannot threaten anyone with prosecution, and therefore any oversight directed at UCS for this reason is also inappropriate. Second, we are dubious that ExxonMobil, with a market capitalization of nearly \$380 billion, is intimidated by UCS. To the extent they or others are intimidated by UCS's exercise of its constitutionally protected rights, the usual response is to engage in countervailing speech.² Any oversight directed at UCS because someone somewhere feels intimidated by its speech is inappropriate.

Committee's Oversight Infringes the First Amendment Rights of UCS

The Committee's oversight request bears directly on UCS's First Amendment-protected activities. Specifically, the request seeks to expose UCS's conversations with other like-minded organizations, which specifically infringes the right of assembly. In seeking any communications with state attorneys general offices, the request also infringes the UCS's right to petition the government. There is no doubt these activities are protected by the First Amendment.

Notwithstanding the clear First Amendment principles at stake, you assert, citing *Barenblatt v. United States* and *Watkins v. United States*, that the "First Amendment is not an impermeable shield to Congressional investigations."³ However, those cases also clearly affirm that the First Amendment can be invoked when congressional investigations infringe the rights it guarantees. And those cases further stand for the proposition that in instances when First Amendment rights are

¹ Letter from Rep. Lamar Smith, Chairman, Committee on Science, Space and Technology, United States House of Representatives, to Kenneth Kimmell, President, Union of Concerned Scientists (June 17, 2016) (hereinafter "Smith Letter II"), page 1.

² *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our tradition that more speech, not less, is the governing rule.").

³ Smith Letter II at 4.

in jeopardy, Congress' interest in fact finding must be balanced against the First Amendment interests in question. You make no attempt to explain why you believe the Committee's interests outweighs the First Amendment interests of the UCS, and we assert that you can't. Instead, you perfunctorily conclude that the Committee's request is justified in light of these cases. However, you completely ignore the Supreme Court's admonition in *Watkins* that "[w]e cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected."⁴ The Committee's oversight clearly infringes the UCS's constitutional rights and can't be justified under the cases cited by the Committee.

The Committee Incorrectly Applies Case Law from House Un-American Activities Committee

UCS disagrees with your assertion that the *Barenblatt* and *Watkins* cases are "important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client."⁵ Written within a year of each other, both *Watkins* and *Barenblatt* opinions involved the House Un-American Activities Committee's investigation of communist activity in America, during a very different era in which fear of communism was rampant, and to some observers, had reached hysterical proportions.

Furthermore, it is clear that the "Communist Party cases" have not been followed with respect to other groups. In 1963, just four years after *Barenblatt* was decided, the Supreme Court overturned a conviction for contempt of the Florida Legislature, a committee of which was investigating alleged communist infiltration in Florida, including the Miami branch of the National Association for the Advancement of Colored People (NAACP). In applying the Communist Party cases, the Court stated "that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relationship between the information sought and a subject of overriding and compelling state interest."⁶ In analyzing the previous Communist Party cases, the Court observed that "[i]t is apparent that the necessary preponderating governmental interest and, in fact, the very result in those [communism] cases were founded on the holding that the Communist Party is not an ordinary or legitimate political party"⁷ The Court further explained that just because they had recognized a compelling legislative interest in *Barenblatt*, does not *ipso facto* mean all other inquiries that conflict with the First Amendment are also permissible.⁸ In

⁴ *Watkins v. United States*, 354 U.S. 178, 198 (1957). See also, *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) ("There is no doubt that legislative investigations, whether on the federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.").

⁵ *Watkins* did not "sustain" the congressional investigation. It overturned a contempt of Congress conviction because the pertinency of the information sought was unclear and that analysis was undertaken with great care because of the important First Amendment and Due Process concerns.

⁶ *Gibson v. Florida Legislative Investigative Comm.*, 372 U.S. 539, 546 (1963).

⁷ *Id.* at 547.

⁸ *Id.* at 549 ("The fact that governmental interest was deemed compelling in *Barenblatt* [and other communist party cases] and held to support the inquiries there made into membership in the Communist Party does not resolve the issue here, where the challenged questions go to membership in an admittedly lawful organization.").

overturning the contempt conviction, the Court balanced the equities in favor of the NAACP, referring to the latter as “a concededly legitimate and nonsubversive organization.”⁹ Like the NAACP, UCS is a legitimate, law abiding organization that for nearly half a century has combined the knowledge and influence of the scientific community with the passion of concerned citizens to build a healthy planet and a safer world.

Based on the foregoing, the Committee’s inquiry is barred by the First Amendment. The cases relied upon by the Committee to justify its oversight request bear no relation at all to this case and do not support the proposition that the Committee has the requisite compelling state interest needed to override the UCS’s First Amendment rights.

Committee Lacks Jurisdiction

As mentioned in our previous letter, Rule X of the Rules of the House of Representatives does not confer jurisdiction over this matter to the Committee. The attempt to bootstrap jurisdiction over federally funded research to this inquiry, which you did not do in the May 18 letter, is a superficial pretext. Furthermore, you assert that “[m]uch of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars.”¹⁰ It is not clear to what federally funded research you could be referring, and you do not identify that funding in your letter. The news reports that have surfaced thus far reveal that ExxonMobil scientists were being paid by the company to research climate change. Thus, while we disagree with your theory of jurisdiction, we also question its factual support. We would further note that “when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter.”¹¹ We understand Rule X to be clear and that it does not authorize the Committee to investigate UCS’s protected First Amendment activities.

In sum, this investigation is based on a mischaracterization of UCS’s work and violates their First Amendment rights. Further, as demonstrated above, the case law you cite does not apply, and the Committee lacks jurisdiction. This line of inquiry risks chilling the ability of private citizens to expose waste, fraud, and abuse. Because of all of these reasons, we continue to respectfully decline to provide the requested documents.

Sincerely,



Neil Quinter

cc: The Honorable Eddie Bernice Johnson,
Ranking Member, Committee on Science, Space and Technology

⁹ *Id.*

¹⁰ Smith Letter II at 3.

¹¹ *Watkins v. United States*, 354 U.S. 178, 198 (1957).