



STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

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August 11, 2016

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

Dear Chairman Smith:

We write to express our profound concern with the subpoenas issued on July 13, 2016 to our colleagues, the attorneys general of Massachusetts and New York. Through these subpoenas, which we understand you issued without a vote of the Committee, you seek the production of materials developed by the attorneys general in the course of their ongoing respective investigations of potential violations by the ExxonMobil Corporation of state securities and consumer protection laws. You have framed this intervention as “vigorous oversight” of state attorneys general and their investigative work. Such oversight would exceed Congress’ constitutional authority, and the July 13 subpoenas should therefore be withdrawn.

Your interference in our colleagues’ work ignores a “vital consideration” under our constitutional system of dual sovereignty: the preservation of comity between the federal government and the states. *See Younger v. Harris*, 401 U.S. 37, 44-45 (1971). “Comity,” Justice Black wrote for the Supreme Court in *Younger*, means “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief 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.” *Id.* Any claim of a congressional right to “oversee” the work of state constitutional law enforcement officers in fulfilling their core responsibilities under state law disrupts this comity and tears at the essential fabric of our national Constitution.

As attorneys general, we each hold offices established in our states' constitutions or statutes. Our offices are critical to the functioning of our states' governments, and they have deep historical roots. Some of us, like the attorneys general of Massachusetts and New York, hold offices whose origins precede the founding of our country. The state attorney general has been described by the Florida courts, for example, as "the attorney and legal guardian of the people. . . . His duties pertain to the Executive Department of the State, and it is his duty to use means most effectual to the enforcement of the laws, and the protection of the people, whenever directed by the proper authority, or when occasion arises." *State of Florida v. Exxon Corp.*, 526 F.2d 266, 270 (5th Cir. 1976) (quoting *Attorney General v. Gleason*, 12 Fla. 190, 212 (Fla. 1868)) (holding that Attorney General of Florida had legal authority to pursue federal antitrust action against Exxon and other oil companies without authorization of government agencies allegedly injured by conduct at issue). Several state supreme courts, recognizing the broad discretion conferred on state attorneys general by state constitutions, have aptly described the office of attorney general as a "public trust." See, e.g., *Gleason*, 12 Fla. at 214; *Attorney General v. Morita*, 41 Haw. 1, 15 (Haw. Terr. 1955); *Commonwealth v. Burrell*, 7 Pa. 34, 39 (1847).

In fulfilling this public trust, we are each accountable in multiple ways to the people of our states. Most of us were elected directly to our offices by the people we serve. State legislatures write and enact most of the laws that our offices enforce, including securities and consumer protection laws like the ones that give rise to the investigations in New York and Massachusetts that you have proposed to "oversee." Moreover, we are accountable to the courts of our states, which, on innumerable occasions over the course of our states' histories, have ruled both for and against us and our predecessors on issues of federal and state constitutional law, on issues of statutory interpretation, and on other issues.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, the federal government is one of limited powers, and, under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is fundamental to our system of dual sovereignty that, as the Supreme Court has said, "States are not mere political subdivisions of the United States." *New York v. United States*, 505 U.S. 144, 188 (1992). Indeed, "State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty.'" *Id.* (quoting *The Federalist* No. 39).

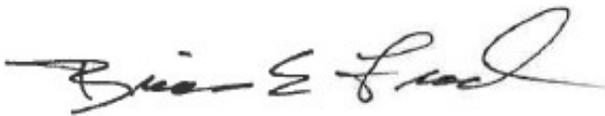
In light of our nation's commitment to the preservation of a system of dual sovereignty, it is not surprising that, despite centuries of investigative and prosecutorial activity by state attorneys general in which constitutional objections have been raised, you have not identified a single valid precedent, from any period of our country's history, for the "vigorous oversight" of state attorneys general that you are now proposing to undertake. Difficult enough are cases where Congress proposes to regulate *subject matters* arguably reserved to the states, and where there may be some analytical difficulty entailed in drawing "distinction[s] between what is truly national, and what is truly local." *United States v. Morrison*, 529 U.S. 598, 617 (2000). Your investigation, though, would go further. The stated purpose of your investigation is to oversee *state constitutional officers themselves* and the manner in which they fulfill their responsibilities under *state law*. Who oversees state officials is a matter "of the most fundamental sort for a sovereign entity," because it is "through the structure of its government" that "a State defines itself as sovereign." *Gregory v. Ashcroft*, 501 U.S. at 460 (holding that Congress could not, through laws prohibiting age discrimination, regulate the retirement age for state judges). Our national Constitution and our respective states' constitutions neither anticipate nor tolerate a structure under which Congress arrogates to itself the authority to oversee investigations conducted by state attorneys general.

Your proposed "vigorous oversight" does not merely interfere with our work and the work of our colleagues. You also purport to supplant the role of state legislatures and state courts. We cannot understand on what basis you seem to assume, for example, that state courts in Massachusetts will be unable to resolve the constitutional objections that ExxonMobil, through skilled counsel, has already lodged there. State courts, not Congress, are the appropriate arbiters of any state law claims brought by the attorneys general of Massachusetts and New York against ExxonMobil and of any constitutional objections that ExxonMobil might assert.

The Constitution establishes "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. Your proposed oversight of state constitutional officers cannot be squared with these essential principles of federalism, nor can your attempt to oversee the resolution of alleged constitutional issues arising from the ongoing investigative activities

of state attorneys general undertaken under state law. We therefore 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,



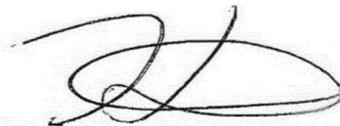
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Kamala D. Harris
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Karl A. Racine
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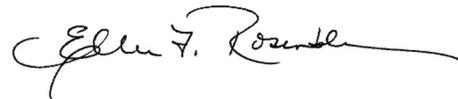
Douglas Chin
Hawaii Attorney General



Janet T. Mills
Maine Attorney General



Jim Hood
Mississippi Attorney General



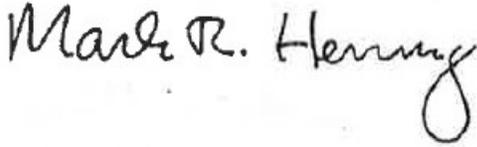
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cc: The Honorable Eddie Bernice Johnson
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