

October 30, 2024

The Honorable Merrick Garland
Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Attorney General Garland,

I write to request a Department of Justice investigation into the misuse of government resources and the invasion of state prerogatives, in violation of the principles of federalism on which our country was founded, by the United States House of Representatives Select Subcommittee on the Coronavirus Pandemic (the “Subcommittee”) under the chairmanship of Brad Wenstrup.

On September 10, 2024, my client, the Honorable Andrew M. Cuomo, appeared before the Subcommittee and was questioned extensively about the New York State Department of Health’s issuance of a March 25, 2020 advisory concerning the admittance and re-admittance to nursing homes of individuals previously diagnosed with COVID-19. This interrogation far exceeded the Subcommittee’s jurisdiction and appears to have been an improper effort to advantage the interests of private litigants against Governor Cuomo, warranting investigation by the Department of Justice.

House Resolution 5, which established the Subcommittee, authorizes it to investigate the following issues—and *only* these issues:

1. The origins of the COVID-19 pandemic;
2. The effectiveness of federal laws and programs to address the pandemic;
3. The development of vaccines and federal vaccination policies;
4. The economic impacts of the pandemic and the federal government’s response;
5. The societal impacts of school-closure decisions;
6. Executive-branch activities related to the pandemic;
7. Pandemic-related whistleblower protections; and
8. Executive-branch cooperation with congressional and regulatory oversight.¹

Nothing in House Resolution 5—or anywhere else—authorizes the Subcommittee to investigate a State’s internal regulatory advisory concerning nursing-home admissions. And for good reason: the Constitution establishes the federal government as a government of limited powers, with all others reserved to the states and the people.² Accordingly, Congress’s power to investigate, which

¹ H. Res. 5 ((Jan. 9, 2023), available at <https://www.congress.gov/bill/118th-congress/house-resolution/5/text>).

² U.S. Const. amend. X (“The 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.”); *Kilbourn v. Thompson*, 103 U.S. 168, 182 (1880) (“The powers of Congress itself . . . are dependent solely

is “justified solely as an adjunct to the legislative process,” is limited to “legitimate task[s] of the Congress.”³ Nothing in the Constitution grants Congress the power to police state regulatory agencies, because its investigative power does not “extend to an area in which Congress is forbidden to legislate.”⁴ And, of course, “[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible.”⁵

Wenstrup is well aware of these limitations on the Subcommittee’s mandate, as evidenced by his description of House Resolution 5 in a March 5, 2024, letter to Governor Cuomo: “House Resolution 5 specifically authorizes the Select Subcommittee to investigate ‘the implementation or effectiveness of any *Federal* law or regulation applied, enacted, or under consideration to address the coronavirus pandemic and prepare for future pandemics’ and ‘*executive branch* policies, deliberations, decisions, activities, and internal and external communications related to the coronavirus pandemic.”⁶

Yet the Subcommittee nonetheless used federal personnel, property, and funds to hold an hours-long public hearing concerning an issue on which it has no right to legislate and which it therefore has no business investigating. This overreaching alone, and the attendant waste of limited federal resources, would be reason enough for this referral.

But the circumstances here are even more troubling. There are indications that Wenstrup and other members of the Subcommittee are colluding with Janice Dean, a Fox News personality whose husband, Sean Newman, is a named plaintiff in a private lawsuit seeking damages from Governor Cuomo and others based on allegations regarding the March 25, 2020 nursing-home advisory.⁷ Dean attended the Subcommittee’s September 10 hearing—presumably at the invitation of Wenstrup and/or other Subcommittee members—and, later the same day, the New York Post

on the Constitution. Such as are not conferred by that instrument, either expressly or by fair implication from what is granted, are ‘reserved to the States respectively, or the people.’”) (holding that Congress can compel testimony on pain of contempt only where that “testimony is required in a matter into which that House has jurisdiction to inquire”).

³ *Trump v. Mazars USA, LLP*, 591 U.S. 848, 862-63 (2020) (quotation marks omitted).

⁴ *Quinn v. United States*, 349 U.S. 155, 161 (1955); *see also Watkins v. United States*, 354 U.S. 178, 187 (1957) (“No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.”).

⁵ *Watkins*, 354 U.S. at 187.

⁶ Letter to the Hon. Andrew M. Cuomo (Mar. 5, 2024) at 6 (emphases added) (footnote omitted), available at <https://oversight.house.gov/wp-content/uploads/2024/03/2024.03.05-BRW-Letter-to-Cuomo.pdf>. The March 5 letter describes the Subcommittee’s inquiry as one concerning “how New York implemented federal guidance from both the Centers for Medicare and Medicaid Services (CMS) and Centers for Disease Control and Prevention (CDC) regarding protecting residents in nursing homes and other long-term care facilities.” *Id.* at 1. However, any such inquiry—even if genuine, which this patently was not—would likewise have fallen outside the Subcommittee’s jurisdiction under Resolution 5, as set forth above.

⁷ *See Arbeeney et al. v. Cuomo et al.*, Civ. No. 1:22-2336-LDH-LB (E.D.N.Y.).

published a photograph of Wenstrup embracing Dean immediately after he had finished interrogating Governor Cuomo:⁸



Wenstrup had previously appeared on Dean’s podcast to discuss the nursing-home advisory and the related litigation against Governor Cuomo. On a March 24, 2024 episode of *The Janice Dean Podcast*, Wenstrup stated that Governor Cuomo “may have other, ah, lawsuits pending. I don’t know about his legal issues, and he can probably hire more than one lawyer. . . . He’s not doing things that help make his case, if he even has a case, which, as you look at this more and more, it doesn’t make much sense to say that this is even defensible [sic]”⁹

On September 13, 2024—a mere three days after the September 10 hearing—Wenstrup again appeared on Dean’s podcast, this time joined by Daniel Arbeeney, one of Newman’s fellow named plaintiffs against Governor Cuomo, and his brother, Peter Arbeeney.¹⁰ During that episode, Wenstrup said to Dean, “I don’t know if there’s trials coming up for [Governor Cuomo] on this, but it looks like his lawyers are preparing for that.” Dean responded, “Yeah, I do.”¹¹

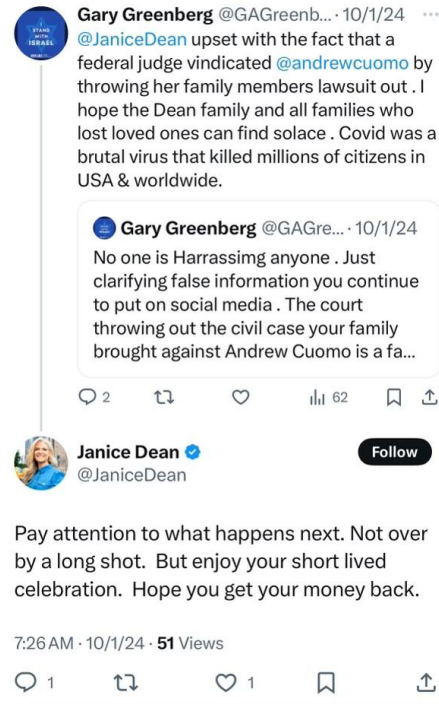
⁸ New York Post, “Fox News’ Janice Dean Gives Heartfelt Take on Cuomo’s DC Appearance Over COVID Nursing-Home Deaths” (Sept. 10, 2024), available at <https://nypost.com/2024/09/10/us-news/fox-news-janice-dean-gives-heartfelt-take-on-cuomos-dc-appearance-over-covid-nursing-home-deaths/>.

⁹ “Preventing Another Pandemic” (Mar. 24, 2024), available at <https://podcasts.apple.com/us/podcast/preventing-another-pandemic/id1634639649?i=1000650258358>.

¹⁰ “Disgraced Governor Cuomo Faces Nursing Home Families” (Sept. 13, 2024), available at <https://podcasts.apple.com/us/podcast/disgraced-governor-cuomo-faces-nursing-home-families/id1634639649?i=1000669461033>.

¹¹ *Id.* A few minutes later, Peter Arbeeney aptly observed, “I think that this is not necessarily a federal issue. I think it’s more of a state issue.”

The Arbeeny/Newman lawsuit was subsequently dismissed on September 30, 2024.¹² The following day, Dean posted the following on X (formerly known as Twitter), suggesting that she had secret information concerning “what happens next”:



In light of Wenstrup’s comments and apparent confidences, made to an interested party during the same period when Wenstrup was using his authority to cause the Subcommittee to misuse government resources to “investigate” a matter beyond its jurisdiction—apparently in service of a private lawsuit—I hereby refer this matter to the Department of Justice and request that you launch an investigation into this misconduct.

Thank you for your prompt attention to this matter.

Sincerely,

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¹² See *Arbeeny*, Civ. No. 1:22-2336-LDH-LB (E.D.N.Y. Sept. 30, 2024).