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CHAIRMAN

GREG WALDEN, OREGON
RANKING MEMBER

ONE HUNDRED SIXTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE

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May 12, 2020

The Honorable Anna Eshoo
Chairwoman
Subcommittee on Health
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairwoman Eshoo,

I write to ask a number of questions regarding the upcoming hearing, "Protecting Scientific Integrity in the COVID-19 Response." While the notice for this hearing indicated that, due to the COVID-19 pandemic, the logistics for this hearing would be "different," I have yet to be fully informed about the planned hearing procedures. Since neither I nor my staff had heard from you during this process to provide routine or customary information, my staff reached out to yours yesterday. However, I write to you today since none of the questions posed to your staff could be definitively answered.

All whistleblowers deserve to be heard, and Dr. Bright raises serious allegations that require a full and complete investigation. This Subcommittee knows and respects Dr. Bright, a world-renowned immunologist. He testified before the Subcommittee on Oversight and Investigations numerous times on issues related to pandemic preparedness. I have always felt that Dr. Bright appreciated the bipartisan nature in which we conducted our work, whether it was a hearing or a briefing with staff.

Whistleblowers, including Dr. Bright, must have their rights protected and deserve to have their allegations investigated with policies and procedures that have been long established and upheld as independent and fair. Conversely, Dr. Bright has made serious accusations against respected public servants and they deserve the fairness of an investigation before their reputations are damaged if these allegations turn out not to be true. Dr. Bright filed his whistleblower complaint with the Office of Special Counsel, an independent office established

by the Congress exactly for matters such as this, on Tuesday, May 5.¹ The same day, it was announced on Twitter that you planned to hold a hearing,² and two days later, you officially noticed the hearing.³ The next day, Friday, May 8, 2020, the Office of Special Counsel (OSC) recommended that Dr. Bright be temporarily reinstated in his position as director of BARDA so that it could conduct its investigation and move forward with its customary process of thoroughly reviewing a whistleblower complaint.⁴

As is clear from the timeline, we are at the very beginning of this process. To our knowledge, your office has not engaged in an investigation of the matter at hand. Moreover, the precedent and expertise for whistleblower matters at the Committee lies with the Subcommittee on Oversight and Investigations, not the Subcommittee on Health. Calling a hearing at this point, without an investigation either by OSC or the Subcommittee on Oversight and Investigations is premature and not respectful of the complete hearing of whistleblower's complaints by the Committee.

As alluded to earlier, I am especially concerned about the way in which this hearing was called. You first announced your intention to hold a hearing via press reports, on April 24, reported widely via Twitter.⁵ You then announced additional details that were reported via the same platform on May 5, the same day that Dr. Bright's complaint was made public.⁶ Despite ostensibly being copied on each of the invitations that were transmitted to potential witnesses, neither I nor Republican Leader Greg Walden have received official transmissions of copies. We learned of the existence of these invitations when we were informed by the Department of Health and Human Services and the White House that they received invitations for Secretary Alex Azar, Assistant Secretary for Preparedness and Response Robert Kadlec, and Director of Trade and Manufacturing Policy Peter Navarro. Additionally, these invitations were transmitted from your personal office, and not on letterhead from the Committee, which is not the customary way of inviting witnesses to testify before the Energy and Commerce Committee.

It has long been established that, in order to provide ample time for Administration witnesses to prepare to testify before Congress, the Subcommittee should contact the relevant agency at least 14 days prior to the intended hearing date. Republicans followed this customary

¹ READ: Rick Bright's full whistleblower complaint (May 5, 2020), Politico, available at <https://www.cnn.com/2020/05/05/politics/rick-bright-full-complaint/index.html>

² RepAnnaEshoo (May 5, 2020), I plan to hold a hearing next week to examine the whistleblower complaint filed by Dr. Rick Bright, a former HHS top official. 1/4 [Tweet], available at <https://twitter.com/RepAnnaEshoo/status/1257784875618361346>

³ Energy and Commerce Committee, *E&C Announces Hearing on Protecting Scientific Integrity in COVID-19 Response* (May 7, 2020) available at <https://energycommerce.house.gov/newsroom/press-releases/ec-announces-hearing-on-protecting-scientific-integrity-in-covid-19-response>

⁴ Sarah Owerhohle, *Federal watchdog backs reinstating ousted vaccine expert* (May 8, 2020), Politico, available at <https://www.politico.com/news/2020/05/08/special-counsel-rick-bright-hhs-244993>

⁵ Manu Raju, *Key House chairwoman wants Bright to testify before Congress about removal from key post*, CNN (April 23, 2020), available at <https://www.cnn.com/2020/04/23/politics/anna-eshoo-democrats-bright-testify/index.html>

⁶ RepAnnaEshoo (May 5, 2020), I plan to hold a hearing next week to examine the whistleblower complaint filed by Dr. Rick Bright, a former HHS top official. 1/4 [Tweet], available at <https://twitter.com/RepAnnaEshoo/status/1257784875618361346>

timeline in the Majority during both the Obama and Trump Administrations, and Chairman Pallone has also followed this precedent this Congress. The Office of Management and Budget (OMB) must clear all testimony provided by agency officials and providing this customary two-week notice ensures sufficient time for drafting and review, in addition to the necessary time for witness preparation.

Given that you did not provide the customary notice to the Administration for this week's hearing, I assume that Secretary Azar, Assistant Secretary Kadlec, and Mr. Navarro will not be in attendance. However, this and other important details have not been confirmed for me.

In addition, you informed me yesterday, May 11, that you reserved the right to invite yet another witness, a non-governmental witness who would be testifying on a second panel. At 8:51 pm, less than 72 hours before the hearing your staff transmitted a witness invite. The tradition of the Subcommittee is that the Minority can also invite at least one witness for a non-governmental panel. By announcing your intention less than 72 hours before the hearing, in the middle of a pandemic with travel across the country significantly restricted, you are effectively denying the Minority the ability to invite a witness.

Accordingly, I have numerous questions regarding the substance of this hearing:

- Is Dr. Bright the only witness, or will there be other witnesses? When will you confirm that other witnesses have accepted your invite(s) and will populate a potential second panel?
- In what capacity is Dr. Bright testifying? Will he be testifying as a private citizen or as an agency official? If the latter, in what position is he testifying? Will his testimony reflect the views of the Administration or his own views? Will his testimony be cleared by the OMB?
- Did you conduct briefings with any of the invited witnesses prior to sending the invitations? Your staff has informed us that they only confirmed witness availability and did not discuss testimony details. Is that an accurate description of all communications you and your staff have had with any invited witness? The tradition of the Health Subcommittee is to conduct pre-hearing briefings with witnesses identified by both Majority and Minority staff as well as Administration officials. If Dr. Bright is being called in his official capacity, why was longstanding Health Subcommittee protocol to conduct staff calls on a bipartisan basis not followed here?
- Have you collected any documents not otherwise publicly available in preparation for this hearing? If so, I request that you provide a copy to the Minority.
- Do you plan to use any documents, either publicly available or not, at this hearing?
- If you plan to use documents, either publicly available or not, do you plan to collect those documents in a document binder and provide a copy to the Minority in advance of the hearing?
- If you plan to use documents, do you intend to enter them into the record of the hearing?
- If you plan to enter documents into the record, do you intend to allow for redactions of personally identifying information, such as email addresses, or other sensitive information prior to the publication of the documents in the hearing record?

- Will the witness(es) testify under oath? As you know, the Health Subcommittee does not swear in witnesses. The longstanding practice of the Committee is that testifying under oath is strictly reserved for the Oversight and Investigations Subcommittee for nearly two decades.

Additionally, Members have not been notified of how this hearing will be conducted in a way that is consistent with social distancing guidelines and that is safe for Members and staff. We have 33 Members on the Subcommittee and roughly 50 chairs; therefore, we cannot possibly have full attendance and safely socially distance. Accordingly, I have several questions on the logistics of this hearing:

- Do you plan to have a bipartisan call with members of the Health Subcommittee in advance of the hearing to advise on how you plan to change hearing procedures, to accommodate social distancing guidelines?
- Have you been working with the Office of the Attending Physician and the Architect of the Capitol to establish safe procedures for conducting this hearing? If so, what are the recommendations of the Office of the Attending Physician and the Architect of the Capitol, and how do you plan to implement those recommendations?
- How will Members be recognized? As you know, Members present when the hearing begins are recognized based on seniority at the gavel. Members who arrive after the hearing begins are recognized in the order of appearance. Members of the full Committee waiving onto the subcommittee are recognized last. Assuming you are not asking all Members to assemble at the start of the hearing how will the subcommittee handle recognition?
- Will the Committee provide masks to Members and staff, or will they have to bring their own masks?
- Will the Committee allow Members to stay in their offices and come to the hearing room only when it is time for them to ask questions?
- If you plan to allow Members to stay in the hearing room for the duration of the hearing, do you plan to limit the number of Members who can stay, given the need for social distancing? If so, how do you propose to limit the number of Members? If not, how do you plan to keep an appropriate distance between and among Members and staff?
- Will there be sanitation procedures to address the Members rotating in and out of the hearing room and anterooms?
- Do you plan to ask Members to clean their area and microphone before leaving the hearing room? If so, will you provide cleaning supplies, or will Members need to bring that themselves?
- Will staff be allowed in the hearing room? If so, are there any limits on the number of staffers per Member or amount of time each staffer may be in the hearing room? Will staffers be required to show identification?
- Will the hearing be open to the public or open to the press?
- If the hearing will be open to the public, have you notified Capitol Police that members of the public may be entering the building given the current restrictions on public access to the Capitol Complex? If the hearing will be open to the public, what procedures will you put in place to allow for appropriate distance between members of the public? If the

public or the press are allowed in the room and the House is not in session, have you notified Capitol Police?

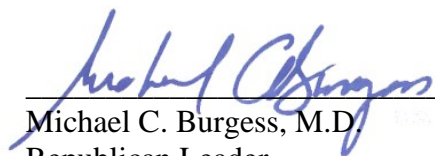
- If the hearing will be open to the press, what procedures will you put in place to allow for appropriate distance between members of the press?
- Do you plan to allow for the witness(es) to consult with relevant attorneys or other advisors, or should these individuals also maintain a 6-foot distance? If the instruction is that the witness(es) should maintain a 6-foot distance from others including attorneys and advisors, how do you plan to allow for the witness(es) to consult with attorneys or advisors if needed?
- If there are two panels to this hearing, what sanitation protocols will you put in place to clean the hearing room, including the witness table, any chairs behind the witness, the press area, if applicable, and the dais between the first and second panels?

As former Chairman of the Health Subcommittee, I am aware of the procedures that are in place for calling a hearing, and I am frustrated by your lack of respect for how our Committee conducts its business. When I was Chairman, even when there were strong disagreements with the Minority, we ensured that the Minority had the opportunity to engage in staff level witness calls and typically provided at least ten days' notice for a hearing. I certainly never sent witness invitations without informing my counterparts or noticed a hearing via tweet.

Despite the partisan manner in which this hearing has been called, I do believe that there are numerous priorities that we should be working on together in the face of this pandemic. If you are going to require Members to travel back to Washington, D.C. from across the nation while the House is not in session, we should take advantage of the opportunity to conduct other hearings on our country's response to COVID-19. Over the past few days, I have sent you letters outlining some of the topics that the Health Subcommittee could examine, including the [Strategic National Stockpile](#) and COVID-19's impact on [mental health](#).

The Energy and Commerce Committee has a long history of bipartisan health policy, and in the midst of a pandemic, we should not abandon that tradition. I have been calling for hearings on COVID-19 since January and continue to request that we hold numerous hearings on the response. This is not a matter of partisan politics, but of the public health of our nation.

Sincerely,



Michael C. Burgess, M.D.
Republican Leader
Subcommittee on Health