

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

_____)
THE RECTOR AND VISITORS OF THE)
UNIVERSITY OF VIRGINIA,)
)
Petitioner,)
)
v.) Case No. _____)
)
KENNETH T. CUCCINELLI, II,)
ATTORNEY GENERAL OF VIRGINIA,)
)
Respondent.)
_____)

**PETITION TO SET ASIDE CIVIL INVESTIGATIVE DEMANDS
ISSUED TO THE UNIVERSITY OF VIRGINIA**

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Dated: May 27, 2010

PRELIMINARY STATEMENT

Academic freedom is essential to the mission of our Nation's institutions of higher learning and a core First Amendment concern.¹ As Thomas Jefferson intended, the University of Virginia (the "University") has a long and proud tradition of embracing the "illimitable freedom of the human mind" by fully endorsing and supporting faculty research and scholarly pursuits.² Our Nation also has a long and proud tradition of limited government framed by enumerated powers, which Jefferson ardently believed was necessary for a civil society to endure.

The Civil Investigative Demands³ ("CIDs") issued to the University by the Office of the Attorney General of Virginia (the "Attorney General") threaten these bedrock principles. The CIDs are deficient under the Virginia Fraud Against Taxpayers Act, Va. Code § 8.01-216.1 *et seq.* ("FATA"), and their sweeping scope is certain to send a chill through the Commonwealth's colleges and universities. For these reasons, the Rector and Visitors of the University of Virginia, pursuant to Va. Code § 8.01-216.18, respectfully petition this Court for an order setting aside the CIDs.

¹ "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Teachers and students must always remain free to inquire, to study and to evaluate" *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

² "This institution of my native state, the Hobby of my old age, will be based on the illimitable freedom of the human mind, to explore and to expose every subject susceptible of it's contemplation." Thomas Jefferson to Antoine Louis Claude Destutt de Tracy, 26 December 1820 < [http://wiki.monticello.org/mediawiki/index.php/Illimitable_freedom_of_the_human_mind_\(Quotation\)_-_note-0#_note-0](http://wiki.monticello.org/mediawiki/index.php/Illimitable_freedom_of_the_human_mind_(Quotation)_-_note-0#_note-0) >.

³ A CID is similar to an administrative subpoena and may, under circumstances limited by statute, command the production of documents, information or testimony. The CIDs at issue in this Petition are attached hereto as Exhibits 1 and 2.

The CIDs at issue appear to be unprecedented. To the University's knowledge, this is the first time that a Virginia Attorney General has used the limited authority under FATA to issue a CID in service of an investigation into scientific research conducted by a university faculty member. The CIDs identify Dr. Michael Mann, an Assistant Professor in the University's Department of Environmental Science from 1999 to 2005, and his research on climate change, which was funded in part by four federal grants and one University grant all initially awarded between 2001 and 2003. The CIDs do not state why they identify Dr. Mann and his research, but the requests for information are sweeping in scope, seeking, among other things, all "data, materials, and communications that Dr. Mann created, presented or made in connection with or related to" the grants specified in the CIDs.

Under FATA, the Attorney General may issue a CID *only* if (i) the CID states "the nature of the conduct constituting the alleged violation of a false claims law that is under investigation," and (ii) the Attorney General has "reason to believe" that the CID recipient has information about a violation of FATA. Va. Code Ann. §§ 8.01-216.10(A), 8.01-216.11. The CIDs meet neither requirement.

The CIDs do not state the nature of the conduct that could constitute a potential FATA violation. And for good reason. None of the five identified grants appears to implicate FATA.⁴ Four of the five grants were awarded by the federal government, not the Commonwealth. FATA extends only to allegations of false claims submitted for Commonwealth funds. The fifth grant was an internal University grant initially awarded in 2001. FATA did not become effective until

⁴ FATA imposes civil penalties on any person who, among other things, "[k]nowingly presents, or causes to be presented, to an officer or employee of the Commonwealth a false or fraudulent claim for payment or approval;" "[k]nowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Commonwealth;" or "[c]onspires to defraud the Commonwealth by getting a false or fraudulent claim allowed or paid." Va. Code Ann. § 8.01-216.3(A)(1), (2), (3).

2003, *see* Virginia Acts 2002, c.842 (effective date January 1, 2003), and it does not apply retroactively. Given these circumstances, there is no objective “reason to believe” that the University has information about a FATA violation.

Furthermore, the expansive scope of the information requested in the CIDs likewise appears untethered to any potential FATA violation. Rather, the requests seek a voluminous body of academic and scientific information, documents and correspondence related to the merits of scientific research spanning a period of more than ten years. The nexus between these broad requests and the five identified grants (or any potential FATA violation) is unexplained.

The Attorney General has authority under FATA to issue CIDs in order to investigate potential violations of that statute – to root out fraud on the taxpayers of the Commonwealth. FATA does not authorize the Attorney General to engage in scientific debate or advance the Commonwealth’s positions in unrelated litigation about federal environmental policy and regulation. This is particularly true where, as here, the information requested goes to the core of academic research otherwise protected by law. Unfettered debate and the expression of conflicting ideas without fear of reprisal are the cornerstones of academic freedom; they consequently are carefully guarded First Amendment concerns. Investigating the merits of a university researcher’s methodology, results, and conclusions (on climate change or any topic) goes far beyond the Attorney General’s limited statutory power. The CIDs at issue thus exceed the limited investigative authority granted to the Attorney General under FATA. Permitting them to be used in the sweeping fashion attempted here would impair academic freedom in the Commonwealth.

For these reasons, and the grounds identified herein, the CIDs should be set aside.

FACTUAL AND PROCEDURAL HISTORY

CID Authority. “The issuance of a CID is a unique procedure almost, but not quite, akin to a grand jury investigation.” *In re Oral Testimony of a Witness Subpoenaed Pursuant to Civil Investigative Demand No. 98-19*, 1 F. Supp. 2d 587, 589 (E.D. Va. 1998) (discussing federal False Claims Act CID authority). Under FATA, the Attorney General may issue a CID *only* if (i) the CID states “the nature of the conduct constituting the alleged violation of a false claims law that is under investigation,” and (ii) the Attorney General has an objective “reason to believe” that the CID recipient has information about a FATA violation. Va. Code Ann. §§ 8.01-216.10(A), 8.01-216.11; *see also id.* at § 8.01-216.2 (definition of “investigation”).

“Climategate” Emails. In November 2009, thousands of emails and related documents were stolen from a computer system at the Climatic Research Unit (“CRU”) of the University of East Anglia in England. It was initially alleged that these emails showed that certain members of the climate science community manipulated research data and conclusions. Those allegations have been and continue to be investigated by an international panel established by the University of East Anglia, the United Kingdom’s House of Commons Science and Technology Committee, and Pennsylvania State University, where Dr. Mann has been a faculty member since 2005. Although considerable media attention was devoted to the allegations initially raised regarding these “climategate” emails, the subsequent investigations have not found any fraudulent conduct.

The Commonwealth’s EPA Litigation. In February 2010, the Commonwealth filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit, challenging the EPA’s Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). *Commonwealth of Virginia v. United*

States Envtl. Prot. Agency, Case No. 10-1036 (D.C. Cir., filed February 16, 2010). Citing the CRU “climategate” emails, the Commonwealth has requested an order requiring EPA to reconsider its finding that climate change poses a threat to public health and welfare. The proceedings before the D.C. Circuit are limited to the administrative record. On April 15, 2010, the Commonwealth filed a motion to remand the D.C. Circuit proceedings to adduce additional evidence; specifically, the CRU “climategate” emails. *See* Joint Motion of the State of Alabama and the Commonwealth of Virginia to Remand to Adduce Additional Evidence (Document No. 1240064, filed April 15, 2010).

The CIDs at Issue. On April 23, 2010, the Attorney General issued two nearly identical CIDs to the University “in connection with an investigation by the Attorney General into possible violations by Dr. Mann of §§ 8.01-216.3(A)(1), (2), and (3) of FATA.” Exhibit 1, CID No. 1-MM at 1 (served on the President of the University); Exhibit 2, CID No. 2-MM at 1 (served on the Rector of the University’s Board of Visitors). The CIDs state that the investigation “relates to data and other materials that Dr. Mann presented in seeking awards/grants funded, in whole or in part, by the Commonwealth of Virginia or any of its agencies as well as data, materials and communications that Dr. Mann created, presented or made in connection with or related to [five specified] awards/grants.” *Id.*

The Five Identified Grants. The five grants listed in the CIDs appear to be the five listed in Dr. Mann’s publicly available curriculum vitae that reference the University:

2003-2006 *Decadal Variability in the Tropical Indo-Pacific: Integrating Paleo & Coupled Model Results*, NOAA-Climate Change Data & Detection (CCDD) Program [Principal Investigators: M.E. Mann (U.Va), J. Cole (U. Arizona), V. Mehta (CRCES)]
U.Va award (M.E. Mann): \$102,000

- 2002-2005 *Remote Observations of Ice Sheet Surface Temperature: Toward Multi-Proxy Reconstruction of Antarctic Climate Variability*, NSF-Office of Polar Programs, Antarctic Oceans and Climate System [Principal Investigators: M.E. Mann (U. Va), E. Steig (U. Wash.), D. Weinbrenner (U. Wash)] U.Va award (M.E. Mann): \$133,000
- 2002-2003 *Paleoclimatic Reconstructions of the Arctic Oscillation*, NOAA-Cooperative Institute for Arctic Research (CIFAR) Program [Principal Investigators: Rosanne D'Arrigo, Ed Cook (Lamont/Columbia); Co-Investigator: M.E. Mann] U.Va subcontract (M.E. Mann): \$14,400
- 2002-2003 *Global Multidecadal-to-Century-Scale Oscillations During the Last 1000 years*, NOAA-Climate Change Data & Detection (CCDD) Program [Principal Investigator: Malcolm Hughes (Univ. of Arizona); Co-Investigators: M.E. Mann; J. Park (Yale University)] U.Va subcontract (M.E. Mann): \$20,775
- 2001-2003 *Resolving the Scale-wise Sensitivities in the Dynamical Coupling Between Climate and the Biosphere*, University of Virginia-Fund for Excellence in Science and Technology (FEST) [Principal Investigator: J.D. Albertson; Co-Investigators: H. Epstein, M.E. Mann] U.Va internal award: \$214,700

The first four grants were awarded by federal government agencies. The fifth grant was an internal University grant initially awarded in 2001 – two years before FATA came into effect.

Breadth of the CIDs. The requests for information in the CIDs are extremely broad and do not appear to be tailored to any of the grants identified. For example, while the grants appear to have been initially awarded between 2001 and 2003, the CIDs seek information spanning an 11-year period from January 1, 1999 to the present. Included among the requests are “[a]ll correspondence, messages or e-mails sent to or received by Dr. Michael Mann” and *thirty-nine* other scientists, as well as “[a]ll research assistants, secretaries or administrative staff with whom

Dr. Mann worked while he was at the University of Virginia.” Exhibit 1 at 3, 7-8. The CIDs do not identify any connection between these various individuals and the five grants.

Agreements Regarding this Process. Like other Commonwealth entities, the University is typically represented by the Attorney General and/or counsel reporting to the Attorney General. The University’s response to the CIDs was initially delayed while, with the approval of the Attorney General, it engaged special outside counsel to represent its interests in responding to the CIDs. By written agreement with the Attorney General, the date for the University to seek relief from the CIDs was extended to May 27, 2010.

GROUND FOR RELIEF

1. Failure to State Nature of Conduct Constituting Violation. The CIDs are invalid for failure to state the “the nature of the conduct constituting the alleged violation of a false claims law that is under investigation.” Va. Code Ann. § 8.01-216.11.

2. No Basis for FATA Violation. The CIDs are invalid because the five grants identified therein do not appear to provide a basis to allege a FATA violation and, thus, there is no statutory basis for the CIDs to be issued.

3. No Objective “Reason to Believe.” The CIDs are invalid because there is no objective “reason to believe” that the University has information relevant to a FATA violation. Va. Code Ann. § 8.01-216.10(A).

4. No Statutory Authority to Issue CIDs. The CIDs are invalid because FATA does not authorize the issuance of CIDs to the Commonwealth and her agencies and instrumentalities.

5. Overbroad Exercise of the Attorney General’s Limited Statutory Authority. The CIDs are invalid because they constitute an impermissibly overbroad use of the Attorney

General's limited authority under FATA to investigate fraud on the taxpayers of the Commonwealth.

6. Requests for Information in CIDs Are Overbroad. The CIDs are overbroad because they seek documents and information far beyond what is relevant to an investigation of a potential FATA violation.

7. Compliance with CIDs Is Unduly Burdensome. Compliance with the sweeping temporal and substantive scope of the CIDs would constitute an undue burden.

8. CIDs Impermissibly Interfere with Academic Freedom. Enforcing the CIDs will interfere with recognized First Amendment principles and important public policies protecting the academic freedom of institutions of higher learning from government intrusion into research and scientific inquiry.

9. CIDs Request Information Protected by Law. Relief from the CIDs should be granted with respect to all documents and information covered by applicable statutory and common law privileges, protections and doctrines, and the University reserves the right to raise such objections with respect to specific documents and information as appropriate.

The University's assessment of the CIDs and the requested documents and information is ongoing and, thus, the University reserves the right to assert such other grounds for relief as the University may deem appropriate.

BRIEFING ON THE MERITS

The University will file briefing in support of this Petition on a schedule to be addressed with the Attorney General.

PRAYER FOR RELIEF

WHEREFORE, the University respectfully requests that the Court enter an Order to:

- (1) Stay the running of time for compliance with the CIDs while the Petition is pending;
- (2) Set aside the CIDs in their entirety; and
- (3) Award any other relief that the Court deems just and appropriate.

Date: May 27, 2010

Respectfully submitted,

**THE RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA**

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May 2010, a true and correct copy of the foregoing was served by electronic mail and certified U.S. Mail, with return receipt requested, on the following:

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