

LEGAL MEMORANDUM

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The Climate Change Inquisition: An Abuse of Power that Offends the First Amendment and Threatens Informed Debate

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Abstract

A coalition of state attorneys general, “AGs United for Clean Power,” has announced they are investigating any company that challenges the unproven scientific theory of man-induced, catastrophic climate change. The state AGs are investigating those whom they consider to be promoting heresy—First Amendment rights be damned. Rather than pursuing their agenda through proper democratic procedure, these attorneys general and their allies are attempting to quash an important public policy debate in bad faith, and implement their own agenda through an avalanche of litigation and judicial fiat.

Last March, a coalition of state attorneys general, “AGs United for Clean Power,” announced they would be investigating any company that challenges the unproven scientific theory of man-induced, catastrophic climate change.¹ After the announcement, U.S. Virgin Islands Attorney General Claude Walker moved—almost immediately—to subpoena ExxonMobil (as well as the Competitive Enterprise Institute) for all of its research, correspondence, and communication regarding climate change, including with third parties such as conservative and libertarian think tanks, foundations, and universities, as well as individual researchers, scientists, and writers.² Attorney General Walker’s sweeping action illustrates the danger of the AGs’ investigations: Not only are the investigations a serious abuse of their legal authority, they set a dangerous precedent—one with serious economic implications that will undermine scientific and public policy debates and chill speech protected by the First Amendment.

KEY POINTS

- The idea that the science of climate change is “settled” is contrary to the very spirit of scientific inquiry.
- No consensus exists that man-made emissions are the primary driver of global warming or, more importantly, that catastrophic global warming is occurring, is accelerating, or is dangerous.
- The claim that ExxonMobil has committed “fraud” that justifies these investigations cannot meet the most fundamental legal element necessary to prove fraud: a false statement of a material fact. A statement of opinion about climate change is simply not actionable.
- The First Amendment protects not just ExxonMobil, but numerous other organizations and individuals from being forced to disclose their internal communications, internal work product, research, writings, and other communications on a public policy issue as controversial as climate change.

This paper, in its entirety, can be found at <http://report.heritage.org/lm193>

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The Science and Policy Debate

Science should be employed as one tool that guides public policy.³ Many proponents of action on global warming argue “the science is settled” and debate is over. Deriding climatologists who do not hold the view of the Administration, President Obama said, “We don’t have time for a meeting of the Flat Earth Society.”⁴

The idea that the science of climate change is “settled” is contrary to the very spirit of scientific inquiry. No consensus exists that man-made emissions are the primary driver of global warming or, more importantly, that catastrophic global warming is occurring, is accelerating, or is dangerous. Climatologists differ on the various causes of climate change, the rate at which the earth’s climate is changing, the effect of man-made emissions on the climate, the most accurate climate data and temperature sets to use, and the accuracy of climate models projecting decades and centuries into the future.⁵

The science may be settled that man-made emissions have had some impact on the earth’s temperature, but the consensus stops there. And even that may be a stretch. Indeed, there are some credible scientists who also believe man-made carbon dioxide emissions have played almost no role in any warming that may be occurring.⁶

Dire predictions by climatologists and politicians alike for global cooling, global warming, and more intense natural disasters have been extremely inaccurate. Politicians will attempt to link extreme weather events to man-made warming without examining observed trends. It may be convenient to point to the Louisiana floods, Superstorm Sandy, Hurricane Katrina, or the tornado in Joplin, Missouri, as evidence of man-made global warming to advance a political agenda. But the exact role of man-made carbon dioxide emissions’ impact on extreme weather events is certainly not definitive, and likely undetectable. In fact, even as man-made greenhouse gas emissions have increased above allegedly dangerous levels, there have been no significant trends in increased hurricanes, tornadoes, flooding, or droughts.⁷

The Administration’s erroneous conclusion that the science is “settled” has serious implications for American families and businesses. Most of America’s (and the world’s) energy needs are met by relatively abundant and affordable natural resources that emit carbon dioxide when used. Implementing

restrictions and regulations that raise the cost of coal, natural gas, and oil will not only drive energy bills higher, but also increase the costs for all of the other goods and services requiring energy to manufacture and transport. The regulations will disproportionately impact low-income Americans who spend a larger percentage of their budget on energy expenditures.

Heritage Foundation research has found that any sort of carbon tax, cap and trade, or other combination of carbon regulations such as the regulations on new power plants and existing ones (such as the Clean Power Plan proposed by the U.S. Environmental Protection Agency) will destroy hundreds of thousands of jobs and cut income—all without having any meaningful impact on global temperatures, now or in the future.⁸

Specifically, Heritage analysts estimate that, by 2035, the higher energy costs of the Obama Administration’s climate agenda will contract economic production and consumption, resulting in:

- An average employment shortfall of nearly 400,000 jobs;
- Average employment shortfall in manufacturing of 200,000 jobs;
- An aggregate gross domestic product (GDP) loss of more than \$2.5 trillion (inflation-adjusted);
- Increased electricity expenditures for a family of four by at least 13 percent a year; and
- A total income loss of more than \$20,000 per family of four (inflation-adjusted).⁹

The climate “benefit” for such severe economic sacrifice is a negligible change in Earth’s temperature. According to a climate model developed by the National Center for Atmospheric Research, even if the Administration pursued an aggressive, impractical, and impossible regulatory agenda to eliminate all carbon dioxide emissions in the United States, the result would be a less than two-tenths of a degree Celsius decrease in global temperatures.¹⁰ Adoption of such an agenda by the developed world will not make any meaningful impact, either. Even if the entire industrialized world eliminated all economic activity and reduced greenhouse gas emissions

to zero, the climate impact would still be less than four-tenths of a degree Celsius of averted warming by the year 2100.¹¹

The Legal Inquisition (and Propaganda War) Begins

In September 2015, 20 academics at schools ranging from Columbia University to Rutgers sent an open letter to President Barack Obama and U.S. Attorney General Loretta Lynch urging them to use the Racketeer Influenced and Corrupt Organizations Act (RICO) to prosecute “corporations and other organizations that have knowingly deceived the American people about the risks of climate change.”¹² Their “misdeeds” in denying climate change must be “stopped as soon as possible,” according to these Ivory Tower inquisitors. This letter followed a call by Senator Sheldon Whitehouse (D-RI) in May 2015 for RICO investigations of “fossil fuel companies and their allies.” Documents obtained by the Competitive Enterprise Institute (CEI) through a Freedom of Information Act lawsuit against George Mason University suggest this letter was written in “consultation with Sen. Whitehouse.”¹³

Apparently, these academics are oblivious to the fundamental infringement of the First Amendment they were urging—that the government use its legal power to shut down debate over a contentious, unproven, scientific theory. This tactic is the exact opposite of the basic mission of academic institutions, which is to have an open, unrestricted intellectual environment that fosters the vigorous and free exchange of facts, theories, and ideas in research, scholarship, and public policy.

Passed in 1970, RICO is a federal law that was created as a tool to go after organized crime, including drug cartels and Mafia operations that engage in money laundering and other forms of racketeering. Since then, prosecutors have extended the law’s reach to encompass a long series of federal crimes ranging from murder to kidnapping to bribery to fraud. Any two such violations can, under the law, constitute a pattern of racketeering activity.¹⁴ Furthermore, deriving any income from such racketeering activity in the operation of an “enterprise” (such as a corporation, partnership or other entity, and any group of individuals associated in fact even if not a legal entity) constitutes a violation of the law, which can have very severe civil and criminal penalties. Many states have adopted state versions of the

federal RICO law, including the U.S. Virgin Islands. The federal statute imposes everything from substantial jail time to recovery of damages at three times the amount of actual damages, as well as forfeiture of any interest in property derived from the unlawful activity.¹⁵

Injustice From the U.S. Department of Justice

Unfortunately, both Attorney General Lynch and certain state attorneys general have begun taking action along the lines advocated by these academics, as well as by elected officials such as Senator Whitehouse and some radical environmental groups. In a hearing on March 9, 2016, before the U.S. Senate Judiciary Committee, Senator Whitehouse urged Lynch to use the RICO law against those “who pretend the science of carbon emissions’ dangers is unsettled,” particularly those in the “fossil fuel industry” who supposedly have constructed a “climate denial apparatus.”¹⁶ Whitehouse has also urged editorial boards to refrain from publishing any articles or letters containing what he calls “phony ‘opinion’ writing” about the climate change debate.¹⁷

Instead of responding that the Department of Justice does not investigate those who hold disfavored views regarding scientific controversies, Lynch instead told Senator Whitehouse that she had discussed the possibility of pursuing civil actions against so-called “climate change deniers.” She also said that she had “referred it to the FBI to consider whether or not it meets the criteria for which we could take action.”¹⁸

Lynch’s response so concerned five Members of the U.S. Senate that they sent a letter to the AG, chastising her for using Justice Department “law enforcement resources to stifle private debate on one of the most controversial public issues of our time—climate change.”¹⁹ The Senators called this approach a “blatant violation of the First Amendment” and “an abuse of power that rises to the level of prosecutorial misconduct.” Additionally, they called on Lynch to halt all investigations of anyone’s views on climate change and to “explain what steps you are taking as the federal official charged with protecting the civil rights of American citizens to prevent state law enforcement officers from unconstitutionally harassing private entities or individuals simply for disagreeing with the prevailing climate change orthodoxy.”

However, the Senators' concerns were not addressed when Assistant Attorney General Peter J. Kadzik sent a letter on June 29, 2016, stating that the Justice Department would "neither confirm nor deny the existence" of any investigation. Kadzik claimed that the Justice Department only engages in the "fair, evenhanded administration of the federal criminal laws."²⁰ Thus, given a second chance, the Justice Department once again refused to do what it should have done—state categorically that it does not target those who hold disfavored views regarding scientific controversies.

State Attorneys General Publicize Their Criminalization of Dissent

Less than a month after Lynch's hearing, on March 29, 2016, more than a dozen state attorneys general held a press conference in which they announced that they had formed a coalition, "AGs United for Clean Power," to investigate and prosecute companies or others that "misled investors and the public on the impact of climate change."²¹ Speaking at the press conference, New York Attorney General Eric Schneiderman said that "the bottom line is simple: climate change is real." He explained that the coalition would "step into [the] breach" left by "gridlock in Washington" by targeting "well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action." Schneiderman said that if companies are committing fraud by "lying" about the dangers of climate change, the AGs will "pursue them to the fullest extent of the law."²²

At the same press conference, Virgin Islands Attorney General Claude Walker also made it abundantly clear that his actions were intended to change public policy rather than carry out his primary duty—to enforce the law. The goal of his investigation was to "make it clear to our residents as well as the American people that we have to do something transformational" on climate change to encourage the public "to look at renewable energy," which he claimed was "the only solution" to our energy needs. Anyone who disagreed with him was "selfish" and acting "to destroy the planet."

The presence at the press conference of former Vice President Al Gore, who has no current government position of any kind but has profited enormously from investments in so-called "green" or "clean energy" companies,²³ emphasized the political

nature and political goals of these AGs, as opposed to neutral and dispassionate law enforcement objectives. Gore said that this coalition was "a key step on the path to a sustainable, clean-energy future" and that they could not "allow the fossil fuel industry or any industry to treat our atmosphere like an open sewer or mislead the public about the impact they have on the health of our people and the health of our planet."²⁴

Other State Attorneys General Defend the First Amendment

Other state attorneys general criticized the targeting of climate change dissenters. Oklahoma Attorney General Scott Pruitt and Alabama Attorney General Luther Strange said they would not be joining this effort because it was "inappropriate for State Attorneys General to use the power of their office to attempt to silence core political speech on one of the major policy debates of our time." "Reasonable minds can disagree about the science behind global warming, and disagree they do," said Pruitt and Strange. That type of "scientific and political debate is healthy, and it should be encouraged." It should "not be silenced with threats of criminal prosecution by those who believe that their position is the only correct one and that all dissenting voices must therefore be intimidated and coerced into silence."²⁵

On June 15, 2016, 13 state attorneys general, including Strange and Pruitt, sent a strongly worded letter on Strange's letterhead ("Strange") to all the "AGs United for Clean Power," cautioning them they should "[s]top policing viewpoints."²⁶ They charged that using "law enforcement authority to resolve a public policy debate undermines the trust invested in our offices and threatens free speech." Furthermore, the letter pointed out that they were unaware of any viable fraud case, in light of what the AGs United for Clean Power were doing:

1. their investigation targets a particular type of market participant;
2. the Attorneys General identify themselves with the competitors of their investigative targets; and
3. their investigation implicates an ongoing public policy debate.

In explaining this, Strange warned that if “it is possible to minimize the risks of climate changes, then the same goes for exaggeration.” Even if fossil fuel companies may have minimized the risks, “Does anyone doubt that ‘clean energy’ companies” may have “exaggerated the risks of climate change?” And thus could be targeted by Strange and his fellow AGs? Yet, the “clean power” AGs were only targeting “companies and non-profits allegedly espousing a particular viewpoint.” According to Strange, “any fraud theory requiring more disclosure of Exxon would surely require more disclosure by ‘clean energy’ companies.”

Strange also found it “unusual” and a “dangerous practice” that the “clean power” AGs had aligned “themselves with the competitors of their investigative targets.” For example, one of the AGs present at their March 29 press conference, Lisa Madigan of Illinois, emphasized that she looked forward to working with those at the press conference to “advocate for a comprehensive portfolio of renewable energy sources.” In fact, present at the press conference was “a senior partner of a venture capital firm [Kleiner Perkins Caufield & Byers] that invests in renewable energy companies.” Yet if the focus of the AGs is fraud, “such alignment of law enforcement sends the dangerous signal that companies in certain segments of the energy market need not worry about their misrepresentations.” That partner actually made the unsubstantiated claim at the press conference that “global warming pollution” was the reason for “the spread of Zika” and other natural events like flooding in Louisiana and Arkansas and Super Storm Sandy.

Strange asked, “Do these statements increase the value of clean energy investments offered for sale by Kleiner Perkins? Should these statements justify an investigation into all contributions to environmental non-profits by Kleiner Perkins’s partners? Should these questions be settled by our state courts under penalty of RICO charges?” As Strange and his fellow AGs said, “May it never be.”

Strange admonished the “clean power” AGs that what they were doing “raised substantial First Amendment concerns.” Government investigations “indicating that one side of the climate change debate should fear prosecution chills speech in violation of a formerly bi-partisan First Amendment consensus.” He cited Supreme Court Justice Louis Brandeis’s admonition in *Whitney v. California*²⁷ that

when faced with “danger flowing from speech...the remedy to be applied is more speech, not enforced silence.” Unfortunately, here, the remedy chosen by the “clean power” AGs is “silence through threat of subpoena,” according to Strange.

Investigations and Targeting of Dissenters and Skeptics

Even before the March 29 press conference, New York Attorney General Schneiderman had opened a securities fraud investigation of ExxonMobil under the state’s Martin Act over whether it misled the public and its shareholders over the supposed dangers of climate change.²⁸ Schneiderman subpoenaed ExxonMobil demanding “extensive financial records, emails and other documents to probe the company’s knowledge and disclosures about climate change going back to the 1970s.”²⁹

A legal expert at Columbia University School of Law, Merritt Fox, doubts that Schneiderman’s investigation “will bear fruit” since the Martin Act requires the state to show that a reasonable investor would not have bought or sold the company’s stock if the investor had known about the omitted information.³⁰ But as Fox says, “the market was well supplied with information about climate change” and he would be “amazed if what the Exxon scientists knew was so different from what other scientists outside Exxon knew and were publicly available that it would” have affected the decision-making of investors. In fact, ExxonMobil has acknowledged climate change and its risks in numerous documents and filings, such as a 2006 Corporate Citizenship Report that states that “the risk to society and ecosystems from rising greenhouse gas emission could prove to be significant” and “it is prudent to develop and implement strategies to address this risk.”³¹

California Attorney General Kamala Harris launched a similar investigation of ExxonMobil for supposedly lying to the public and shareholders about the risk of climate change and into whether such actions would involve securities fraud and violations of environmental laws.³² Her action was applauded by Congressman Ted Lieu (D-CA), who has sent letters to Attorney General Lynch and the Securities and Exchange Commission urging them to open federal investigations of ExxonMobil for securities fraud and violations of racketeering, consumer protection, truth in advertising, public health, and shareholder protection laws.³³

The Virgin Islands vs. Exxon Mobil, The Competitive Enterprise Institute et al.

Of the various probes being conducted by state AGs, the most information has been revealed about the investigation initiated by the attorney general of the U.S. Virgin Islands, Claude Walker. In April 2016, a private lawyer hired by Walker—Linda Singer of Cohen Milstein Sellers & Toll—served a subpoena on the Competitive Enterprise Institute (CEI) on behalf of the Virgin Islands AG in an investigation of ExxonMobil.³⁴

CEI is a non-profit public policy institute that researches and publishes studies and reports on issues it believes are “essential for entrepreneurship, innovation, and prosperity to flourish.” It is dedicated to the principles of “limited government, free enterprise, and individual liberty.”³⁵ CEI is well known for its high-quality, objective research on energy and climate issues, which clearly made it a target for Walker.

The subpoena stated that it was issued as part of an investigation into ExxonMobil’s alleged violation of Section 605 of the Criminally Influenced and Corrupt Organizations Act, which is the Virgin Islands-version of the federal RICO law.³⁶ Specifically, the investigation is over whether ExxonMobil engaged “in conduct misrepresenting its knowledge of the likelihood that its products and activities have contributed and are continuing to contribute to Climate Change in order to defraud the Government of the United States Virgin Islands...and consumers in the Virgin Islands, in violation of 14 V.I.C. §834 (prohibiting obtaining money by false pretenses) and 14 V.I.C. §551 (prohibiting conspiracy to obtain money by false pretenses).”

The 14-page subpoena demanded that CEI turn over all documents, communications, statements, emails, op-eds, speeches, advertisement, letters to the editor, research, reports, studies, and memoranda of any kind that referred to climate change, greenhouse gases, carbon tax, climate science, and other similar terms and issues in any way related to ExxonMobil or the “products sold by or activities carried out by ExxonMobil [that] directly or indirectly impact climate change.” The subpoena even demanded all of CEI’s text messages and communications on social networking platforms such as Facebook, Google+, My Space, and Twitter. The time period covered 10 years starting in 1997, although the subpoena demanded all documents “in effect” during that time period, too, even if they were created before 1997.

CEI fought back against the subpoena, sending an extensive objection to Walker.³⁷ In the cover letter sent by CEI’s attorney, Andrew Grossman, he told the AG that the legal action targeting CEI was “a blatant attempt to intimidate and harass an organization for advancing views that you oppose” in violation of the First Amendment.³⁸ The subpoena was “invalid because the underlying investigation is pretextual, is being undertaken in bad faith, is intended as a fishing expedition, and is in support of an investigation of charges that have no likelihood of success.”

Further, CEI objected due to an interesting wrinkle in the investigation. It turns out that Walker was not actually conducting the investigation himself. Instead, he had hired the same private law firm that employed Linda Singer, Cohen Milstein Sellers & Toll, which has been called one of the most feared plaintiffs’ firms” in the country.³⁹ On its own website the firm highlights a quote from *Inside Counsel Magazine* that it is the “most effective law firm in the United States for lawsuits with a strong social and political component.”⁴⁰ CEI claimed that the use of the private firm violated the Fifth and Fourteenth Amendments to the Constitution because Walker had delegated “investigative and prosecutorial authority to private parties.”

Walker had also apparently made a substantive procedural error: he had not properly domesticated the Virgin Islands subpoena in the District of Columbia where CEI is located under the applicable ordinance that requires that the subpoena be issued by a “court of record.”⁴¹ Rather, Walker had issued the subpoena himself. Thus, the subpoena was “defective on its face,” according to CEI.⁴²

In addition to its objection, CEI filed a motion under the District of Columbia’s Anti-SLAPP Act asking that Walker’s actions be dismissed and that attorneys’ fees and sanctions be awarded to CEI against both Walker and Cohen Milstein. SLAPP stands for “strategic lawsuit against public participation” and is a law adopted by many states that is intended to stop the abuse of the legal process by plaintiffs who file lawsuits in order to punish or silence opposing points of view. The District’s law is meant to provide the target of a SLAPP lawsuit like CEI with the ability to quickly dispense with litigation that has been filed to prevent it from “communicating views to members of the public in connection with an issue of public interest.”⁴³

The response filed by Cohen Milstein on behalf of Attorney General Walker demonstrated just how

little basis there is for investigating ExxonMobil or subpoenaing CEI. Both Walker and all of the AGs United for Clean Power have made it clear that their investigations are based on fraud committed by ExxonMobil in denying the existence or extent of man-induced, catastrophic climate change.

Yet when pressed by CEI in both its objection and its anti-SLAPP motion to specifically cite the alleged fraud committed by ExxonMobil, the only response forthcoming from Walker was two statements made by ExxonMobil in a 2016 annual report and a 2014 investor guide:

- “International accords and underlying regional and national regulations for greenhouse gas reductions are evolving with uncertain timing and outcome, making it difficult to predict their business impact.”⁴⁴
- “Current scientific understanding provides limited guidance on the likelihood, magnitude, and timeframe of physical risks such as sea level rise, extreme weather events, temperature extremes, and precipitation.”⁴⁵

These statements from ExxonMobil simply express the current uncertainty that exists over the scope, causes, and pace of climate change, and what the appropriate climate policy should be. Man-induced catastrophic climate change is an unproven scientific theory—not an indisputable fact. The effects of, and policy responses to, climate change are matters of enormous controversy and disagreement, and statements reflecting that cannot even remotely be considered as actionable fraud. As the Supreme Court said in 2003 in *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, “simply labeling an action one for ‘fraud’ does not carry the day.”⁴⁶ And, as referenced earlier, such as in its 2006 Corporate Citizenship Report, ExxonMobil has acknowledged climate change and its risks, something that Walker fails to mention in any of his pleadings or public statements. Likewise, CEI’s experts have stated that the evidence supports the case for anthropogenic climate change, but not the case for catastrophic warming and not for extreme policy measures that make society poorer and less able to adapt.⁴⁷

Perhaps recognizing the legal jeopardy he was in as a result of the anti-SLAPP action filed by CEI, Walker withdrew his D.C. subpoena of CEI soon after

the motion was filed and then withdrew his original Virgin Islands subpoena just days after a hearing was held in the District of Columbia court, although CEI’s request for sanctions and attorneys’ fees against Walker remains pending. At the same time, Walker withdrew a subpoena he had sent to ExxonMobil at its principal office in Texas. That subpoena was also the target of a lawsuit filed by ExxonMobil in state court in Texas.

In *ExxonMobil v. Walker*, the oil company sued both the U.S. Virgin Islands attorney general and his outside counsel, Cohen Milstein, claiming that Walker’s subpoena and so-called “investigation” violated the company’s “constitutionally protected rights of freedom of speech, freedom from unreasonable searches and seizures, and due process of law and constitute the common law tort of abuse of process.”⁴⁸ In its complaint, ExxonMobil pointed to the March press conference held by the state attorneys general and charged that the statements of the AGs made it “unmistakably clear” that this was a “politically-motivated event, urged on by activists intolerant of contrary views.” ExxonMobil pointed out all of the factual and legal errors in Walker’s actions, including the fact that the Virgin Islands RICO law has a five-year statute of limitations; yet the company had “no physical presence in the Virgin Islands; it owns no property, has no employees, and has conducted no business operations in the Virgin Islands in the last five years.” Thus, Walker had no jurisdiction over ExxonMobil.

ExxonMobil provided a concise, clear description of what this investigation and subpoena were all about: “a pretextual use of law enforcement power to deter ExxonMobil from participating in ongoing public deliberations about climate change and to fish through decades of ExxonMobil’s documents with the hope of finding some ammunition to enhance Attorney General Walker’s position in the policy debate.”⁴⁹ Similar to CEI, the company also raised the issue that Walker’s hiring of Cohen Milstein on a contingency-fee basis was a conflict of interest and “impermissibly delegated” prosecutorial powers, particularly given the fact that the law firm was pursuing an unconnected case against ExxonMobil in federal court in the District of Columbia and had already collected a \$15 million contingency-fee payment from Walker in a second, unrelated case.⁵⁰ According to ExxonMobil, this raises serious doubts about whether the firm should

be allowed “to serve as the ‘disinterested prosecutor’ whose impartiality is demanded by law and expected by the public.”⁵¹

The oil giant asked the Texas court to quash the subpoena and declare it an abuse of process. The company’s claims were bolstered when the attorneys general of both Texas and Alabama, Ken Paxton and Luther Strange, filed a joint “Plea in Intervention” asking the state court to allow them to intervene in the lawsuit.⁵² The AGs told the court that the “sovereign power and investigative and prosecutorial authority” of both states were “implicated by the issues and tactics” being used by Walker and his contingency-fee private attorney. They accused Walker of being “driven by ideology, and not law” and colluding with Cohen Milstein. It is “disconcerting,” noted the AGs, “that the apparent pilot of the discovery expedition is a private law firm that could take home a percentage of penalties (if assessed) available only to government prosecutors.”

Furthermore, the AGs stated their goal in intervening was to “protect the fundamental right of impartiality in criminal and quasi-criminal investigations.” The use of contingency fees “raises serious due process considerations” since they “cut against the duty of impartiality by giving the attorney that represents the government a financial stake in the outcome.” Contingency fees should not be “used in criminal and quasi criminal cases” like this one “where a multitude of fundamental rights, including speech, lie in the balance.”⁵³ Faced with not only the opposition of ExxonMobil, but that of the Texas and Alabama attorneys general, Walker withdrew his subpoena and ExxonMobil dismissed its lawsuit at the end of June.

Through an open records request, CEI was apparently able to obtain a copy of the contingency fee agreement between Walker and Linda Singer and attorneys at Cohen Milstein Sellers & Toll. The agreement, executed by Walker on April 13, 2016, shows that Walker obviously anticipated that he could potentially obtain hundreds of millions of dollars through these RICO climate change prosecutions. The agreement has a sliding scale for its payments to the law firm: 27 percent of a recovery up to \$100 million, 22 percent of funds from \$100 to \$250 million, and 18 percent of anything above \$250 million.⁵⁴ Given that ExxonMobil, for example, has no assets or business in the U.S. Virgin Islands, this agreement is simply staggering.

Additionally, the agreement appoints Cohen Milstein as a “Special Assistant Attorney General” of the U.S. Virgin Islands and authorizes it to file pleadings and take other actions in the Attorney General’s name, with the firm having “day-to-day responsibility for the prosecution and conduct of the litigation.” Giving a law firm that is motivated exclusively by profit the power to undertake law-enforcement activities, sue for damages, and coerce settlements under government authority is extremely troubling. As the Supreme Court has recognized, “[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”⁵⁵ It is particularly problematic when a “governmental official stands to profit economically from vigorous enforcement.”⁵⁶

Here, a private law firm has been appointed as a governmental official specifically so that it can profit. Notably, if these legal efforts were to result in some other kind of relief that would appear to advance AG Walker’s stated aims—for example, if ExxonMobil were to agree to run commercials on the risks of climate change, to build a solar array, or to fund research on renewable energy—then Cohen Milstein would receive nothing at all. Its interest in the outcome of this investigation is purely pecuniary.

According to a detailed exposé in *The New York Times*, the “boom in the contingency law business” of state AGs hiring private attorneys has been driven in part by lawyers such as “Ms. Singer who have capitalized on personal relationships with former colleagues that they have nurtured since leaving office, often at resort destination conferences where they pay to gain access.”⁵⁷ This practice, “where a single case can generate millions in payments” to the law firm, has “gotten out of hand” according to Scott Harshbarger, the former Democratic attorney general of Massachusetts.

Harshbarger says that “it seriously threatens the perception of integrity and professionalism of the office, as it raises the question of whether attorneys are taking up these cases because they are important public matters, or they are being driven more by potential for private financial gain.”⁵⁸ These same plaintiffs’ law firms have donated “at least \$9.8 million directly to state attorneys general and political groups related to attorneys general over the last decade,” according to *The New York Times* report.

Massachusetts v. ExxonMobil

A similar battle is ongoing between ExxonMobil and the current Massachusetts attorney general, Maura Healey. Healey was also a participant in the March press conference, when she claimed there was no problem “we need to worry about more than climate change” because it “threatens the very existence of our planet.”⁵⁹

In April, Healey sent ExxonMobil a voluminous “Civil Investigative Demand” (the equivalent of a subpoena) similar to the one generated by Claude Walker, seeking all of its research and communications with third parties on climate change. Among the institutions and organizations named in the CID were the Competitive Enterprise Institute, The Heritage Foundation, the American Enterprise Institute, the Mercatus Center at George Mason University, and even the Acton Institute for the Study of Religion and Liberty.⁶⁰ Healey claims this request is in connection with an investigation into whether ExxonMobil has violated Massachusetts General Law (M.G.L.) c. 93A, §2 (unfair and deceptive practices) in the marketing and sale of “energy and other fossil fuel derived products to consumers” as well as the sale of securities to investors.⁶¹

ExxonMobil has filed a petition in state court in Suffolk County in Massachusetts asking that the CID be set aside or modified for the following reasons: 1) The AG lacks jurisdiction over the company; 2) The CID violates constitutional protections; and 3) The CID constitutes an abuse of process.⁶² ExxonMobil has also asked the court to formally recuse Healey from handling this case because her “extrajudicial statements disparaging ExxonMobil and prejudging the outcome of any investigation preclude her from serving as a disinterested prosecutor.” Because Healey’s “partisan statements also undermine the public’s confidence” in her conduct, an independent counsel should be appointed to determine “whether an investigation is warranted and, if so, to conduct that investigation.” The oil company also filed a separate lawsuit in federal court in Texas in June seeking an injunction against Healey “barring the enforcement” of the CID.⁶³ Both cases are still pending.

The Secret Advocacy Groups Behind the Attorney General Inquisition

One of the most intriguing and troubling aspects of the legal crusade against scientific dissent on climate change is the apparent involvement of certain

advocacy organizations in pushing government prosecution of those who disagree with them on this issue. For example, in January 2016, the Rockefeller Family Fund hosted a meeting in New York of about a dozen environmental activists. The purpose of this meeting? To organize this campaign against climate change dissent.

According to an agenda of the meeting viewed by *The Wall Street Journal*, the meeting’s goals included “to establish in public’s mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm” and to “delegitimize [ExxonMobil] as a political actor.”⁶⁴ Part of the discussion of their grand strategy was how to include “industry associations, scientists and front groups” in their targeting. And at the top of their list for “legal actions & related campaigns” was state “AGs.”⁶⁵

This meeting was a coalescence of the legal and public relations strategy outlined in a workshop held in 2012 by the Union of Concerned Scientists in California with “two dozen leading scientists, lawyers and legal scholars, historians, social scientists and public opinion experts,” which concluded that the tobacco litigation was the model that should be used for “targeting carbon producers” for “U.S.-focused climate mitigation.”⁶⁶ The meeting was intended to forge a “consensus on a strategy that incorporates legal action (for document procurement and accountability) with a narrative that creates public outrage.”⁶⁷

Following the January 2016 meeting in New York, these anti-fossil fuel activists engaged in meetings, communications, and briefings with some of the state AGs, according to internal emails and communications obtained by the Energy & Environment Legal Institute through an open records request to the office of the Vermont Attorney General.⁶⁸ Some of them secretly briefed state AGs before their March press conference on arguments they could present to justify “climate change litigation” and the “imperative of taking action now.”⁶⁹

The AGs and their staffs tried to hide their discussions and coordination with the activists (who were labeled as “outside advisors”) by “using a ‘Common Interest Agreement’... [that] sought to protect as privileged the discussions about defending President Obama’s controversial global warming rules, and going after political opponents using the Racketeer Influenced and Corrupt Organizations Act

(RICO).⁷⁰ At one point, Matt Pawa, an environmental lawyer who was involved in these briefings, contacted the offices of the New York and Vermont AGs after he was called by a *Wall Street Journal* reporter. Pawa asked what he should say if the reporter inquired whether Pawa was involved in the secret briefings. Eric Srolovic from the New York AG's office told Pawa that he should "not confirm" that Pawa had attended "or otherwise discuss the event."⁷¹

When the involvement of these "outside advisors" was revealed, Congressman Lamar Smith (R-TX), Chairman of the U.S. House Committee on Science, Space and Technology, sent a letter to the groups, including the Union of Concerned Scientists, Greenpeace, and the Rockefeller Family Fund (which had hosted the January planning meeting), asking for copies of their communications with state AGs over a coordinated strategy to target ExxonMobil and other climate change dissenters.⁷² Smith and a dozen other committee members expressed their concern that these investigations were intended to "silence speech" and were "based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations.

In an ironic legal twist that is apparently lost on them, the environmental groups refused to comply with Smith's request, claiming it was a violation of their First Amendment rights. In a letter sent by the groups' law firm, the climate change activists said they could not "in good faith comply with an illegitimate government request that encroaches so fundamentally" on their "protected constitutional rights."⁷³ Apparently, while these groups are entitled to claim free speech protections, those who question an unproven scientific theory should not be able to claim the same protections. In fact, it is "grossly irresponsible" for such dissenters to "invoke the First Amendment," at least according to Yale University Law School Dean Robert Post.⁷⁴

State AGs, such as Maryland's Brian Frosh, also rejected Smith's request, asserting that the committee had no right to "intrude upon the law enforcement actions of the chief legal officer of a sovereign state." Without apparently realizing that he was, in essence, confirming the relationship between the state AGs and environmental activists, Frosh also claimed that Smith had no right to "scrutinize privileged internal deliberations" or communications with private organizations.⁷⁵

The First Amendment, Scientific Debate, and Fraud Investigations

Government prosecutors and the other participants in the crusade against ExxonMobil and the think tanks, researchers, scientists, and policy makers in the climate change debate argue the First Amendment does not protect the supposedly fraudulent conduct of those who "deny" that catastrophic climate change is occurring and that man is the chief culprit for this problem. They point to the successful tobacco litigation that obtained large settlements from tobacco companies for lying about the health effects of cigarettes. Senator Whitehouse, for example, argues that "the government's victory in the tobacco fraud lawsuit" justifies going after climate change deniers because the "fossil fuel industry's support for an array of groups that propagate climate change denial" is identical to "the tobacco industry's pattern of denial of the dangers of its products."⁷⁶

There is a fatal flaw in this false analogy: It fails to distinguish between proven facts and unproven theory. When the tobacco lawsuits were filed, they were backed by decades of tests, observations, research, and medical experience showing that without question, tobacco contains carcinogens that cause cancer, and that nicotine is a highly addictive drug. Proponents of climate change litigation have no such conclusive data upon which to rely. Moreover, the speech at issue is not commercial speech about the suitability or safety of a particular product, such as cigarettes, but speech about matters of public policy and scientific debate.

The assertion by Whitehouse that man-induced, catastrophic climate change is an irrefutable "fact" cannot be sustained by any objective review of the evidence. As has been discussed, there are many problems with this theory, from computer models that have over-predicted warming to data sets that disagree on whether the earth is warming at all or whether temperatures have plateaued.⁷⁷ And it is a matter of great uncertainty—and vigorous debate—over how much the climate is influenced by man-made events, as opposed to natural occurrences such as sun flares.⁷⁸

Thus, the claim that ExxonMobil and presumably others have committed fraud that justifies these investigations cannot meet the most fundamental legal element necessary to prove fraud: a false statement of a material *fact*. A statement of opinion—such as whether climate change does or does not exist

or whether there are any steps that can be taken to modify or reduce its risk—is simply not actionable. As courts have recognized, if it “is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise,... the statement is not actionable.”⁷⁹

As CEI said in one of its briefs, “advocacy, opinion, and expression of policy view do not lose their character as such or their constitutional protection even should they later turn out to be incorrect or should they omit some contrary fact or consideration that a government official believes ought to have been noted.”⁸⁰ The claim by Virgin Islands AG Claude Walker that a statement such as “current scientific understanding provides limited guidance on the likelihood, magnitude, and timeframe of physical risks such as sea level rise, extreme weather events, temperature extremes, and precipitation” in relation to climate change is a fraudulent statement of fact lacks merit.

The other elements of a fraud case are (1) knowledge by the defendant that his statement is false; (2) intent by the defendant to deceive the victim; (3) justifiable reliance by the victim on the false statement; and (4) injury to the victim as a result of the fraud.⁸¹ Since speculations about whether climate change is occurring and what can be done about it are not facts, the other elements of a fraud case do not even come into play.

Even if the existence of man-induced, catastrophic climate change were a material fact, what evidence could possibly be produced about “reliance” by consumers on ExxonMobil’s reasonable statements about climate change? As the Eleventh Circuit Court of Appeals recently pointed out in a case construing the federal wire fraud statute, even a lie is not actionable fraud if the defendant did not “intend to harm the victim” by obtaining something through the fraud to which the defendant is not entitled.⁸² Consumers buy ExxonMobil’s fossil fuel products like gasoline for their automobiles, boats, lawnmowers, and other machines with internal combustion engines. Their justifiable reliance is that the company produces a product that will run their machines efficiently without damaging their engines.

The claim by government prosecutors that the state of the weather—or the global climate—has a material bearing on consumers’ decisions to purchase ExxonMobil products (as opposed to the quality of the products and their price relative to that of

competing offerings sold by other companies, such as Shell or BP) is neither reasonable nor justified. The same is true of investors—climate change has nothing to do with, and is of no relevance to, whether ExxonMobil is able to find and refine oil at a price that will return a profit on the investments made by stockholders in the company.

New York AG Schneiderman recently claimed that climate change means that ExxonMobil will have to leave enormous amounts of oil reserves in the ground. Thus ExxonMobil may be “overstating their assets by trillions of dollars” according to Schneiderman, which could amount to “massive securities fraud.”⁸³ But as ExxonMobil has said, if the company’s forecast of its oil reserves is wrong, “that’s not fraud, that’s wrong.” That is why “we adjust our outlook every year, and that’s why we issue the annual forecast publicly, so people can know the basis of our forecasting,” according to Alan Jeffers, a spokesman for ExxonMobil.⁸⁴ The amount of the reserves of untapped oil still underground will not change based on whether climate change is actually occurring. Jeffers says that allegations that it secretly developed a definitive understanding of climate change before the rest of the world’s scientists are “preposterous.”

The serious First Amendment issues raised by the targeting of ExxonMobil and the subpoena served on the Competitive Enterprise Institute, as well as the effort of state AGs to obtain all communications with third party think tanks, foundations, universities, researchers, and scientists, are matters of paramount concern. As the U.S. Court of Appeals for the District of Columbia Circuit said in 2003, “compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.”⁸⁵

Conclusion

The state AGs are targeting for investigation those whom they consider to be promoting heresy—questioning the legitimacy of the unproven theory of man-induced, catastrophic climate change. Their charges of fraud do not meet even the most minimal legal standards applicable to such investigations, and their public statements make it clear they are interested in achieving political changes in public policy through the courts, rather than the legislative process, where such changes should be debated and discussed. And following such debate, any

potential changes can then be implemented through the democratic system, rather than judicial fiat. Such an approach is particularly important when the economic consequences of such policy changes are as significant as those associated with all of the momentous and far-reaching measures being proposed by those who believe that climate change is the “single most significant threat facing the future of humanity.”⁸⁶

The First Amendment protects not just Exxon-Mobil,⁸⁷ but also CEI and numerous other organizations and individuals from being forced to disclose their internal communications, internal work product, research, writings, and other communications on a public policy issue as controversial as climate change. Subpoenas intended to retaliate against, and chill the speech of, those advocating a point of view with which these state AGs disagree are a misuse of prosecutorial resources that offends the First Amendment.⁸⁸

The vague nature of the fraud allegations made, and the voluminous character of the subpoenas, show that these AGs seem to be engaged in a massive fishing expedition. In fact, a strong case can be made that the investigations are pretextual and undertaken in bad faith. As the courts have said, they will quash subpoenas that are not issued in good faith and that are intended as a “fishing expedition.”⁸⁹ What is going on here certainly seems to meet that standard.

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79. Guilford Transp. Indus. v. Wilner, 760 A.2d 580, 588 (D.C. 2000).
80. U.S. Virgin Islands v. ExxonMobil Oil Corp., No. 2016-CA-2469 at 14 (D.C. Super. Ct.) (memorandum of points and authorities in support of nonparty Competitive Enterprise Institute's special motion to dismiss under D.C. Anti-SLAPP Act and motion for sanctions) (citing N.Y. Times v. Sullivan, 376 U.S. 254, 271-273 (1964)).
81. The U.S. Supreme Court explained the basic elements of a civil fraud case in *Southern Development Co. of Nevada v. Silva*, 125 U.S. 247 (1988) (excluded from the definition of a "material fact" are "statements as consist merely in an expression of opinion or judgment"); see also *The Fraud Trial*, ASS'N OF CERTIFIED FRAUD EXAMINERS at 6, http://www.acfe.com/uploadedFiles/Shared_Content/Products/Self-Study_CPE/Fraud-Trial-2011-Chapter-Excerpt.pdf.
82. U.S. v. Takhalov, No. 13-12385 (11th Cir. July 11, 2016) ("The wire-fraud statute, 18 U.S.C. § 1343 does not enact as federal law the Ninth commandment given to Moses on Sinai. For § 1343 forbids only schemes to defraud, not schemes to do other wicked things, e.g., schemes to lie, trick, or otherwise deceive."), <http://media.ca11.uscourts.gov/opinions/pub/files/201312385.pdf>.
83. John Schwartz, *Exxon Mobil Fraud Inquiry Said to Focus More on Future Than Past*, N.Y. TIMES (Aug. 19, 2016), http://www.nytimes.com/2016/08/20/science/exxon-mobil-fraud-inquiry-said-to-focus-more-on-future-than-past.html?_r=0.
84. *Id.*
85. AFL-CIO v. FEC, 333 F.3d 168, 175 (D.C. Cir. 2003) (citations omitted); see also NAACP v. Alabama, 78 S.Ct. 1163 (1958).
86. Post, *supra* note 74.
87. In re Asbestos School Litigation, Pfizer Inc. v. Giles, 46 F.3d 1284 (3rd Cir. 1994) (a for-profit corporation's speech and associational activities are protected by the First Amendment).
88. Lacey v. Maricopa Cty., 693 F.3d 896, 917 (9th Cir. 2012); Pebble Ltd. Partnership v. EPA, 310 F.R.D. 575, 582 (D. Alaska 2015).
89. Cooper v. U.S. 353 A.2d 696 (D.C. 1975); Turner v. U.S., 443 A.2d 542 (D.C. 1982).