# ARTICLES

# Warning to Corporate Counsel: If State AGs Can Do This to ExxonMobil, How Safe Is Your Company?

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## INTRODUCTION

Nation-states have long fought wars for control of oil. In a novel development, American states are now fighting a war over control of oil—not with one state attempting to take oil from another, but with some states attempting to deny its use to other states. In 2015, New York's Attorney General, Eric

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Schneiderman, began an investigation of ExxonMobil.[1] Then, at a news conference held in New York City on March 29, 2016, Schneiderman said that he and a group of other attorneys general were looking at "creative legal theories" to bring about "the beginning of the end of our addiction to fossil fuel."[2] The group is comprised of seventeen attorneys general, representing fifteen states, the District of Columbia, and one territory.[3] Opposing these attorneys general from mostly "blue states" are attorneys general from twenty-seven mostly "red states."[4]

## I. TIMELINE OF EVENTS

On September 16, 2015, *InsideClimate News* published the first article in its exposé series entitled, "Exxon: The Road Not Taken."[5] The articles in the series alleged, based largely on ExxonMobil's own public records, that the company attempted to cover up or discredit its own climate change research dating back more than thirty years.[6] The multiple-article series was published over three months. On October 9, 2015, the *Los Angeles Times* also published an article in collaboration with Columbia University's Energy and Environmental Reporting

1. Justin Gillis & Clifford Krauss, *ExxonMobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES (Nov. 5, 2015), https://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html [https://perma.cc/T7GL-9VBM].

2. *See* Press Conference, Eric T. Schneiderman, N.Y. Att'y Gen., et al., *A.G. Schneiderman, Former Vice President Al Gore and a Coalition of Attorneys General From Across the Country Announce Historic State-Based Effort to Combat Climate Change* (Mar. 29, 2016), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across [https://perma.cc/5AZN-27QM] [hereinafter *Mar. 29 Press Conference*].

3. Schneiderman has said the members will cooperate on issues of climate change, but only the attorneys general from Massachusetts and the Virgin Islands indicated they would be launching investigations similar to those of New York and California, which had previously launched an investigation. Jake Pearson, *US Virgin Islands, Massachusetts Launch Probes into Exxon*, ASSOCIATED PRESS: THE BIG STORY (Mar. 29, 2016, 3:57 PM), *available at* http://www.usnews.com/news/business/articles/2016-03-29/us-virgin-islands-massachusetts-launch-probes-into-exxon [https://perma.cc/MB9V-8R99].

4. As of May 2016, twenty-seven states have filed suit challenging the U.S. Environmental Protection Agency's Clean Power Plan, which is a rule to crack down on carbon emissions. A second group of eighteen states (and the District of Columbia) has filed as State Intervenors in support of the EPA, stating they have a "compelling and urgent interest in reducing dangerous carbon-dioxide pollution from the largest source of those emissions: fossil-fueled power plants." Proof Brief for State and Municipal Intervenors in Support of Respondents at 1, West Virginia v. EPA (D.C. Cir. Mar. 29, 2016), *available at* https://www.edf.org/sites/default/files/content/cities_and_states.pdf [https://perma.cc/4EQG-PT2X]. For a breakdown of states that are suing or supporting the EPA, see *E&E's Power Plan Hub: Legal Challenges,* ENERGYWIRE, http://www.eenews.net/interactive/clean_power_plan#legal_challenge_status_chart/ [https://perma.cc/D39N-G54P] (last visited May 9, 2016).

5. Neela Banerjee, Lisa Song & David Hasemyer, *Exxon: The Road Not Taken*, INSIDECLIMATE NEWS (Sept. 16, 2015), http://insideclimatenews.org/content/Exxon-The-Road-Not-Taken [https://perma.cc/6H73-PKYM].

6. *Id.*

Project entitled, "What Exxon Knew about the Earth's Melting Arctic."[7] Like the *InsideClimate News* reports, the *Los Angeles Times* article alleged that, while ExxonMobil's internal research identified climate change as a real phenomenon, the company nevertheless supported organizations that raised questions about the veracity of the science behind it.[8]

Following these reports, some policymakers and activist environmental groups called for state and federal authorities to launch further investigations.[9] The reports prompted New York Attorney General Schneiderman either to initiate or accelerate his investigation into whether ExxonMobil defrauded shareholders by suppressing information about the risk of climate change in order to bolster the company's long-term financial outlook.[10] In November 2015, the media reported that the New York Attorney General's office had initiated an investigation of ExxonMobil.[11] In January 2016, California Attorney General Kamala Harris announced her office was conducting an inquiry similar to that in New York.[12] A number of other state attorneys general have since announced support for Schneiderman's investigation, and two have launched their own investigations.[13]

Schneiderman said in a November 10, 2015, interview that he issued the broad subpoena to ExxonMobil "because of public statements they have made and how they have really shifted their point of view on this" with regards to publicly reporting the company's climate change research.[14] "[W]e're very interested in seeing what science Exxon has been using for its own purposes," Schneiderman explained.[15] "Were they using the best science and the most competent models for their own purposes, but then telling the public, the

7. Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), http://graphics.latimes.com/exxon-arctic/ [http://graphics.latimes.com/exxon-arctic/].

8. *Id.*

9. *See* Joanna Walters, *Environmental Groups Demand Inquiry After Exxon 'Misled Public' on Climate,* THE GUARDIAN (Oct. 30, 2015), http://www.theguardian.com/us-news/2015/oct/30/exxonmobil-climate-change-environmental-groups-federal-investigation [https://perma.cc/79P7-SJYY]; Jamie Henn, *The Department of Justice Must Investigate ExxonMobil*, 350.ORG (Oct. 30, 2015), http://350.org/the-department-of-justice-must-investigate-exxonmobil/ [https://perma.cc/WB2K-NKSU]; Press Release, Climate Hawks Vote, *Climate Hawks Vote Calls on State Attorneys General to Investigate ExxonMobil for Climate Deception* (Oct. 28, 2015), http://www.climatehawksvote.com/state_ags_exxon [https://perma.cc/5HQU-V3F9]; Rebecca Leber, *Democrats Request a DOJ Investigation Into ExxonMobil, Alleging Climate Science Coverup*, NEW REPUBLIC (Oct. 16, 2015), https://newrepublic.com/article/123137/democrats-request-doj-investigation-exxonmobil [https://perma.cc/5GFU-NHJG].

10. *See* Gillis & Krauss, *supra* note 1.

11. *Id.*

12. Ivan Penn, *California to Investigate Whether ExxonMobil Lied About Climate-Change Risks*, L.A. TIMES (Jan. 20, 2016), http://www.latimes.com/business/la-fi-exxon-global-warming-20160120-story.html [https://perma.cc/L2RL-8WV2].

13. *Supra* note 3.

14. Interview by Judy Woodruff with Eric Schneiderman, N.Y. Att'y Gen., PBS NEWSHOUR (Nov. 10, 2015), http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research/ [https://perma.cc/76QR-V9EA].

15. *Id.*

regulators and shareholders that no competent models existed?"[16]

Schneiderman's investigation immediately created political controversy. At the time, all three major Democratic presidential candidates (Hillary Clinton, Bernie Sanders, and Martin O'Malley) called on the U.S. Department of Justice to investigate ExxonMobil for misleading the public and investors.[17] U.S. Representatives Ted Lieu (D-Calif.) and Mark DeSaulnier (D-Calif.) wrote a letter to U.S. Attorney General Loretta Lynch calling for an investigation into what they called "a massive campaign of denial and disinformation."[18] A petition launched by environmental groups has collected over 49,000 signatures in favor of investigating ExxonMobil.[19] As reported by *Bloomberg BNA* and other media outlets, the Department of Justice has forwarded Rep. Lieu's letter to the FBI "as a courtesy."[20]

## II. PROSECUTOR OR HUCKSTER?

Using the Martin Act,[21] New York Attorney General Schneiderman is ostensibly investigating whether ExxonMobil defrauded shareholders and the public by suppressing information about the risk of climate change in order to bolster the company's long-term financial outlook. As with investigations by former New York Attorney General Elliot Spitzer, this investigation looks like yet another instance of irresponsible grand-standing.[22]

### *A. The March 29th News Conference*

When the New York Attorney General's office initiated the investigation of ExxonMobil, it was reported that the focus of the investigation concerned

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16. *Id.*

17. Emily Atkin, *BREAKING: Hillary Clinton Endorses Federal Investigation of Exxon*, THINK PROGRESS (Oct. 29, 2015), http://thinkprogress.org/climate/2015/10/29/3717602/clinton-investigate-exxon/ [https://perma.cc/DX4W-S8L2]; Press Release, Bernie Sanders, United States Senator for Vermont, *Sanders Calls for Probe into ExxonMobil Claims on Climate Change*, BERNIE SANDERS (Oct. 20, 2015), *available at* http://www.sanders.senate.gov/newsroom/press-releases/sanders-calls-for-probe-into-exxon-mobil-claims-on-climate-change [https://perma.cc/G46E-GJU3]; @MartinOMalley, TWITTER (Oct. 16, 2015, 1:22 PM), https://twitter.com/MartinOMalley/status/655116504699027456 [https://perma.cc/97ZR-76B2].

18. Letter from Ted W. Lieu and Mark DeSaulnier, Members of Congress, to Loretta E. Lynch, U.S. Att'y Gen. (Oct. 14, 2015), *available at* https://lieu.house.gov/sites/lieu.house.gov/files/documents/2015.10.15%20Rep.%20Ted%20Lieu_DOJ_ExxonMobil.pdf [https://perma.cc/AP5T-5F4N].

19. Petition, *Investigate Exxon*, 350.ORG, *available at* http://act.350.org/sign/exxon_DOJ [https://perma.cc/4LRS-TT7L] (last visited Jan. 7, 2017).

20. *See* Andrea Vittorio, *DOJ, SEC Note Request for ExxonMobil Climate Probe*, BLOOMBERG BNA (Mar. 4, 2016), https://www.bna.com/doj-sec-note-n57982068110/ [https://perma.cc/2G4N-XVYW] ("'As a courtesy,' the request has been forwarded to the Federal Bureau of Investigation to determine if a probe of the oil giant is warranted, according to a January letter from the DOJ's assistant attorney general for legislative affairs provided to Bloomberg BNA March 3 by the office of Rep. Ted Lieu (D-Calif.).'").

21. N.Y. GEN. BUS. LAW, Art. 23-A §§ 352-353 (1921).

22. *See* John Cassidy, *The Investigation: How Eliot Spitzer Humbled Wall Street*, THE NEW YORKER (Apr. 7, 2003), http://www.newyorker.com/magazine/2003/04/07/the-investigation [https://perma.cc/AW7L-6L38].

whether ExxonMobil misled the investing public and consumers as to what the company knew about the state of scientific knowledge concerning climate change.[23] During a press conference on March 29, 2016, however, it became apparent that the New York Attorney General, in coordination with Al Gore,[24] is leading a multi-state legal effort against ExxonMobil and other fossil-fuel companies to curtail and ultimately to eliminate the use of fossil fuels.[25]

While Schneiderman said that "we are pursuing this as we would any other fraud matter," the emphasis of his remarks was about combatting the forces blocking climate-change efforts in Washington, a challenge which "requires a multi-state effort," leading Schneiderman to decide to lead the charge to "send[] a message that . . . a lot of us in state government are prepared to step into this battle with an unprecedented level of commitment and coordination."[26]

Despite accusations of fraud, a charge most frequently and forcefully made by Al Gore, the news conference did not address what ExxonMobil did to violate the law. Schneiderman never specified whether the investigation was pursuing criminal or civil fraud. He did say near the end, however, that financial damages would not be sufficient, suggesting possible criminal charges.[27]

Although Schneiderman had been speaking at times like he was making a closing argument to a jury, he responded to a question by saying that he was "not prejudging," and that, as to ExxonMobil, he believed it was "too early to say what we're going to find . . . ."[28] It was as if Schneiderman was saying "we know these fossil fuel companies are guilty, but we are still investigating to see what laws they violated." There was a black-and-white tenor to the press conference, opposing "morally vacant forces" by those of us who "are sending a message" about "the beginning of the end of our addiction to fossil fuel," which will "heal[] the world."[29] Schneiderman's final words summarize his purpose: "[W]e are going to save the planet and that is ultimately what we are here for."[30]

### *B. Ethics and Environmental Extremism*

These "caped crusaders," gathered in Gotham City "to save the planet," exhibited—at best—ethical obtuseness concerning restraints on prosecutorial power. Bringing in "superstar" Al Gore may have gained more attention than

23. First Amended Complaint and Motion for Declaratory and Injunctive Relief, Exxon Mobil v. Eric Schneiderman & Maura Healey, No. 4:16-CV-469-K (D. Texas Nov. 10, 2016), *available at* http://www.mass.gov/ago/docs/energy-utilities/exxon/exxon-first-amended-complaint-appendix.pdf [https://perma.cc/L4ES-MD9A] [hereinafter *Exxon Amended Complaint*].

24. *See* AL GORE, https://www.algore.com/ [https://perma.cc/KRA2-W3CA ] (last visited Apr. 9, 2016).

25. *Mar. 29 Press Conference, supra* note 2.

26. *Exxon Amended Complaint, supra* note 23.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

the event otherwise would have received and may have convinced some that what these AGs are doing is important. In his excitement to impress, however, Schneiderman was forgetful of his professional responsibilities.

This was purportedly a press conference about suspected illegal, and possibly criminal, activity. Even if including an environmentalist extremist at this law-enforcement press conference was somehow justified, the presence of Mr. Gore—a competitor invested in alternative energy who stands to gain financially from any damage done to oil and other fossil fuel companies[31]—was certainly not. Perhaps Schneiderman figured that ideological lawyers on any ethics committee in a "blue state" would think his noble purposes justified Mr. Gore's presence, if he thought about the conflict at all.

But Mr. Gore was not merely present, he frequently and forcefully accused the targets of the investigation with fraud. As a matter of professional responsibility, Schneiderman should have restrained Mr. Gore in his remarks. Section 3.8 of the American Bar Association Code of Professional Responsibility, "Special Responsibilities of a Prosecutor," provides that "the prosecutor should refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused *and exercise reasonable care to prevent . . . other persons assisting or associated with the prosecutor in a criminal case from making*" such statements.[32] Although ExxonMobil has not been formally accused through an indictment, Schneiderman's remarks, and

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31. *See* James Fallows, *The Planet-Saving, Capitalism-Subverting, Surprisingly Lucrative Investment Secrets of Al Gore*, THE ATLANTIC (Nov. 2015), *available at* http://www.theatlantic.com/magazine/archive/2015/11/the-planet-saving-capitalism-subverting-surprisingly-lucrative-investment-secrets-of-al-gore/407857/ [https://perma.cc/2E22-6JMX]. Mr. Gore is co-founder and chairman of Generation Investment Management LLP. Its "Climate Solutions Strategy" involves "investing in both private and listed growth stage companies that have demonstrated commercial traction," including Bio-based Fuels, Plastics and Chemicals; Recycling; Re-use and Resource Sharing; Renewable Energy; and Sustainable Mobility. *See* GENERATION INV. MGMT., CLIMATE SOLUTIONS STRATEGY, https://www.generationim.com/strategy/climate-solutions.html [https://perma.cc/GMP7-HPBK] (last visited Apr. 9, 2016).

32. MODEL RULES OF PROF'L CONDUCT R. 3.8 (AM. BAR ASS'N 1983) (emphasis added)

> The prosecutor in a criminal case shall:
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> (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

*See also* ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 3-1.4 (AM. BAR ASS'N, 3d ed. 1993):

> (a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.
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> (b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from

especially Mr. Gore's multiple references to "fraud," were likely to heighten public condemnation of ExxonMobil.

## III. WHAT FRAUD?

Federal criminal prosecutors routinely infringe on the state police powers,[33] often by using the amorphous federal mail and wire fraud statutes.[34] Prosecuting a mail or wire fraud charge is regularly just a "hook" to go after some other offense that may be a state, but not a federal, crime.[35] Rarely, however, do the states reciprocate by infringing on the legitimate powers of federal law enforcement.[36] The federal government also focuses on fraud more than states do. As a percentage of their caseloads, state prosecutions for fraud are relatively rare as compared to their frequency in federal prosecutions.[37] In New York, however,

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making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.

33. *See* John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545 (2005) (discussing the overexpansion of federal criminal law and arguing that "[t]he constitutional allocation of power which leaves general police powers in the states should mean that the federal role is much smaller"); *see also* John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310 (2004) (footnotes omitted) ("[M]erely invoking interstate commerce is not necessarily constitutionally sufficient to justify every federal crime. Otherwise, the federal government would be exercising a general police power, which the Constitution withholds.") [hereinafter Baker, *Reforming Corporations*]; *see generally* AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME (1998) (discussing the remarkable growth of federal criminal law since 1970).

34. *See, e.g.,* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995) ("[T]he mail fraud statute has become the primary provision to extend federal jurisdiction to crimes traditionally prosecuted only at the state and local level."); *see also* Sorich v. United States, 555 U.S. 1204, 1309 (2009) (Scalia, J., dissenting from denial of certiorari) (urging the Court to narrowly construe the honest services fraud statute that is "[q]uite a potent federal prosecutorial tool" under which a broad reading could "seemingly cover a salaried employee's phoning in sick to go to a ball game").

35. *See* Peter R. Ezersky, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427, 1428 (1985) ("Serving as a jurisdictional hook to facilitate federal prosecutorial involvement where it is not otherwise explicitly authorized, the mail fraud statute is now regularly used to prosecute general wrongdoing on the basis that a letter was posted during the course of the scheme."); *see also* Daniel C. Richman & William J. Stunz, *Al Capone's Revenge: An Essay on the Political Economy of Prextextual Prosecution*, 105 COLUM. L. REV. 583 (2005) (arguing pretextual charges are often employed by federal prosecutors due to superior manpower and resources required to pursue drawn out and intricate investigations).

36. For example, the State of Virginia prosecuted North Carolina resident Jeremy Jaynes under Virginia's anti-spam law for spamming AOL's Virigina-based servicer, conduct also illegal under the federal CAN-SPAM Act, 15 U.S.C. § 7701(a)(2). However, the federal statute was adopted after Jaynes' conduct occurred, thereby preventing federal charges under the federal statute. The Virigina Supreme Court later struck down the state's anti-spam law as overbroad. *See* Jaynes v. Commonwealth, 666 S.E.2d 303, 314 (Va. 2008), *cert. denied*, 129 S. Ct. 1670 (2009); *see also* Larry O'Dell, *Va. Court Strikes Down Anti-Spam Law*, USA TODAY (Sep. 12, 2008), http://usatoday30.usatoday.com/tech/products/2008-09-12-360718828_x.htm [https://perma.cc/4BL3-2PRM] (reporting that Jaynes' attorney Thomas M. Wolf said the federal CAN-SPAM Act does not apply to Jaynes).

37. Federal prosecutor, later defense attorney, and current U.S. District Judge Jed Rakoff famously wrote: "To Federal prosecutors of white-collar crime, the mail fraud statute is our Stradivarius, our Colt

where organized crime and corruption prosecutions by state prosecutors have been fairly frequent since Tom Dewey was governor, fraud charges have been more common than in other states.[38]

Although Schneiderman has declined to identify specific laws ExxonMobil allegedly violated, he has confirmed that "all of the claims would lie in some form of fraud."[39] Media reports indicate Schneiderman is likely relying on broad powers granted to his office by the Martin Act,[40] the pre-1933 federal Securities Act attempt by New York to curb fraud in financial and securities markets.[41] The Martin Act empowers the New York Attorney General to prosecute "any device, scheme, or artifice to defraud or for obtaining money or property by means of any false pretense, representation, or promise."[42] This "blue sky" law was enacted in response to concerns over stockbrokers selling shares in shell companies that had no genuine operating business.[43] Unlike other securities legislation, including federal laws, the Martin Act vests sole implementation and enforcement responsibilities with the Attorney General, not with a regulatory agency.[44]

### *A. Fraud, Blue Sky Laws, and the Martin Act*

From after the Civil War until the Securities Acts of 1933,[45] fraud and related offenses—notably lotteries—were primarily a concern of state law enforcement.[46] Originally, lotteries were treated as the form of fraud that most con-

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.45, our Louisville Slugger, our Cuisinart—and our true love." He said they may flirt with other laws, but they always come home to mail fraud, "with its simplicity, adaptability, and comfortable familiarity." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980).

38. *See* HANDBOOK OF ORGANIZED CRIME IN THE UNITED STATES 433 (Robert J. Kelly, Ko-lin Chin, & Rufus Schatzberg ed., Greenwood 1994).

39. *Has ExxonMobil Misled the Public about Its Climate Change Research?*, PBS NEWSHOUR (Nov. 10, 2015), http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research/ [https://perma.cc/YM7G-5EEC].

40. Martin Act, N.Y. GEN. BUS. LAW, Art. 23-A, §§ 352-359(g) (McKinney 1928).

41. *See, e.g.*, Gillis & Kraus, *supra* note 1; David Voreacos, *The Martin Act: New York's Big Hammer for Financial Fraud*, BLOOMBERG QUICK TAKE (updated Nov. 10, 2015, 10:36 PM), https://www.bloomberg.com/quicktake/martin-act [https://perma.cc/3XV5-2WNC].

42. N.Y. GEN. BUS. LAW, Art. 23-A § 352.

43. *See* Ambrose V. McCall, *Comments on the Martin Act*, 3 BROOK. L. REV. 190, 192–93 (1933) (tracing the prevalent history of stock racketeering that led the Legislature of the State of New York to enact Blue Sky Laws).

44. N.Y. GEN. BUS. LAW, Art. 23-A § 352.

45. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a *et seq.*).

46. *See* JOHN L. THOMAS, LAW OF LOTTERIES, FRAUDS AND OBSCENITY IN THE MAILS 5 (1903) ("The first attempts to suppress lotteries in most of the States were by legislation simply, but it was found, however, that laws forbidding lotteries that could be repealed . . . were not effective, and at this time all the States have adopted constitutional provisions prohibiting the licensing or authorization of lotteries."); *see also* John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495, 519 (1985) (using the postal power, Congress was able to enact federal crimes against lotteries, frauds, and obscenity in the mails premised on the federal government's exclusive control over the postal system, thereby not intruding into state control of local crimes).

cerned the public.[47] Following the Civil War, many financially strapped states resorted to lotteries to deal with their financial challenges.[48] But states could not easily police lottery tickets coming from other states.[49] So a major reason for the federal mail fraud statute enacted in 1872[50] was to assist the states in preventing fraud in lotteries.[51] The statute gave the states concurrent jurisdiction to prosecute violations of the federal mail fraud statute.[52] Over time, the states eliminated their lotteries.[53] Then in 1892, the federal government enacted the anti-lottery act, prohibiting the transportation of lottery tickets across state lines.[54] By the time of the Supreme Court decision in the Lottery Case (1903),

47. *See* Baker, *supra* note 46, at 535 ("National sentiment against lotteries led to the enhancement of federal law enforcement powers as reflected by the modification of the 1872 Postal Act in 1876 and by the Anti-Lottery Act of 1890."); THOMAS, *supra* note 46, §§ 1–5 (sketching the historical background leading up to Congress enacting the first federal law against lotteries).

48. Baker, *supra* note 46, at 534 ("Faced with severe financial problems, Louisiana amended its constitution to allow the legislature to legalize lotteries, which it did by an 1866 statute.").

49. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (holding state sovereign immunity bars an individual from suing a state without the state's consent).

50. A number of state laws and eventually, state constitutions, prohibited or regulated lotteries during the eighteenth and nineteenth centuries. *See* THOMAS, *supra* note 46, at 5. In 1799, Congress authorized actions for violations of the postal laws to be brought in any state or territorial court or before a justice of the peace. *See* Act of Mar. 2, 1799, ch. 43, § 28, 1 Stat. 733 (1799). Unable constitutionally to eliminate lotteries, Congress enacted the first federal law related to lotteries in 1827 by prohibiting the postmaster from acting as a lottery agent. *See* Act of Mar. 2, 1827, ch. 61 § 6, 4 Stat. 238 (1827). By enacting the Post Office Act of 1872, Congress extended federal criminal jurisdiction in this area. *See* Act of June 8, 1872, ch. 335, 17 Stat. 283 (1872); *see also* Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 120 (1987) ("The original mail fraud statute, enacted in 1872 as part of a legislative package dealing with the post office, was remarkable as an extension of federal authority into an area formerly thought to be of state concern only.").

51. Baker, *supra* note 46, at 514 ("[The 1872 Post Office Act] operated only in a limited way by policing the postal system, an area state law could not reach without congressional cooperation.").

52. In 1799, Congress granted state courts concurrent jurisdiction over crimes committed in violation of the Post Office Act of 1799. The provision was incorporated by subsequent Acts, including the 1872 Post Office Act, vesting state courts with concurrent jurisdiction:

> [All] causes of action arising under the postal laws may be sued, and all offenders against the same may be prosecuted, before the justices of the peace, magistrate, or other judicial courts of the several States and Territories, having competent jurisdiction by the laws thereof, to the trial of claims and demands of great value, and of prosecutions where the punishments are of as great extent; and such justices, magistrates, or judiciary shall take cognizance thereof, and proceed to judgment and execution as in other cases.

Act of June 8, 1872, ch. 335, § 305, 17 Stat. 283, 323; U.S. Rev. Stat. § 3833 (2d ed. 1878). This statute has since been superseded and the federal district courts now have exclusive jurisdiction, 18 U.S.C. § 3231 (2015).

53. *See* THOMAS, *supra* note 46, at 5 (1903) ("[A]t this time all the States have adopted constitutional provisions prohibiting the licensing or authorization of lotteries.").

54. Act of March 2, 1895, ch. 191, 28 Stat. 963 (1895); *see* Champion v. Ames, 188 U.S. 321 (1903) (upholding the constitutionality of the Lottery Act); *see also* Baker, *supra* note 46, at 532–36 (tracking the development of anti-lottery laws and a well-organized lottery that was legal in Louisiana that also sent lottery tickets into states where gambling was illegal).

purely domestic trafficking of lottery tickets had been largely suppressed.[55]

Thereafter, however, the focus on fraud shifted to stocks, as stock ownerships exploded from 1900 to 1928.[56] "According to congressional reports, in the decade after World War I, approximately fifty billion dollars of new securities were floated in the United States and half of them were worthless."[57] To protect against stock frauds, states enacted what are known as "blue sky laws" during this period.[58] Some states did so by enacting licensing and registration laws.[59] Others enacted anti-fraud statutes, which is what New York did by adopting the Martin Act.[60]

The Martin Act grants very broad powers to the New York Attorney General to investigate and prosecute financial fraud. A primer by *Legal Affairs Magazine* notes:

> [The Martin Act] empowers [the New York Attorney General] to subpoena any document he wants from anyone doing business in the state; to keep an investigation totally secret or to make it totally public; and to choose between filing civil or criminal charges whenever he wants. People called in for questioning during Martin Act investigations do not have a right to counsel or a right against self-incrimination. Combined, the act's powers exceed those given any regulator in any other state.[61]

To bring a case under the Martin Act, the Attorney General does not have to prove the intention of wrongdoing, that a transaction took place, or that anyone was actually defrauded.[62] An analysis by Dechert Financial Services explains that, "[n]otably, scienter, reliance and damages need not be demonstrated. Instead, the only elements needed to establish a Martin Act violation are a misrepresentation or omission of material fact when engaged in inducing or

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55. Champion v. Ames, 188 U.S. 321 (1903) (involving a purported monthly drawing of the so-called Pan-American Lottery Company, claiming to draw a monthly prize at Ascuncion, Paraguay).

56. Elizabeth Keller, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 331 (1988).

57. *Id*. at 334.

58. *See* McCall, *supra* note 43 (describing the connection between the growth of American interest in securities and the accompanying field of fraudulent operations).

59. Keller, *supra* note 56, at 331.

60. *Id.* at 333–34.

61. Nicholas Thompson, *The Sword of Spitzer*, LEGAL AFFAIRS (May/June 2004), *available at* http://www.legalaffairs.org/issues/May-June-2004/feature_thompson_mayjun04.msp/ [https://perma.cc/7PE9-KNCR]. This power is limited by time, however. The Martin Act has a statute of limitations that requires cases to be brought within six years of the commission of the crime or within two years of discovery. N.Y. C.P.L.R. § 213(8) (McKinney 2004).

62. *See* People v. Federated Radio, 154 N.E. 655, 657–58 (N.Y. 1926) (finding the Martin Act does not require plaintiffs to allege intentional misstatements and that promoters will not be relieved of liability for a lack of scienter). The court's broad reading of the Martin Act continued in later cases. *See, e.g.*, State v. Sonifer Realty Corp., 622 N.Y.S.2d 516, 516–17 (N.Y. App. Div. 1955); People v. Royal Sec. Corp., 165 N.Y.S.2d 907, 909 (N.Y. Sup. Ct. 1955); State v. 7040 Colonial Rd. Assoc. Co., 671 N.Y.S.2d 938, 941–42 (N.Y. Sup. Ct. 1998).

promoting the issuance, distribution, exchange, sale, negotiation or purchase of securities."[63] The broad scope of the Martin Act, coupled with its very low bar of proof, puts a great deal of power in the hands of the New York Attorney General.

Although decidedly weighted in favor of the Attorney General, the Act was not originally designed in a way that it could actually protect the public against genuine fraud. First, state blue sky laws were generally ineffective.[64] Second, in New York in particular, "[t]he Attorney General had difficulty in uncovering fraud in order to protect unsuspecting investors."[65] Given the importance of New York as the financial center of the country, "a more rigorous blue sky law could have had a profound deterrent effect on unethical practices in the sale of securities."[66] Instead, listing on the New York Stock Exchange (which is voluntary) produced "disclosure [that] was more demanding than any of the blue sky laws."[67]

Furthermore, as broad as the Martin Act is both in terms of its coverage and the powers given to New York's Attorney General, the language of the statute seems to preclude any legitimate charge of civil, much less criminal, fraud for what Schneiderman has been suggesting. That is the conclusion that any competent, fair-minded prosecutor would reach after reading Professor John Coffee's comprehensive article, "On Thin Ice: Climate Change, Exxon, NYAG, and the Martin Act."[68]

### 1. Professor Coffee's Analysis

In his article "On Thin Ice," Professor John Coffee, a leading securities law expert,

> attempt[s] a dispassionate assessment that considers, first, what needs to be shown to support such a cause of action (and why the Martin Act may need to be re-interpreted in line with the U.S. Supreme Court's decision this year in *Omnicare v. Laborers Dist. Council Constr. Indus. v. Pension Fund*) and, second, whether the failure to disclose support for advocacy or lobbying groups can be deemed material under existing standards of materiality.[69]

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63. *New York's Martin Act: A Primer*, DECHERT LLP (Jan. 15, 2004), *available at* https://www.dechert.com/files/Publication/a4def5dd-77bf-48ae-bead-491bfcb9142c/Presentation/PublicationAttachment/dbeb2852-2e00-49d6-971f-4c2db9674658/FS_2004-04.pdf [https://perma.cc/9M7S-XB26]; *see also* John C. Coffee, Jr., *On Thin Ice: Climate Change, Exxon, NYAG and the Martin Act,* N.Y. L.J. (Nov. 19, 2015), http://www.newyorklawjournal.com/id=1202742773121?keywords=on+thin+ice&publication=New+York+Law+Journal [https://perma.cc/PG2B-JK3E].

64. *See* Keller, *supra* note 56, at 332–33.

65. *Id.* at 334.

66. *Id.*

67. *Id.*

68. Coffee, *supra* note 63.

69. *Id.* at ¶ 4.

He also considers "whether the First Amendment limits the ability of regulators to insist that corporate participants in a public policy debate disclose their support for advocacy groups or other researchers."[70]

Having reviewed the published news reports, Professor Coffee says "[a] close reading of these articles suggests that Exxon was essentially stating its own opinions (which may have been biased), but it was not asserting objectively false facts."[71] After analyzing the impact of the Supreme Court's decision in *Omnicare*, he considers what might theoretically provide a basis for the New York Attorney General to investigate, namely that in some circumstances, statements of opinion could be materially misleading. Nevertheless, he casts serious doubt on the viability of such a theory in the Exxon situation[72]:

> But the issue still remains: Is it really material to investors in appraising Exxon as an investment to know what Exxon thought about the likelihood (or avoidability) of climate change? After all, the reasonable investor knows that Exxon has a strong self-interest and a likely bias on these issues. Also, the market is well supplied with information on this topic from a variety of sources. On this basis, the "truth on the market defense" may be applicable, even if Exxon's disclosures omitted material information.[73]

Regarding ExxonMobil's funding of certain advocacy groups, Professor Coffee writes, "As a matter of traditional securities law, Exxon is not the 'maker' of the advocacy group's statements and could not be held liable in a private action for them."[74] He says, "[T]he Martin Act might be read differently [from traditional securities law], but the case for doing so seems weak [because] Exxon's financial support to these groups could not have been financially material to Exxon."[75]

After noting the First Amendment issues raised by *Citizens United v. FEC*,[76] Professor Coffee suggests that "[p]erhaps Congress or New York State" could draft a donation-disclosure requirement consistent with *Citizens United*, but that "[t]he Martin Act does not do this."[77]

### 2. Proof Questions for a Prosecutor

Professor Coffee's analysis does not distinguish between civil and criminal fraud. Nor need it have because such a distinction would seem to be meaningless in a statute that has been interpreted by the New York courts not to require a

70. *Id.*
71. *Id.* at ¶ 6.
72. *Id.* at ¶ 11.
73. *Id.* at ¶ 12.
74. *Id.* at ¶ 20.
75. *Id.* at ¶ 21.
76. *Id.*
77. *Id.*

"guilty mind," that is, a *mens rea* or scienter requirement.[78] If, however, the New York courts fail to follow Professor Coffee's analysis as to materiality and the First Amendment protections for corporations are curtailed, then what?

The overly long and complex language of the Martin Act[79] criminalizes many acts.[80] Nevertheless, as broad as the Martin Act may be for purposes of

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78. Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc., 962 N.E.2d 765, 768 (N.Y. 2011) (internal citations omitted) ("The Act has since been amended on a number of occasions to broaden its reach. In 1955, for example, the Legislature added section 352-c, which allowed the Attorney General to bring criminal proceedings against those employing fraudulent practices 'even absent proof of scienter or intent.' Analogously, in contrast to a common-law fraud claim, the Attorney General 'need not allege or prove either scienter or intentional fraud' in a civil enforcement action under the Martin Act.").

79. The statute runs about 24,000 words.

80. N.Y. GEN. BUS. LAW, Art. 23-A § 352-c:

Prohibited acts constituting misdemeanor; felony

1. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to use or employ any of the following acts or practices:

(a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;

(b) Any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;

(c) Any representation or statement which is false, where the person who made such representation or statement:
(i) knew the truth; or
(ii) with reasonable effort could have known the truth; or
(iii) made no reasonable effort to ascertain the truth; or
(iv) did not have knowledge concerning the representation or statement made; where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section three hundred fifty-two of this article, regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted.

2. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to engage in any artifice, agreement, device or scheme to obtain money, profit or property by any of the means prohibited by this section.

3. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, engaged in the sale of any securities or commodities, as defined in section three hundred fifty-two of this article, within or from the state of New York to represent that they are an "exchange" or use the word "exchange," or any abbreviation or derivative thereof, in its name or assumed name unless it is registered with the Securities and Exchange Commission as a national securities exchange, pursuant to section six of the Securities and Exchange Act of 1934, or unless it has been designated as a contract market by the Commodity Futures Trading Commission, pursuant to section five of the Commodity Exchange Act.

4. Except as provided in subdivision five or six, a person, partnership, corporation, company, trust or association, or any agent or employee thereof, using or employing any act or practice declared to be illegal and prohibited by this section, shall be guilty of a misdemeanor.

5. Any person, partnership, corporation, company, trust or association, or any agent or employee thereof who intentionally engages in any scheme constituting a systematic

investigation, in order to have a provable case a prosecutor must still show evidence of a prohibited act. The acts prohibited by sub-section one, which might arguably apply to information about climate change not disclosed by ExxonMobil, would be "fraud, deception, concealment, suppression, false pretense." The acts prohibited by sub-section two include "any artifice, agreement, device, or scheme to obtain money, profit, or property by any of the means prohibited by this section." The "means prohibited by this section" could be those of sub-sections two or three, but sub-section three is inapplicable to the situation. So we only need to consider the means prohibited by sub-section two.

Thus, what act—or, more specifically, failure to act—by ExxonMobil might fall within this list of prohibited acts? Corporations "fail" to disclose all kinds of information. Such non-transparency regarding information does not constitute any of the prohibited acts listed in sub-section one, unless a corporation has a legal duty to disclose the particular type of information. So non-disclosure about climate change, even if true, would not fit the language of sub-section one. Also, for sub-section two, the non-disclosure of information would not fit any of the listed prohibited acts.

Although New York courts have said the Martin Act requires no scienter,[81] one cannot eliminate the criminal "act" words in the statute. The "act" words in the statute do not include simple non-disclosure. Rather, the acts listed carry intentionality within the meaning of each word. Although the New York Court of Appeals has said that the Martin Act goes beyond common law fraud,[82] an

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> ongoing course of conduct with intent to defraud ten or more persons or to obtain property from ten or more persons by false or fraudulent pretenses, representations or promises, and so obtains property from one or more of such persons while engaged in inducing or promoting the issuance, distribution, exchange, sale, negotiation or purchase of any securities or commodities, as defined in this article, shall be guilty of a class E felony.
>
> 6. Any person, partnership, corporation, company, trust or association, or any agent or employee thereof who intentionally engages in fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale, or who makes any material false representation or statement with intent to deceive or defraud, while engaged in inducing or promoting the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of any securities or commodities, as defined in this article, and thereby wrongfully obtains property of a value in excess of two hundred fifty dollars, shall be guilty of a class E felony.

*See also id*. at § 352-d:

> Effect of prosecution under previous section
>
> A person, partnership, corporation, company, trust or association or any agent or employee thereof that, having engaged in any act or practice constituting a violation of section three hundred fifty-two-c of this article, commits additional acts under such circumstances as to constitute a felony, the crime of conspiracy, petit larceny, or more than one of the aforesaid, is punishable therefor, as well as for the violation of that section, and may be prosecuted for each crime, separately or in the same information or indictment, notwithstanding any other provision of law.

81. *Assured Guar. (UK) Ltd*., 962 N.E.2d at 768.
82. *Id*.

act of "fraud" must amount to more than non-disclosure of some information a corporation is not legally required to disclose.

As expressed in Schneiderman's own words, ExxonMobil's alleged criminal "act" is its failure to do something about climate change. But no law prohibits the use of fossil fuels for any purpose. As Schneiderman declared at his February 29th press conference, however, he is investigating Exxon in order to "save the planet" because Congress will not impose further regulations on fossil-fuel companies. In other words, Schneiderman is investigating for the purpose of prosecuting an activity he believes should be illegal, but which currently is not.

Schneiderman's theory about "fraud" is patently pretextual. By his own words at the February press conference, Schneiderman has provided grounds for a credible claim that he is applying the Martin Act to ExxonMobil in a manner that violates the "vagueness and overbreadth" due process restrictions of the Fourteenth Amendment.[83]

What if ExxonMobil does not make a "vagueness and overbreadth" challenge or fails on such challenge? Suppose the New York courts reiterate the language about the lack of scienter in the Martin Act as stated in the New York Court of Appeals case which observed that the Act had been amended in 1955 to include subsection 352-c.[84] 352-c-1(c) criminalizes "[a]ny representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth."

Assume the very unlikely event that a criminal prosecution against ExxonMobil actually goes to trial. Then, Schneiderman would have to prove the corporation defrauded the investing public and consumers. But how could the failure to release climate-change information have defrauded the investing public and consumers? Release of negative information often depresses the price of a corporation's stock and its sales. Assuming arguendo that release of additional climate-change data by Exxon could have had that effect, could that convince members of a jury that ExxonMobil had violated the Martin Act? It is highly unlikely that members of the public sitting on a criminal jury would feel that they and other consumers and the investing public had been defrauded because the price of Exxon stock is higher than it would have been or the price of gas lower than Schneiderman thinks it ought to have been. If Schneiderman actually believes that he could achieve a jury verdict against ExxonMobil based on the notion that consumers and the investing public have been defrauded by ExxonMobil's non-disclosure of climate-change information, even if true, he is out of touch with reality.

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83. *See, e.g.*, Brian Hodgkinson, *Don't Feed the Deer: Misapplications of Statutory Vagueness and the First Amendment Overbreadth Doctrine: County Court, Sullivan County New York People v. Gabriel*, 29 TOURO L. REV. 949, 954–62 (2013) (providing a good explanation of the vagueness and overbreadth doctrines as applied by federal courts and New York courts).

84. *Assured Guar. (UK) Ltd.*, 962 N.E.2d at 768.

Professor Coffee's concluding paragraph refers to "knights on horseback dispensing justice as they see fit." State attorneys general, however, have powers that were not possessed by the knight errant, Don Quixote. Even so, at some point the courts and/or a jury will impose constraints on, if not completely thwart, Schneiderman's attempt "to grasp beyond his reach."[85]

### *B. Who and What Initiated This Investigation?*

One is hard put to think of who, other than Galileo's inquisitors, would think that a criminal or civil fraud trial is the proper forum in which to resolve the *bona fides* of those engaged in scientific controversies. It is the role of scientists to question each other's research as to whether it is based (in Schneiderman's words) on "using the best science and the most competent models."[86] But is it the role of a prosecutor?

*InsideClimate News* takes credit for initiating the investigation of ExxonMobil:

> The investigations began after *InsideClimate News,* and later the *Los Angeles Times*, as well as other journalists reported on the history of Exxon's emerging understanding of climate change science in the 1970s and its subsequent efforts to undermine the scientific consensus, in part by financing research organizations including CEI [the Competitive Enterprise Institute].[87]

Apparently, Schneiderman's office has attempted to downplay the role of *InsideClimate News* by claiming its office actually initiated the investigation. An article in *InsideClimate News* reported, based on a source who was not identified, that "investigators have been looking into what Exxon knew about climate change and what it said about it to the public and shareholders for some time, [but] recent investigative news reports by *InsideClimate News*[88] and the Los Angeles Times[89] made the issue 'more ripe.'"[90]

Just as *InsideClimate News* faults ExxonMobil for non-transparent funding of publications reflecting its views and interests, a similar charge has been made against *InsideClimate News.* A *National Review* article reported that *Inside-*

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85. Charles Baudelaire, *Punishment for Pride*, *in* THE FLOWERS OF EVIL 37 (James N. McGowan, trans., 2008).

86. *Supra* note 14.

87. John H. Cushman Jr., *Think Tank with Fossil-Fuel Ties Subpoenaed in AG's Climate Inquiry*, INSIDECLIMATE NEWS (Apr. 8, 2016), http://insideclimatenews.org/news/08042016/think-tank-fossil-fuel-ties-competitive-enterprise-institute-subpoena-attorney-general-climate-change-exxon [https://perma.cc/T8X4-VUXX].

88. Neela Banerjee, Lisa Song, & David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago,* INSIDECLIMATE NEWS (Sep. 16, 2015), https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming [https://perma.cc/JG9S-L2SV].

89. Jerving et al., *supra* note 7.

90. Bob Simison, *New York Attorney General Subpoenas Exxon on Climate Research*, INSIDECLIMATE NEWS (Nov. 5, 2015), http://insideclimatenews.org/news/05112015/new-york-attorney-general-eric-schneiderman-subpoena-Exxon-climate-documents [https://perma.cc/6GY5-HRX2].

*Climate News* has ties with a public relations firm dealing with biotech companies and that *InsideClimate News* receives funds from environmentalist foundations and activists.[91] Yet, neither *InsideClimate News* nor the publications it attacks, such as those of the Competitive Enterprise Institute, take their respective positions solely based on the sources of their funding. Unlike lawyers, they are not "hired guns." Rather, they are ideologically-driven organizations and publications that receive funding from the sources that agree with the positions they take.[92]

While prosecutors are lawyers, they are not supposed to be just "hired guns" either. Instead, they are expected to play a neutral role in enforcing the law. Regardless of their personal beliefs, ideology should not get in the way of their review of facts. No matter how much Schneiderman may detest fossil fuels in general and ExxonMobil in particular, he risks compromising his role as a prosecutor if he ignores facts.

Schneiderman need not have given any weight to the expected denial by an ExxonMobil vice president for public affairs that "unequivocally reject[ed] the allegations that ExxonMobil has suppressed climate change research."[93] The company, however, added that "ExxonMobil has included information about the business risk of climate change for many years in our 10-K Corporate Citizenship Report and in other reports to shareholders."[94] Before proceeding much further, any competent, fair-minded prosecutor's office would have—if only to protect its own reputation—reviewed these documents to determine the strength of ExxonMobil's factual defense.

In all probability, Schneiderman knows his investigation will never result in a trial. Possibly, although it is unlikely to happen, he may hope eventually to achieve a victory by entering some kind of settlement with ExxonMobil. He may think he can replicate the settlement with Peabody Coal on similar charges that he announced just days after the Exxon subpoenas.[95]

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91. Jillian Kay Melchior, *InsideClimate News: Journalism or Green PR?*, NAT'L REV. (Dec. 22, 2015), http://www.nationalreview.com/article/428878/environmentalism-advocacy-journalism-who [https://perma.cc/268M-TQWS].

92. *Id*.

93. Gillis & Krauss, *supra* note 1.

94. Simison, *supra* note 90.

95. *See* Press Release, Eric T. Schneiderman, N.Y. Att'y Gen. General, *A.G. Schneiderman Secures Unprecedented Agreement with Peabody Energy to End Misleading Statements and Disclose Risks Arising from Climate Change* (Nov. 9, 2015), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-secures-unprecedented-agreement-peabody-energy-end-misleading [https://perma.cc/KV5Q-RRZ4]. In his statement about Peabody, the world's largest private sector coal company, Schneiderman said, "This case represents an unprecedented first step in the absolutely critical work of forcing coal and other fossil fuel companies to start being honest about the damage they are doing to our planet." *But see* Coffee, *supra* note 63 ("[The New York Attorney General] appears to have caught Peabody in a misstatement, as (at least in the NYAG's view) Peabody had in fact calculated the impact that it claimed it could not predict . . . . [T]his settlement does not imply by any means that corporations will be held liable under the Martin Act because they have not revealed the impact that they are having on the environment.").

Schneiderman, however, may not even be that concerned about reaching a settlement. He may well be satisfied just to lead what is clearly a well-orchestrated effort to damage ExxonMobil's reputation[96] that eventually results in federal legislation or a criminal investigation by the Justice Department.[97]

Schneiderman's office may not pay a price for ignoring facts if it is able to win in "The Court of Public Opinion." Regardless of facts detailed on its website, ExxonMobil is losing the media battle, as indicated by Google searches.[98] If ExxonMobil is engaged in a publicity offensive, someone needs to improve its "search-engine optimization" ("SEO" techniques)[99] because ExxonMobil's defense to the investigation does not have much presence.

Mass media battles with opposing ideological viewpoints attacking each other are nothing new. What is new is the attempt by a state prosecutor to create a crime, where none currently exists, based on one side of the ideological divide.

## IV. HOW IS EXXONMOBIL DEFENDING ITSELF?

As indicated above,[100] in "The Court of Public Opinion" ExxonMobil is not defending itself very well. It has, of course, lawyered up even more than usual[101] and has tried to fight some of the subpoenas.[102] ExxonMobil has been

96. *See* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud,* 36 J. L. & ECON. 757, 758 (1993) (presenting evidence that the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud); *see also* Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 60 STAN. L. REV. 271, 280 (2008) ("The perception that the reputational consequences of a conviction could exceed even the substantial monetary penalties in any parallel civil litigation can explain why firms under investigation for criminal violations are willing to do almost whatever it takes—including waiving attorney-client privilege, assisting the government's prosecution of their senior officers, and paying millions of dollars in civil fines—to avoid an indictment.").

97. *See Mar. 29 Press Conference*, *supra* note 2; *see also* John S. Baker, Jr., *Reforming Corporations, supra* note 33, at 337–54 (discussing ways in which criminal law provides prosecutors with practical and political advantages over direct attempts to legislate new corporate regulations).

98. In Google searches about the investigation, the reports overwhelmingly tilt in Schneiderman's favor. In a search of the term "Exxon Fraud Investigation" on April 11, 2016, for example, the first entry favorable to Exxon appeared as the second-to-last entry on the fourth page. It was Chris White, *Attorneys General Claim Exxon committed 'Fraud,'* DAILY CALLER (Mar. 29, 2016), http://dailycaller.com/2016/03/29/attorneys-general-claim-exxon-committed-fraud/ [https://perma.cc/WU96-EYE2].

99. *See What Is SEO/Search Engine Optimization?*, SEARCHENGINELAND, http://www.searchengineland.com/guide/what-is-seo/ [https://perma.cc/TQ3X-5JDR] (last visited Apr. 10, 2016) ("All major search engines such as Google, Bing and Yahoo have primary search results, where web pages and other content such as videos or local listings are shown and ranked based on what the search engine considers most relevant to users. Payment isn't involved, as it is with paid search ads.").

100. *See supra* note 98 and accompanying text.

101. Sarah N. Lynch, *Exxon Taps High-Profile Lawyer to Fight N.Y. Climate Change Probe,* REUTERS (Dec. 1, 2015), http://www.reuters.com/article/us-exxon-probe-climatechange-idUSKBN0TK5RR20151201#IzcPvu18G5BHbFwR.97 [https://perma.cc/D987-C97D].

102. ExxonMobil first sued Claude Walker, the Attorney General of the U.S. Virgin Islands. David Hasemyer, *Exxon Sues a Second Attorney General to Fight Off Climate Fraud Probe*, INSIDECLIMATE NEWS (Jun. 16, 2016), https://insideclimatenews.org/news/16062016/exxon-sues-massachusetts-attorney-general-climate-change-fraud-investigation [https://perma.cc/VCX6-FY8S]. Then ExxonMobil filed suit

focusing on a First Amendment free speech argument to defend itself. Exxon's lawyers argue that the subpoenas by the state Attorneys General are a violation of the company's constitutional rights because they are "impermissible viewpoint-based restrictions[s] on speech, and it burdens ExxonMobil's political speech."[103] The viability of this argument may depend on *Citizens United*,[104] which Al Gore[105] and every self-respecting Democratic official condemns as the death of democracy. Given, however, that Justice Scalia's seat on the Supreme Court will now be filled by a Republican president, ExxonMobil may succeed in this argument.

Regardless, it is unfortunate that the facts do not matter much in this situation. ExxonMobil's website provides detailed information responding to the charges made by *InsideClimate News* and the *Los Angeles Times*, as well to a report by the Columbia School of Journalism and an editorial in the Washington Post,[106] but this information has not received much publicity. More significantly, ExxonMobil is hampered by what is normally its strength: it is a public corporation.

### *A. Public Corporations and Leftist Ideology*

In the current cultural climate largely dominated by left-wing ideology, "the facts" only matter if and when there is litigation and it reaches a trial. In this climate, announcing an investigation and defaming a potential defendant may generate substantial publicity. As already noted, Schneiderman's claims have

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in the same federal court in Texas against Maura Healey, the Attorney General of Massachusetts. *Id*. The judge in the Massachusetts case declined to make a decision about the injunction Exxon requested and instead asked the two parties to talk. In argument, the judge was particularly focused on why Exxon would cooperate with the New York subpoena but not with the Massachusetts subpoena. Jeffrey Weiss, *Judge Suggests Exxon, Massachusetts AG Talk about Climate Change Case*, DALL. NEWS (Sept. 19, 2016), http://www.dallasnews.com/business/energy/2016/09/19/irving-based-exxon-vs-massachusetts-attorney-general-set-face-dallas-courtroom-today [https://perma.cc/QSK6-BSH9]. In response, Exxon made a motion to amend in the case against the Massachusetts Attorney General in October 2016 also to invalidate the New York subpoena. *ExxonMobil Fights Climate Change Subpoena*, MARITIME EXEC. (Oct. 19, 2016), http://www.maritime-executive.com/editorials/exxonmobil-fights-climate-change-subpoena [https://perma.cc/DH4P-E9V2].

103. Hasemyer, *supra* note 102.

104. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that corporations have the same rights as individuals under the First Amendment to spend money in election campaigns); *see also* Coffee, *supra* note 63 (arguing the First Amendment limits the ability of regulators to force certain disclosures).

105. Interview by Chris Hayes with Al Gore, Former Vice President, MSNBC (Sept. 29, 2015), *available at* http://www.msnbc.com/transcripts/all-in/2015-09-29 [https://perma.cc/S9V9-KWGT] ("American democracy has been hacked . . . . But the influence of money has to be curbed and Citizens United has made it even worse.").

106. *See ExxonMobil Says Climate Research Stories Inaccurate and Deliberately Misleading*, EXXONMOBIL NEWS AND UPDATES (Oct. 21, 2015), *available at* http://news.exxonmobil.com/press-release/exxonmobil-says-climate-research-stories-inaccurate-and-deliberately-misleading [https://perma.cc/WB2D-LHA7]; *see also* Suzanne McCarron, *The Coordinated Attack on ExxonMobil,* EXXONMOBIL PERSPECTIVES (Apr. 20, 2016), https://energyfactor.exxonmobil.com/perspectives/coordinated-attack-on-exxonmobil/ [https://perma.cc/A2QD-NAUE] (providing information on ExxonMobil's climate research).

been carried by many reports in the blogosphere. Ultimately, the charges against ExxonMobil and the entire fossil-fuel industry are likely to be won or lost in "The Court of Public Opinion." In that forum, left-wing-ideological environmentalism reigns supreme.[107]

Public corporations are vulnerable to ideological attacks precisely because they themselves have no ideology. ExxonMobil and other corporations pursue—or at least purport to pursue—only share-holder value. To the extent that they do pursue profits, corporations are acting in accord with what free-market theory teaches about how corporations ought to behave.[108] But public corporations do not consistently behave according to free-market theory. Many, for example, donate to charities and other 501(c)(3) entities—including left-wing organizations that oppose capitalism.[109] So naturally, free-market theorists have criticized public corporations for charitable donations that appear to reduce shareholder value.

Corporate executives often defend donations to charities and other organizations as part of being "good corporate citizens." Corporations certainly calculate that such actions represent good public relations. In some cases, corporations are attempting—either proactively or defensively in response to a "shakedown"—to assuage outside pressure groups. These "pay-offs" very likely do

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107. Editorial, *The Ideological Environmentalist,* 4 NEW ATLANTIS 108 (2004), *available at* http://www.thenewatlantis.com/docLib/TNA04-StateOfTheArt-The%20Ideological%20Environmentalist.pdf [https://perma.cc/NV7X-FDDL]; *see* Elizabeth Kolbert, *Can Climate Change Cure Capitalism?*, N.Y. REV. (Dec. 4, 2014), http://www.nybooks.com/articles/2014/12/04/can-climate-change-cure-capitalism/ [https://perma.cc/AX2K-DJW8] (reviewing NAOMI KLIEN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE, which argues that climate change is a product of the status quo and the only hope of avoiding catastrophic warming lies in radical economic and poltical change).

108. *See* MILTON FREIDMAN, CAPITALISM AND FREEDOM 133 (40th anniversary ed. 2009) ("In [a free economy], there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud."); *see also* Svetozar Pejovich, *Law as a Capital Good, in* LEXECONICS: THE INTERACTION OF LAW AND ECONOMICS 257–58 (G. Sirkin ed., 2012) (arguing a major function of law is to generate the predictability of behavior, which, over time, allows the individual to identify additional exchange opportunities and exploit the most beneficial ones); *see also* Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right that Big Corporations Should Have but Do Not Want,* 34 HARV. J.L. & PUB. POL'Y 639 (2011) (explaining that, although corporate boards have fiduciary duties to their shareholders, it is an open question as to whether particular campaign contributions unrelated to interests of the corporation could be a violation of the board's duties to shareholders, indicating that, although most contributions would not provoke legal liability due to protection under the business judgment rule, some shareholders could allege that political activities are neither germane to corporate business nor subject to a per se rule of bad faith conduct).

109. *See* Marcelo Prince, *How Do Companies Give to Charity?*, WALL ST. J. (June 25, 2015), http://blogs.wsj.com/corporate-intelligence/2015/06/25/how-do-companies-give-to-charity/ [https://perma.cc/M5SS-GLFH] (looking at 271 corporations, a majority of giving went toward health and social services, K-12 education, higher education, and community and economic development); *see also Americans Donated an Estimate $358.38 Billion to Charity in 2014; Highest Total in Report's 60-Year History,* GIVING USA (June 29, 2015), http://givingusa.org/giving-usa-2015-press-release-giving-usa-americans-donated-an-estimated-358-38-billion-to-charity-in-2014-highest-total-in-reports-60-year-history/ [https://perma.cc/CHK7-HE2U] (finding corporate charitable giving amounted to $17.77 billion in 2014, an increase of 13.7 percent over 2013 giving).

increase, or at least protect, profits because the political and cultural environment has been successfully shaped by left-wing-ideological environmentalism.

Public corporations have not had much reason to fear right-wing activism, although that is beginning to change with the protests against corporate support of Planned Parenthood and possible "Trumpster" activism. Generally, public corporations have become major funders and, collectively, conveyor belts for various left-wing causes.

Public corporations, to varying degrees and for varying reasons, have embraced the "green movement." In some public corporations, notably hotels, *faux* greening has been quite profitable. Those hotel-room cards attempting to make you feel guilty if you want too many towels replaced or sheets changed serve to increase profits by eliminating laundry costs. Like so many environmental efforts, the "greening of hotels" also eliminates entry-level jobs.

Over time, public corporations are also becoming greener due to years of hiring of graduates from law schools and even business schools dominated by anti-corporate attitudes. Internal corporate policies are being affected by the MBAs and lawyers coming from elite universities where they have been indoctrinated in how they can change corporations from the inside.[110]

As reflected by ExxonMobil's website, the Green Ideology has put oil-giants on the defensive. Of the four main topics on the main page, one is entitled "ExxonMobil's perspectives on climate change."[111] On that particular page, the lead statement is the following: "We are committed to positive action on climate change and dedicated to reducing the risk of climate change in the most efficient way for society."[112] The first of the three sub-headings is entitled, "Our position on climate change," a statement that reads as if written by an environmental activist.[113] The third heading, "Our climate science history" contains within it

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110. *See* Joshua Galperin, *Op-Ed: 'Desperate Environmentalism' Won't Save the Environment*, L.A. TIMES (Oct. 29, 2015), http://www.latimes.com/opinion/op-ed/la-oe-galperin-environmental-desperation-20151029-story.html [https://perma.cc/VL7N-2DWK] (claiming many of the author's students see themselves as proponents of bringing about environemtal policy changes within corporations but fail to do so because of appeasement, bringing the author to encourage students to "think big by reminding them of the real and measureable progress that occurred in an age of transformation, not appeasement"); *see also* Mindy Charski, *Business Schools Teach Environmental Studies,* U.S. NEWS (Mar. 26, 2008), http://www.usnews.com/education/articles/2008/03/26/business-schools-teach-environmental-studies [https://perma.cc/JG6E-XVEH]; *see generally* YALE CENTER FOR ENVIRONMENTAL LAW & POLICY: ABOUT US, http://envirocenter.yale.edu/about-us [https://perma.cc/AL7H-835Y] (last visited Jan. 29, 2017) (connecting the Yale School of Forestry & Environmental Studies and Yale Law School to incorporate "fresh thinking and analytically rigorous approaches to environmental decision-maknig across disciplines, across sectors, and across boundaries").

111. *See generally* EXXONMOBIL CORPORATE, http://corporate.exxonmobil.com/ [https://perma.cc/8ARS-HF2Q] (last visited Apr. 24, 2016).

112. *See* EXXONMOBIL: EXXONMOBIL'S PERSPECTIVES ON CLIMATE CHANGE, http://corporate.exxonmobil.com/en/current-issues/climate-policy/climate-perspectives (last visited Apr. 24, 2016).

113. *See* EXXONMOBIL'S PERSPECTIVES ON CLIMATE CHANGE: OUR POSITION, http://corporate.exxonmobil.com/en/current-issues/climate-policy/climate-perspectives/our-position [https://perma.cc/L36V-ES57] (last visited Apr. 24, 2016) ("We have the same concerns as people everywhere—and that is how to provide the world with the energy it needs while reducing greenhouse gas emissions. The risk of climate change

ExxonMobil's defense on "the facts." But you would not necessarily suspect that ExxonMobil was making its case due to the statement describing that section.[114] In other words, ExxonMobil has accepted the rules of engagement laid down by its enemies. ExxonMobil is defending itself against forces attempting to annihilate it as ineffectively as the Obama Administration has been defending against ISIL.

Public corporations routinely appease when faced with bad publicity, and they usually surrender when threatened with a possible criminal investigation.[115] They are so fearful of damage to the company's (read: management's) reputation that they often agree to do things that actually damage the company[116] and its employees.[117] By contrast, privately-held corporations—because the interests of management and the corporation are more often aligned with each other—are more willing to fight government coercion that does damage to the corporation. A good, recent example is the fight against a federal indictment by privately-held Gibson Guitar.[118]

ExxonMobil appears to be putting up more of a fight than is typical for a publicly held corporation.[119] The company is resisting some subpoenas.[120] Possibly, management senses that its corporate (or at least the management's) survival may be at stake. That might seem an unlikely concern for a company

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is clear and the risk warrants action. Increasing carbon emissions in the atmosphere are having a warming effect. There is a broad scientific and policy consensus that action must be taken to further quantify and assess the risks. ExxonMobil is taking action by reducing greenhouse gas emissions in its operations, helping consumers reduce their emissions, supporting research that leads to technology breakthroughs and participating in constructive dialogue on policy options. Addressing climate change, providing economic opportunity and lifting billions out of poverty are complex and interrelated issues requiring complex solutions. There is a consensus that comprehensive strategies are needed to respond to these risks.").

114. *See* EXXONMOBIL'S PERSPECTIVES ON CLIMATE CHANGE, *supra* note 112 ("ExxonMobil is a responsible participant in the discussion on climate change—we will continue to research the issue, support energy efficiency, work to reduce emissions, pursue new technologies and advocate for effective policy approaches.").

115. *See* Baker, *Reforming Corporations, supra* note 33, at 349 (arguing that stigmatizing produces plea agreements).

116. *Id.* at 352 ("Faced with uncertain constructions of federal statutes and unfriendly juries, corporate defendants feel a great deal of pressure to plead guilty, regardless of the merits of the case.").

117. JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW 59–84, (2006) (arguing white-collar criminal law induces organizations to treat their employees improperly, Hasnas identifies five areas in which corporate management interests possibly conflict with employee interest during white collar investigations).

118. Press Release, Gibson Guitar Corp., Gibson Settles with Department of Justice (Aug. 6, 2012), *available at* http://www.gibson.com/News-Lifestyle/Features/en-us/Gibson-Comments-on-Department-of-Justice-Settlemen.aspx [https://perma.cc/7PYS-3Q5D].

119. *Supra* note 102 and accompanying text.

120. David Hasemyer & Bob Simison, *Exxon Fights Subpoena in Widening Climate Probe, Citing Violation of Its Constitutional Rights*, INSIDECLIMATE NEWS (Apr. 14, 2016), http://insideclimatenews.org/news/13042016/exxon-virgin-islands-subpoena-climate-change-investigation-violates-rights-claude-walker [https://perma.cc/NC6E-EK96] (reporting that Exxon alleged the subpoena by Virgin Islands Attorney General Claude Walker seeks records beyond the five-year statute of limitations, violates the company's constitutional rights, and "constitutes an abuse of process, in violation of common law").

that continues to be ranked second on the Fortune 500.[121] Yet, it is worth remembering that Exxon was also ranked second in 1970 when General Motors was ranked first.[122]

### *B. Shareholder Activism for "Social Responsibility"*

GM's decline from the pinnacle of corporate power into bankruptcy involved many factors.[123] The most the public generally knows about GM power is its bankruptcy, its emergence therefrom as "Government Motors," and (maybe) its return to number six on the Fortune 500. Not many remember—if they ever heard of—"Campaign GM," launched in 1970.

Social-responsibility shareholder-activism, originated by Saul Alinsky,[124] began in earnest with Ralph Nader's attack on General Motors through "Campaign GM."[125] GM fought back, but with dirty tricks; and ultimately had to apologize.[126] It lost in court to Nader.[127] GM, however, lost more than that one fight.

Fast forward a few years. In the summer of 2000, the General Counsel of General Motors and then-Senator Fred Thompson co-chaired a conference on federalism sponsored by the Federalist Society. GM's General Counsel expressed his concern that criminal indictments of corporations and its executives often did not require a *mens rea.*[128] When asked whether he would support efforts in Congress to respond to the over-federalization of crime, he responded that this issue was "not high" on GM's priority list. Shortly thereafter, Congress enacted the TREAD Act,[129] which nationalized product liability law related to automobiles and included a criminal provision.[130] As an automobile maker, GM

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121. *See* FORTUNE 500, http://fortune.com/fortune500/2015/ [https://perma.cc/ZFR3-WFBY] (last visited Apr. 25, 2016).

122. *See* FORTUNE 500, Archive 1970, http://archive.fortune.com/magazines/fortune/fortune500_archive/full/1970/ [https://perma.cc/X93R-6VJY] (last visited Apr. 25, 2016).

123. Nate Silver, *GM's Problems are 50 Years in the Making*, FIVE THIRTY EIGHT (Mar. 31, 2009, 11:45 AM), http://fivethirtyeight.com/features/gms-problems-are-50-years-in-making/ [https://perma.cc/7JAX-3ML8].

124. *See* Heidi J. Welsh, *Shareholder Activism*, 9 THE MULTINATIONAL MONITOR (Dec. 1988), *available at* http://www.multinationalmonitor.org/hyper/issues/1988/12/mm1288_06.html [https://perma.cc/4UP3-GWFH].

125. PATRICIA CRONIN MARCELLO, RALPH NADER: A BIOGRAPHY 59 (2004).

126. Morton Mintz, *GM's Goliath Bows to David*, WASH. POST, TIMES HERALD (Mar. 27, 1966), at A7.

127. Nader v. Gen. Motors Corp., 255 N.E.2d 765 (N.Y. 1970).

128. Conference on Federalism with Sen. Fred Thompson and General Motors General Counsel, personally attended by the author, Summer 2000, transcript/recording unavailable.

129. *See* Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act of 2000, 49 U.S.C. §§ 30101–170 (2000), *available at* https://www.gpo.gov/fdsys/pkg/BILLS-106hr5164enr/pdf/BILLS-106hr5164enr.pdf [https://perma.cc/77Z3-LU2V].

130. The National Highway and Traffic Safety Administration (NHTSA) considered seeking criminal liability under the TREAD Act against Toyota in 2010 and GM in 2014, but no individual criminal liability resulted. *See* Daniel Fisher, *GM Criminal Case Lacks One Thing: A Human Criminal*, FORBES (Sept. 17, 2015), http://www.forbes.com/sites/danielfisher/2015/09/17/gm-criminal-case-lacks-one-thing-a-human-criminal/#484d4a092eee [https://perma.cc/QR9R-4G6L]. While the criminal provision has not yet resulted in individual criminal liability, it has resulted in higher fines and larger settlement

should have had serious concerns about this legislation. Thereafter, the author of this article faxed[131] the GM General Counsel a note asking whether he would reconsider and actively oppose over-federalization of crime. No response.

If protecting itself from possible unjust prosecution was not a high priority for GM at the time, what was? Beginning in 1999, GM became a major opponent of the affirmative action litigation against the University of Michigan.[132] GM not only supported the University of Michigan position, but persuaded other Fortune 500 companies to do so.[133] In total, forty Fortune 500 companies supported the University of Michigan position in the Supreme Court. Among them was Exxon.[134]

Exxon and now ExxonMobil have been under attack for a number of years by shareholder activists.[135] The company has resisted shareholder-activist attempts that it adopt a climate-change resolution. In 2014, apparently in response to a request from some shareholders, ExxonMobil produced a report that declared it "highly unlikely" that governments would enact climate-change policies that would be strong enough to have much impact on demand for oil and gas.[136] The investigations launched by the attorneys general renewed a push by environmentalist-shareholder-activists in 2016.[137] The activists view shareholder challenges as the next best option to government regulation.[138]

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amounts. *See* Sindhu Sundar, *Honda Fined $70M for Failing to Report Deaths to NHTSA*, LAW360 (Jan. 8, 2015), https://www.law360.com/articles/609568/honda-fined-70m-for-failing-to-report-deaths-to-nhtsa [https://perma.cc/U3FJ-QVGZ]; Sindhu Sundar, *NHTSA Boosts Authority with Heavy Hand in Takata Settlement*, LAW360 (Nov. 4, 2015), https://www.law360.com/articles/722750/nhtsa-boosts-authority-with-heavy-hand-in-takata-settlement- [https://perma.cc/2P3N-LHMZ] (reaching a $200 million settlement).

131. A copy of the personal letter from Dr. John S. Baker, Jr., to General Motors General Counsel is not available.

132. *See* Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, WAKE FOREST UNIV. LEGAL STUD. RES. PAPER 79 (Sep. 1, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929706 [https://perma.cc/626J-C38X].

133. *Id*. ("The next year, General Motors ("GM"), headquartered in Detroit, also offered its public support to the university, after intense Michigan lobbying. Harry Pearce, General Motor Corporation's vice chairman, thought affirmative action reflected moral and good business sense given the increasingly diverse customer base. After a meeting with Bollinger and Michigan General Counsel Krislov, he agreed to file an amicus brief with the district court and recruit other companies to file a separate Fortune 500 brief. President Ford and GM were just the beginning.").

134. The World Socialist Website noted the importance of support from the forty Fortune 500 corporations for affirmative action and that continuing affirmative action "requires a struggle against the financial oligarchy." Joseph Kay & John Andrews, *US Supreme Court Upholds Affirmative Action,* WORLD SOCIALIST WEB SITE (June 25, 2003), https://www.wsws.org/en/articles/2003/06/affi-j25.html [https://perma.cc/626J-C38X].

135. *See* JAY W. EISENHOFER & MICHAEL J. BARRY, SHAREHOLDER ACTIVISM HANDBOOK, 2011 Supp. at 3–20.

136. Elizabeth Douglass, *Exxon's 25 Years of 'No',* INSIDECLIMATE NEWS, *available at* http://books.insideclimatenews.org/exxons25years [https://perma.cc/869Y-5G67].

137. Ernest Scheyder, *ExxonMobil Must Allow Climate Change Vote: SEC,* REUTERS (Mar. 24, 2016), http://www.reuters.com/article/us-exxon-mobil-shareholders-exclusive-idUSKCN0WP2TG [https://perma.cc/7K4L-ZNXU].

138. *See* AS YOU SOW, SHAREHOLDER ADVOCACY, http://www.asyousow.org/about-us/theory-of-change/shareholder-advocacy/ [https://perma.cc/D4RV-46BL] (last visited Jan. 29, 2017) ("Shareholder

There is a continuing struggle as to whether public corporations should become mere extensions of the federal government as a result of expanding government regulations.[139] Some public corporations already are comfortable with "crony capitalism." Clearly, ExxonMobil is attempting to resist what may seem to corporations as nearly irresistible political-cultural-ideological forces. Those forces are driving towards complete centralization of power directed by bureaucrats following far-left ideology, otherwise popularly referred to as "political correctness."

In the current environment, it is most unlikely that ExxonMobil or any public company would be willing to do what is necessary to challenge the Green Ideology. Consider that the Rockefeller Family Foundation denounced and divested from ExxonMobil, although both are "descendants" of John D. Rockefeller.[140] Over time, the Left and the Green movement are likely to reshape ExxonMobil as they did GM.

## V. CONFEDERACIES AND IDEOLOGICAL "WAR BETWEEN THE STATES"

The investigation of ExxonMobil involves more than the fossil-fuel industry. Anyone concerned about the Constitution's structure should regard the coalition of state attorneys general as acting extra-constitutionally. These "Generals" (a term often applied to state attorneys general, as well as to the U.S. Attorney General) are waging ideological war, also known as "lawfare," against legal corporate practices. The disapproved practices involve environmental, labor, and—in the future—other activities denounced by the ideological Left.

These Generals have likely given little or no thought to the Constitution. The Constitution's Framers worried that powerful forces could pull the federal system towards either of two opposing dangers. A centralized tyranny represented one danger. The more immediate danger, at the time, was that the existing confederacy would fragment and break apart the Union. So the Constitution displaced the existing confederacy and also added two provisions related to

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advocacy leverages the power of stock ownership in publicly-traded companies to promote environmental, social, and governance change from within."); *see also* Mayer Brown, *Shareholder Activism: The New Face of Environmental Lobbying* (Jan. 2010), *available at* https://m.mayerbrown.com/Files/Publication/313c4361-a634-49d8-8317-58eab446675e/Presentation/PublicationAttachment/b160956f-867a-49c4-89dd-ea2ac70a43b4/NEWSL_MINING_JAN10_BULLETIN_SHAREHOLDER_ACTIVISM.PDF [https://perma.cc/4BP7-7J98] (providing an overview of shareholder activism motivated by a desire to reform corporate behavior to address climate change).

139. Obviously, in light of President Trump's recent victory, time will tell in what directions these developments progress.

140. *See* Alan Neuhauser, *Rockefeller Dumps Oil, Exxon Mobil*, U.S. NEWS & WORLD REPORT (Mar. 24, 2016), http://www.usnews.com/news/articles/2016-03-24/in-a-changing-climate-rockefeller-fund-dumps-oil-exxon-mobil-holdings [https://perma.cc/48L3-4URQ] ("Citing 'morally reprehensible conduct on the part of ExxonMobil,' the Rockefeller Family Foundation—whose namesake, John D. Rockefeller, founded Exxon's precursor, Standard Oil—will dump its holdings in America's largest oil conglomerate, plus coal and tar sands companies, the charity announced Wednesday.").

coalitions among states, one prohibiting formal confederacies and the other limiting the ability of states to enter agreements among themselves.

First, Article I, Section 10 of the Constitution prohibited states from "enter-[ing] any Treaty, Alliance, or Confederation."[141] Nevertheless, it took a bloody Civil War to defeat the slave-holding Confederacy and its attempt to secede from the Union.

Second, Article I, Section 10 allows other types of agreements with the consent of Congress. "No State shall, without the consent of Congress . . . enter into Agreement or Compact with another State."[142]

While the Constitution prohibits states from entering treaties, alliances or confederations, the Articles of Confederation allowed Congress to consent to such arrangements: "No two or more States shall enter into any treaty, confederation or alliance whatever between them, *without the consent of the United States in Congress* assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."[143]

Prohibiting altogether confederations of states is a significant structural change from the Articles of Confederation. It reflects the Framers' fear that states creating power blocs through agreements external to, and unregulated by, Congress would jeopardize the Union.[144] They could see from history that confederations that did not dismember eventually centralized because one or more of their members possessed enough power to dominate other members.[145]

The Supreme Court, however, has not clearly drawn a line between those agreements among states that Congress has no power to approve (treaties, alliances, and confederations) and other agreements to which Congress does have the power to consent or not.[146] As a result, it could be difficult to discern whether a particular agreement among states does or does not fall within the

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141. U.S. CONST. art. I, § 10.

142. *Id.*

143. ARTICLES OF CONFEDERATION of 1781, art. VI (emphasis added).

144. THE FEDERALIST NO. 15 (Alexander Hamilton) (writing about the possibility of a league or alliance between independent nations as seen in Europe):

> With a view to establishing the equilibrium of power and the peace of that part of the world, all the resources of negotiation were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.)

145. THE FEDERALIST NO. 6 (Alexander Hamilton) (arguing neighboring nations are natural enemies "unless their common weakness forces them to league in a confederate republic").

146. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (holding that not all agreements between states are subject to the strictures of the compact clause and application of the clause is limited to agreements directed to formation of any combination tending to increase political power in the states by way of encroachment on or interference with the just supremacy of the United States); *see also* Duncan B. Hollis, *Unpacking the Compact,* 88 TEX. L. REV. 741 (2010) (providing an overview of the Compact Clause, explaining the requirement of congressional consent, and differentiating between foreign-state agreements and interstate agreements).

prohibited category. If an agreement is of a type to which Congress can grant or withhold consent, the text literally requires all such agreements to have congressional consent.

The Supreme Court, however, has not strictly followed the language about agreements and compacts in Article I, Section 10. It has permitted certain agreements between states lacking consent from Congress. In *Virginia v. Tennessee*, the Supreme Court said that, as to some agreements, the federal government would have "no possible objection" because they do not "encroach upon or impair the supremacy of the United States."[147]

The words of Schneiderman and his cohorts do not seem to fall within this protected category. At the March 29th news conference, Schneiderman was clear that the coalition was investigating fossil-fuel companies in order "to save the planet" because Congress refuses to take action.

These Generals, therefore, have agreed with each other to a course of action that goes beyond even the Supreme Court's rather casual interpretation of the Compact Clause. According to their own statements, they are taking actions that they believe Congress is obligated to take. Their extra-constitutional agreement infringes on federal power.

What these Generals are attempting differs from coalitions of states that sue the federal government for infringing state power. Such litigation occurs pursuant to processes provided by congressional legislation, the federal rules of civil procedure, and Supreme Court decisions; they involve interpretations of the Constitution and/or federal legislation, and/or federal regulations.

This coalition of states, on the other hand, contemplates coordinated civil litigation and possibly prosecutions of private parties operating in many states because the federal government will not act.[148] Al Gore considers the tobacco litigation a precedent worth expanding.[149] Professor Coffee notes, however, that "as someone who worked with some of the leading plaintiff's firms in [the tobacco] campaign, I think it is a poor analogy, as the tobacco litigation focused on addiction, alleging that the industry secretly addicted its victims."[150]

The Constitution abolished the original Confederation in large part to end the economic warfare among the states that was threatening the Union. The Civil War defeated the slave-holding Confederacy only through bloody warfare that ended the attempt to secede from the Union. Through agreements and coali-

147. *See* Virginia v. Tennessee, 148 U.S. 503, 518 (1893).

148. David Hasemyer & Sabrina Shankman, *Climate Fraud Investigation of Exxon Draws Attention of 17 Attorneys General*, INSIDECLIMATE NEWS (Mar. 30, 2016), http://insideclimatenews.org/news/30032016/climate-change-fraud-investigation-exxon-eric-shneiderman-18-attorneys-general [https://perma.cc/M3JJ-B2Y7] ("Everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action . . . . So today we are sending a message that at least some of us, actually a lot of us, in state government are prepared to step into this battle with an unprecedented level of commitment and coordination.").

149. *See* Coffee, *supra* note 63.

150. *Id.* at 3.

tions, lacking congressional consent, these state Attorneys General are creating nascent confederations. The last thing our Union needs is an ideologically driven economic war waged by some states against others.

## CONCLUSION

In September 2016, the Securities and Exchange Commission announced that it had launched an investigation into ExxonMobil regarding its accounting practices for evaluating the economic viability versus environmental impact of its projects and "Exxon's longstanding practice of not writing down the value of its oil and gas reserves when prices fall."[151] Predictably, ExxonMobil's stock declined.[152] Environmentalists hailed this development.[153] It will be interesting to see whether and how SEC staffers wind their way around the points made in this article and by Professor Coffee discussed above, and whether courts will allow the state Attorneys General, like Schneiderman, to flex their prosecutorial muscle in this manner.[154] While Schneiderman's probe may be meritless, as indicated above, the whole purpose of his probe and his press conference may have been to prompt a federal investigation. If that was his real purpose, it appears that—at least until President Trump nominates new Commissioners to the Securities and Exchange Commission and they are confirmed by the Senate—Schneiderman has achieved his goal.

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151. Bradley Olson & Anna Viswanatha, *SEC Probes Exxon over Accounting for Climate Change*, WALL ST. J. (Sept. 20, 2016), http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593 [https://perma.cc/SZ32-M73Y].

152. Ben Levisohn, *ExxonMobil: Uh Oh. Now the SEC is Investigating*, BARRON'S (Sept. 20, 2016), http://blogs.barrons.com/stockstowatchtoday/2016/09/20/exxonmobil-uh-oh-now-the-sec-is-investigating/ [https://perma.cc/A82D-RR5U].

153. *See, e.g.,* Clifford Krauss, *S.E.C. Is Latest to Look into Exxon Mobil's Workings*, N.Y. TIMES (Sept. 20, 2016), http://www.nytimes.com/2016/09/21/business/energy-environment/exxon-climate-change.html [https://perma.cc/L5AC-65SQ] ("Environmentalists cheered the S.E.C. inquiry in hopes that regulators were escalating their enforcement on the oil and gas industry to include more rigorous reporting to investors on the potential risks of climate change to their businesses.").

154. *Compare* Anthony Watts, *Don't Mess with Texas—#ExxonKnew AG's to Be Hauled into Court*, WUWT (Nov. 18, 2016), https://wattsupwiththat.com/2016/11/18/dont-mess-with-texas-exxonknew-ags-to-be-hauled-into-court/ [https://perma.cc/WC4S-YCC8] (reporting that a federal judge in Texas ordered New York Attorney General Schneiderman to appear for depositions in a case filed as part of Exxon's attempt to block the investigation), *with* People v. Greenberg, 54 N.E.3d 74 (N.Y. 2016), *cert. denied*, 2016 WL 4585284 (2016) (holding that the New York Attorney General's authority under the Martin Act is extensive and includes the power to obtain a permanent injunction against Maurice "Hank" Greenberg, former officer of American International Group (AIG), and to pursue disgorgement as a remedy for any fraud committed).