TESTIMONY OF SHARON Y. EUBANKS
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BEFORE THE SUBCOMMITTEE ON CIVIL RIGHTS AND CIVIL LIBERTIES

Thank you very much for the opportunity to appear before you in this subcommittee's hearing on climate change denial. My name is Sharon Eubanks. I was a career Department of Justice attorney and a member of the Senior Executive Service, serving in the capacity as Director of the Team from 2000 until December 1, 2005. I am the former Director of the Tobacco Litigation Team at the U.S. Department of Justice. In that capacity, as lead counsel with first chair duties representing the United States in the federal government's racketeering case against the tobacco litigation, I had day-to-day responsibilities for preparing, developing, and ultimately trying the federal government's case against the tobacco industry. The nine-month trial spanned the years 2004 and 2005, before the Honorable Gladys Kessler, U.S. District Court for the District of Columbia.

In August 2006, Judge Kessler, in a lengthy opinion, ruled in favor of the Justice Department, finding the tobacco industry defendants liable for violations of the Racketeer Influenced and Corrupt Organizations Act, RICO. The court noted that "over the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public." As part of the remedy for such conduct, the court ordered the industry to change its business practices. *United States v. Philip Morris, et al.,* 449 F.Supp.2d 1 (D.D.C 2006). The testimony below describes parallels between the illegal and deceptive practices of the tobacco industry as revealed in *Phillip Morris* within the context of RICO and the conduct of some of the largest oil, coal, and gas producers in the country. An attached addendum provides extensive supporting documentation for this testimony.

Introduction

The behavior and goals of the tobacco industry and the petroleum industry are quite similar, and for this reason, there are many similarities in their liabilities. Both industries lied to the public and regulators about what they knew about the harms of their products (and they lied about when they knew it). For example, ExxonMobil, like the tobacco industry, engaged in a decades long conspiracy to deceive the American public[1] and funded a climate denial program years after its own scientists established that man-made climate change was real. As in the case of tobacco, the oil industry's campaign of misinformation was conducted by individual companies and by trade groups, advertisers and other proxies that spread its message of doubt. Also, like tobacco, in-house scientists confirmed present and future threats to the public, while

[1] *See e.g.* David Hasemyer and John H. Cushman Jr., "Exxon Sowed Doubt About Climate Science for Decades by Stressing Uncertainty," Inside Climate News (Oct. 22, 2015) *available at* https://insideclimatenews.org/news/22102015/Exxon-Sowed-Doubt-about-Climate-Science-for-Decades-by-Stressing-Uncertainty; Sharon Hall, "Exxon Knew about Climate Change almost 40 years ago," Scientific American (Oct. 26, 2015) *available at* https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/; McKenzie Funk, "Did Exxon Lie About Global Warming?" (June 30, 2016) *available at* https://www.rollingstone.com/politics/politics-news/did-exxon-lie-about-global-warming-103164/.

the companies and their proxies publicly disputed or distorted scientific findings, in particular, the dangers of carbon pollution and climate change. This campaign of climate change denial had the intended effect of delaying actions that might resolve the issues, including government regulatory actions while the public bore the effects of delay.

The Constitution gives Congress the power to investigate in aid of its legislative function. U.S. Const. Article I, Sec. 1. As set forth here and consistent with the testimony given by the other witnesses present here today, there exists substantial evidence to support an investigation by Congress to determine whether a referral to the Department of Justice for civil or criminal prosecution is appropriate. Similarly, the evidence given in today's hearing may be considered in developing potential legislation as well as in exercise of its oversight role.

Background

For more than 50 years, major fossil fuel companies have known that the unabated production and use of their products was contributing to the warming of the planet. This knowledge notwithstanding, individually and through trade associations, law firms, public relations firms, think tanks, and politicians, they financed a sophisticated campaign of denial and actively conspired to deny the threat that they helped to create and knew existed. They also lobbied against policies that would curtail greenhouse gas pollution and investment in alternative energy sources that could have reduced climate dangers. These intentional delays have cost precious time and made the impact of climate change far more dangerous and expensive than it would have been had we begun tackling it a generation ago.

As we face the climate emergency here in the United States, including sea level rise and coastal flooding, increased severity of storms, changes in precipitation patterns, harm to ecosystems, and impacts on human health, we are confronted with a decision: Who should bear the cost of preparing for, coping with, and reducing climate change devastation? That question will be answered in part by court cases filed throughout the country, seeking to hold major fossil fuel companies liable based on a variety of legal theories that focus upon the industry's deceitful conduct and public statements. Congress, too, has an obligation and responsibility to investigate and determine the facts, utilizing its Constitutional powers. Indeed, leaked documents show Congress being targeted by a campaign of deception.[2] A 1998 "Global Science Communications" memorandum reveals that a major tactic was to "educate members of Congress, state officials, industry leadership, and school teachers/students about uncertainties in climate science" so that Congress and others would "raise such serious questions" about climate science that policy-makers would not only refuse to endorse an international treaty on climate, but would also "seek to prevent progress toward implementation" in the future. Congress has a responsibility to hold corporate polluters accountable for the harms they have caused.

Exxon and other fossil fuel companies and allied corporate interest groups knew about the threat of climate change much earlier than we previously thought. Internal company and trade association documents demonstrate that the oil industry, Exxon in particular, had a deep

[2] Although lobbying is a legitimate process of information transfer between constituents and government decision makers, it also produces some obvious disparities. When policy actions are premised on false information from lobbyists, the First Amendment offers no safe harbor: There is no recognized constitutional right to lie.

understanding of the science of global warming some forty years ago. This knowledge extended not only to the warming potential of carbon dioxide--a pollutant emitted through the use of the industry's primary product--and the clear link between increasing CO_2 levels and fossil fuel combustion, but in their own words, to the "potentially catastrophic" impacts that global warming would have on a "substantial portion" of the Earth's population.

Throughout the 1970s and 1980s, Exxon and other companies and industry associations like American Petroleum Institute worked at the forefront of climate science research. They also funded academic scientists, especially those doing climate modeling. They examined the emerging issue both in terms of the existential threat to their business, looked for potential technological solutions, including alternatives to fossil fuels and evaluated the potential impacts on society and ecosystems. The oil company scientists reported their findings to supervisors and executives within their corporations. (*See* Supporting Documents Addendum below).

A. Exxon and Other Industry Leaders Funded a Campaign of Disinformation.

Beginning in the late 1980s, the fossil fuel industry created and spearheaded arguably the most successful social influence campaign in American history, building a climate denial, deception, and propaganda machine so persuasive that the United States remains, to this day, the only industrialized nation on Earth whose lawmakers fail to fully accept climate science. The denial and disinformation campaigns expanded as international negotiations pushed toward the 1997 Kyoto Protocol. Industry scientists actively participated in the Intergovernmental Panel on Climate Change ("IPCC") process and reported back to their employers and funders. This insider information helped to inform strategies to create public "uncertainly" about climate change.

In 1998, the American Petroleum Institute ("API") produced its "Global Climate Science Communications Plan," which was designed and developed by representatives from Exxon, Chevron, and electric utility Southern Company, along with executives from conservative and libertarian organizations. The plan included a multi-million dollar, multi-year budget to instill "uncertainty" about climate change in the public policy arena and stated, "Victory will be achieved when average citizens understand uncertainties in climate science…" The report detailed target audiences, including media, policy makers and specifically teachers.

The plan identified potential funders as API, the Business Roundtable, Edison Electric Institute (EEI), Independent Petroleum Association of America (IPAA), and the National Mining Association (NMA), along with their member corporations. Potential funding recipients were the American Legislative Exchange Council ("ALEC"), Committee for a Constructive Tomorrow ("CFACT"), Competitive Enterprise Institute ("CEI"), Frontiers of Freedom, and the George C. Marshall Institute.

In the years after this plan was leaked and exposed, it appears to have been implemented—a coalition of climate denying organizations, funded through the years by ExxonMobil, American Petroleum Institute, the Koch brothers, the Mercer family and other dark money contributors, have effectively stalled the implementation of prudent climate policy. From 1997 to 2017, Exxon granted over $36 million to climate denying organizations, with nearly $6.8

million of those grants going to the five organizations listed in the 1998 Global Climate Science Communications Plan. Five million dollars in grants were specifically earmarked in Exxon tax and charitable giving documents for climate change programs at various organizations. Roughly $11 million (of the $36M) in grants were given to organizations who became members of the Cooler Heads Coalition, a consortium of climate denier organizations run by the Competitive Enterprise Institute.

Exxon's annual funding to these climate denial organizations more than doubled between 1998 and 2005 (from $1.5 million in 1998 to $3.5 million in 2005), growing rapidly after President George W. Bush took office. Once ExxonMobil's climate denial funding was publicly exposed, the company halted grants to key groups like CEI, CFACT and Heartland Institute between 2005 and 2007.[3] However the Koch brothers and others then increased their support, which accelerated when President Obama was elected.

Companies did not always fund climate denial through proxies. ExxonMobil provided grants directly to Willie Soon, a climate denier, through 2010. Soon received over $1.2 million dollars between 2001 and 2015 from fossil fuel interests including Exxon, API, the Charles Koch Foundation, and Southern Company. It was later revealed that Soon was reporting peer reviewed articles he had authored as "deliverables" to the corporate grant makers, while neglecting to report this financial support to the scientific journals that published his work.[4]

ExxonMobil remained a member of climate-denying ALEC until 2018 when it quit over a dispute about climate policy. Exxon had given ALEC over $1.9 million dollars in grants including over $400,000 in grants earmarked for climate work between 1997 and 2017 (with additional small grants from Exxon verified going back to the early 1990s). Shell similarly left ALEC in 2015 because of ALEC's climate position, and Google and other large companies have likewise recently stopped supporting ALEC for the same reason. Other fossil fuel companies such as Koch Industries, Peabody Coal and others maintain their membership.

B. Fossil Fuel Companies, While Fostering Public Denial of Climate Change, Changed Internal Practices to Adapt to or to Take Advantage of Climatic Change.

The industry took affirmative steps to protect its own assets from climate risks through research, infrastructure improvements, and plans to exploit new reserves in a warming world, all while concealing and denying the dangers of their products to the public.

After nearly 40 years of internal consideration and debate, in 2017, ExxonMobil announced that it would not pursue development of the Natuna natural gas find in Indonesia, given that development would be "uneconomical." But as its own internal documents demonstrate, Exxon knew as early as 1981 that production at "Natuna [would] result in the

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[3] *See* Karen Savage, "Exxon Continues to Fund 'Science' Group Steeped in Climate Denial and Delay," (June 26, 2019), Climate Liability News *available at* https://www.climateliabilitynews.org/2019/06/26/exxon-climate-denial-american-council-science-health/.

[4] *Justin Gillis and John Schwartz,* "Deeper Ties to Corporate Cash for Doubtful Climate Researcher," New York Times (Feb. 21, *2015) available at* https://www.nytimes.com/2015/02/22/us/ties-to-corporate-cash-for-climate-change-researcher-Wei-Hock-Soon.html.

release of a significant amount of CO_2." Exxon scientists explored a number of ways to "dispose" of the CO_2, but realized that it would be the "largest point source" of carbon on Earth, "rais[ing] environmental questions concerning the 'greenhouse' effect." This realization was at least a decade ahead of any plausible international greenhouse gas regulatory regime. An additional clue to their internal thinking is that no one uses the term "*point source"* to talk about anything but pollution.

In 1989, it was reported that Shell engineers were redesigning a $3 billion North Sea offshore platform to protect against sea level rise. They were anticipating increasing the height of their rigs one or two meters to accommodate for expected sea level rise. The company's engineers estimated costs for adaptation to be $16 to $32 million.

Two years later, an Imperial Oil (a subsidiary of Exxon at the time) document described the "purpose of monitoring the emerging global warming science" as an opportunity "to provide assistance within the company to help design and implement the best mitigation and adaptive strategies ..." among other factors. With "research capability in areas such as frost heave and thaw settlement" the company conceded that the "fate of sea ice in a warmed planet will largely determine how Imperial operates in the Arctic." Imperial hoped to eventually build a body of climate-oriented research "to permit engineering of structures, facilities and infrastructure for exploration and development of new hydrocarbon resources."

As recently as 1996, Mobil, Shell, and Imperial Oil protected their joint investments in the Sable gas field project by engineering their structures in Nova Scotia to withstand "rising temperatures and sea levels." As described in the design specifications, "[a]n estimated rise in water level, due to global warming, of 0.5 meters may be assumed" for the project's life.

C. Continuing Bad Acts

Unfortunately, the fossil fuel industry has not outgrown its pattern and practice of denial and deception. If anything, ExxonMobil and its sister oil companies have doubled down on tactics designed to gut or delay a meaningful response to a climate emergency that grows direr with every passing day. Instead of joining hands with those trying to help, the companies responsible for the problem continue to move in the wrong direction.

They do so under a cloak of feel-good corporate messaging promising unrealistic technological solutions to greenhouse gas emissions while they and their proxies continue to undermine the science and attack, one by one, every meaningful proposal for climate relief. The common thread in all of the industry's "green" initiatives is that none disturb the core business of producing fossil fuels. No company has acknowledged -- just as the tobacco companies refused to acknowledge -- that their product *is* the problem.

The most reliable measure of industry intent is what they spend their money on. Despite the certain scientific knowledge that we cannot safely burn what we already have, the fossil fuel industry spends billions of dollars charging full speed ahead finding and exploiting new sources of gas, oil, and coal and marketing the product, while trying to cover those efforts with a parallel multi-million-dollar campaign touting climate-friendly initiatives.

A recent report by InfluenceMap found that five publicly listed oil majors – ExxonMobil, Shell, Chevron, BP and Total – now spend about $195 million a year on branding campaigns suggesting they support action against climate change, but that these campaigns vastly exaggerate those efforts because while publicly endorsing climate action, the companies are massively boosting investment in oil and gas extraction, increasing spending to $115 billion in 2019 with just 3% of that directed at low carbon projects.

D. Fossil Fuel Industry Tactics

While the fossil fuel industry publicly pretends to be a willing partner in pursuing climate solutions, its actual behavior is the precisely the opposite.

Fossil fuel interests have used extreme, scorched earth tactics in an effort to neutralize climate scientists, lawyers, law enforcement officials, non-governmental organizations (NGOs) and think-tanks that have suggested they are responsible and liable for the damage caused by their products. Some of this has been done through industry-funded front groups, trade associations, friendly government officials, and other proxies.

Many of these same tactics were employed by Big Tobacco. The cigarette makers pre-emptively sued the attorneys general of Massachusetts, Alaska and other states that were considering suing them for knowingly and deceptively marketing an addictive, deadly product, hoping to stop the lawsuits. Similarly, ExxonMobil's political allies in Congress subpoenaed the attorneys general of New York and Massachusetts in an attempt to block their investigations into climate-related wrongdoing. But it did not stop there. ExxonMobil also sued the New York attorney general in a friendly Texas forum in another effort to derail the New York investigation. It has subpoenaed lawyers who it believes provided information and assistance to the attorneys general, and accused them and law enforcement officials of an extra-legal conspiracy to destroy them.

In the case of both tobacco and fossil fuels, their efforts ultimately failed to prevent the states from moving ahead, but valuable time was lost. Earlier this year, Exxon fought a shareholder proposal that the company claimed would "micromanage" them. The Securities Exchange Commission granted Exxon's request to block a shareholder resolution that would have urged Exxon to adopt and disclose greenhouse gas emissions on its products in line with the Paris Climate Agreement.

This is only a sampling of the hard-line approach and questionable legal tactics used by both industries to delay, defund, or eviscerate attempts to hold them accountable in court or to their own shareholders.

Another page torn from the tobacco playbook is the harassment of climate scientists and advocates of climate action. For decades, Big Tobacco went to sometimes extraordinary lengths to delegitimize studies linking smoking to cancer, demonstrating nicotine addiction, or showing the industry targeting children as starter smokers. When a 1991 study showed that 30% of three-year-olds were familiar with Joe Camel, a cartoon character used to sell Camel cigarettes, and

that that number jumped to 90 percent for of six-year-olds -- the same percentage as recognized Mickey Mouse. Camel's manufacturer, R.J. Reynolds Tobacco Company, attacked the study and its author, Paul Fischer, suing to get his original research notes and even the names of the children in the study.

The fossil fuel industry has been at least as aggressive. In 2003, climate deniers Willie Soon and Sallie Baliunas co-authored a paper attacking Michael Mann, author of the famous "hockey stick" climate study. The study was published by the ExxonMobil-funded George C Marshall Institute, and support for the report was also acknowledged as coming from the American Petroleum Institute. The attack on Mann did not stop there. Just as tobacco did with the Joe Camel study, Chris Horner and David Schnare, two long-time recipients of fossil fuel money, went after Mann's notes in 2009 in an unsuccessful court battle that lasted five years.

E. Denial Campaigns in the Media and False Solutions

Exxon-produced Op-Ads were printed in newspapers across the country promoting oil and gas interests and discounting claims that the science was settled enough to take mitigating action.

The example below published in 2000 also emphasizes the beneficial CO_2 argument promoted by groups such as the CO_2 Coalition, a climate denial front organization funded by the Koch brothers, the Mercer Family Foundation and other right leaning foundations and groups: ExxonMobil,"Unsettled Science" (2000) *available at* http://www.climatefiles.com/exxonmobil/2000-exxon-global-climate-change-op-ed-series/

Unsettled Science

Knowing that weather forecasts are reliable for a few days at best, we should recognize the enormous challenge facing scientists seeking to predict climate change and its impact over the next century. In spite of everyone's desire for clear answers, it is not surprising that fundamental gaps in knowledge leave scientists unable to make reliable predictions about future changes.

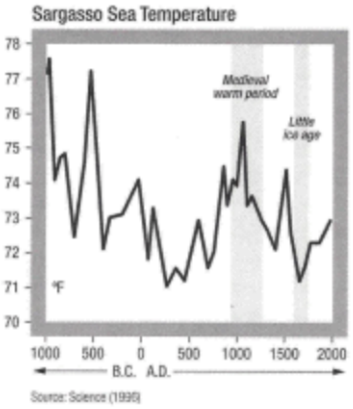
A recent report from the National Research Council (NRC) raises important issues, including these still-unanswered questions: (1) Has human activity already begun to change temperature and the climate, and (2) How significant will future change be?

The NRC report confirms that Earth's surface temperature has risen by about 1 degree Fahrenheit over the past 150 years. Some use this result to claim that humans are causing global warming, and they point to storms or floods to say that dangerous impacts are already under way. Yet scientists remain unable to confirm either contention.

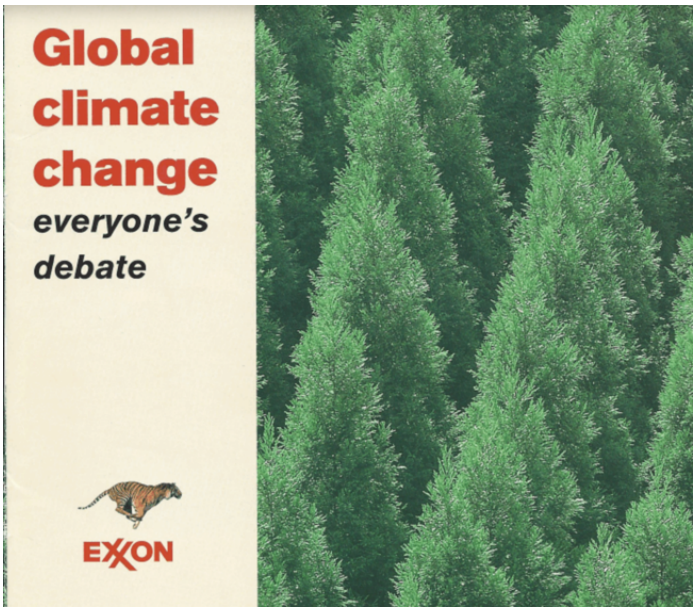
Moreover, computer models relied upon by climate scientists predict that lower atmospheric temperatures will rise as fast as or faster than temperatures at the surface. However, only within the last 20 years have reliable global measurements of temperatures in the lower atmosphere been available through the use of satellite technology. These measurements show little if any warming.

Even less is known about the potential positive or negative impacts of climate change. In fact, many academic studies and field experiments have demonstrated that increased levels of carbon dioxide can promote crop and forest growth.

So, while some argue that the science debate is settled and governments should focus only on near-term policies—that is empty rhetoric. Inevitably, future scientific research will help us understand how human actions and natural climate change may affect the world and will help determine what actions may be desirable to address the long-term.



A [1998 Exxon pamphlet] calls into question IPCC science, highlights uncertainty and focuses on the "debate" around climate change, and mirrors current industry policy of promoting often impractical, costly, or unproven technological solutions, such as vacuuming CO2 out of the air rather than curtailing oil and gas production. See excerpts below from Exxon, "Global Climate Change: everyone's debate":



Here, almost 20 years after its own internal research acknowledged fossil fuel emissions as the chief cause of climate change, Exxon is still publicly questioning whether burning oil, gas and coal contribute to climate change, trying to undermine the premise of efforts to create an international treaty on global warming at the Kyoto conference.

Exxon characterizes climate change as "one of the knottiest and most contentious scientific subjects" and claims climate change is "not a proven threat."[5]

Exxon shares with people around the world the goal of protecting Earth's environment. We take seriously our responsibility to conduct our operations in an environmentally sound way. For that reason, for many years, we've carefully studied and worked to increase understanding of the issue of global climate change — often referred to as "global warming." It's one of the knottiest and most contentious scientific subjects. Essentially, the question is whether the use of fossil fuels — oil, natural gas and coal — is causing Earth's temperature to rise beyond normal variation.

Our analysis indicates that the current state of climate science is too uncertain to provide clear answers to many key questions about global climate change. Even if global warming were a proven threat — which it is not — targets agreed on in Kyoto, Japan, fail to provide a fair, practical or cost-effective solution.

[5] Exxon, "Global Climate Change: everyone's debate" (Oct. 1998) *available at* http://www.climatefiles.com/exxonmobil/1998-exxon-pamphlet-global-climate-change-everyones-debate/.

Calling climate change a "potential concern," the company promises to explore CO_2 absorption. The pamphlet ends with Exxon claiming the Kyoto protocol was a waste of time.

What should we do

The *potential* for climate change caused by elevated levels of carbon dioxide in the atmosphere is a legitimate concern, and reducing the scientific uncertainties is important. We should continue to research this issue. We also should continue to pursue efficient use of energy. Market-oriented policies and new technology can aid considerably in this process. And we can support projects that absorb CO_2 emissions and therefore prevent them from escaping into the atmosphere.

Let's take a closer look at each of these steps.

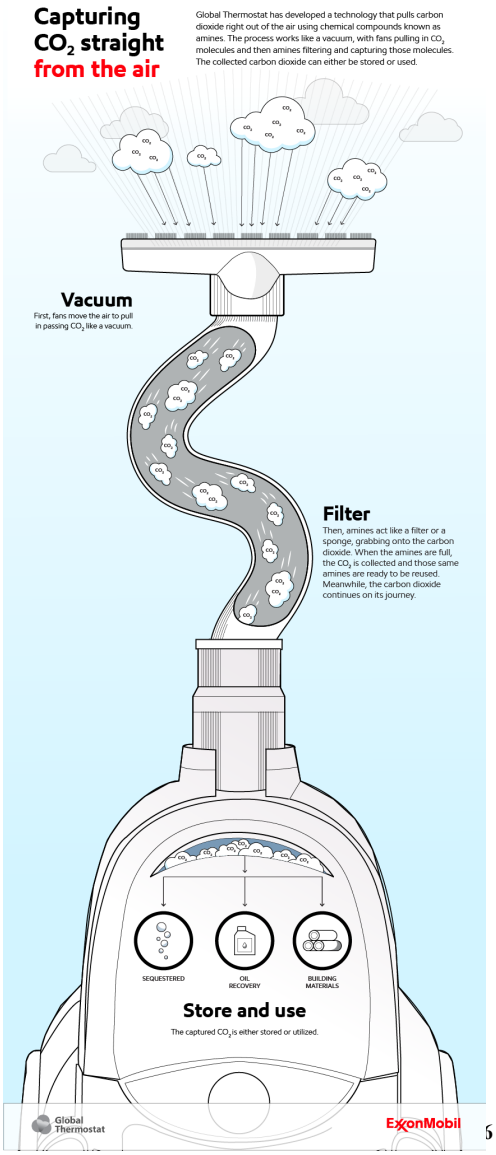
Do we need an insurance policy?

Some people argue that the world needs to take out an insurance policy against the possibility of global warming — just in case.

In deciding whether to buy insurance, people carefully consider several key questions. What is the risk they're trying to protect against? How much does the policy cost? What would the policy do for them? When should they buy the policy?

Answering these questions about global climate change clarifies several points. Because of the scientific uncertainties, we don't have a clear understanding of the risks involved. The Kyoto agreement makes the cost of the policy high. No one can tell us with certainty what benefit we will gain. Thus, it doesn't seem to be a good time to buy the policy.

Thirty years later, Exxon is still pursuing the policy of CO_2 absorption and advertises this research as a way to gain credibility.



Exxon and others continue to pursue technological solutions like carbon capture and sequestration (CCS) that will allow the continued production of fossil fuels. But its costs and logistical barriers are so high, even companies touting CCS are skeptical of the ability of nations to deploy these solutions.[7]

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[6] Exxon, Energy Factor, News "Vacuuming CO_2 Straight Out of the Air," (Jun. 27, 2019) *available at* https://energyfactor.exxonmobil.com/news/global-thermostat/; *see also* Exxon, "Carbon Capture Technology" YouTube (Aug. 5, 2016) ("We're working hard on the stuff") *available at* https://www.youtube.com/watch?v=8Ij-HWslPwM

[7] Exxon, The Outlook for Energy: A View to 2040" 41 (2016) ("As nations look for ways to curb emissions, particularly from coal, some are considering capturing CO_2 and storing it underground; however, carbon-capture-and-storage technologies continue to face substantial economic and practical hurdles that will likely limit their deployment.")

F. The Industry Takes Positions in Climate Litigation that Contradict Its Public Statements.

While ExxonMobil and other companies claim in their advertising that they're now on the right side of the climate issue, they are behaving very differently in responding to lawsuits alleging climate-related wrongdoing. In 2018, in a climate case filed against numerous fossil fuel companies by the cities of San Francisco and Oakland, Theodore Boutrous, an attorney for Chevron, emphasized climate change "uncertainties" and claimed that a five-year old report by the Intergovernmental Panel on Climate Change supported the idea that population growth is the key factor in increasing greenhouse gas emissions.

"It is not (energy) production and extraction that is driving this increase, it is how people are leading their lives," said Boutrous, a partner in the Los Angeles office of Gibson, Dunn & Crutcher.[8]

While BP was running an online "possibilities everywhere" campaign highlighting its supposedly progressive climate stance, it was also part of a group that sent $41 million to a front group called "Protect Colorado," which defeated a bill that would require fracking wells to be set back a certain amount from schools and hospitals.[9]

The American Petroleum Institute intervened in the youth climate case *Juliana v. United States*. In API's answer to the complaint in that case, they stated that they lacked sufficient knowledge to admit or deny any allegations in the complaint including that "[t]he present level of CO2 and its warming, both realized and latent, are already in the zone of danger."[10] API abruptly withdrew from the case after it was served a request for documents.

As noted earlier, the power to investigate these companies' conduct is well-established, and at least in the context of RICO liability, it is important to know the extent and timing of their knowledge regarding climate change. For instance, it would be important to review corporate documents that demonstrate that the groups worked together to monitor climate science, how the efforts were funded in their coordinated work and any funding deliverables, any information regarding the secrecy of the work being done, and efforts to conceal.

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[8] Stuart Levenwearth, "Big Oil lawyer emphasizes climate change 'uncertainties' in wonky court tutorial" McClatchy (Mar. 21, 2018) *available at* https://www.mcclatchydc.com/news/nation-world/national/article206291454.html

[9] Sandra Leville and David Pegg, "Fossil fuel firms' social media fightback against climate action" The Guardian (Oct. 10, 2019) *available at* https://www.theguardian.com/environment/2019/oct/10/fossil-fuel-firms-social-media-fightback-against-climate-action

[10] *Juliana v. U.S.*, Intervenor-Defendants' Answer to First Amended Complaint for Declaratory and Injunctive Relief, Para 8 (Dec. 15, 2016) *available at* https://static1.squarespace.com/static/571d109b04426270152febe0/t/585473288419c253fc5220bb/1481929513269/Doc+93+Intervenor+Answer.pdf; First Amended Complaint for Declaratory and Injunctive Relief, Para 8, (2015) *available at* https://static1.squarespace.com/static/571d109b04426270152febe0/t/57a35ac5ebbd1ac03847eece/1470323398409/YouthAmendedComplaintAgainstUS.pdf

It would be valuable to review documents that show that Congress was a key target of their corporate campaigns, aimed to make lawmakers believe and express "uncertainty" surrounding climate change science. Based upon my experience as a Director of the Tobacco Litigation Team for the United States, documents that could illuminate the association's potentially unlawful activities include documents relating to risk management, public relations and advertising material, and science and "education" grant deliverables.

Comparisons with Tobacco Litigation: A RICO Case

For years, scientists and environmental and human rights advocates have been sounding the alarm on climate change, warning governments around the world that time is running out to prevent catastrophic and irreversible damage. The climate change deniers and their sponsors have had an adverse impact on progress, to be sure. Moreover, with the United States retreating from the global stage on the issue and with other countries falling short of their commitments to meet emission and reduction targets, it appears that these dire warnings are not being taken seriously enough. In order to force government action and hold corporations accountable, litigation should be considered. Just as state attorneys general and other elected officials around the country have filed lawsuits, so too should the United States consider taking legal action. There is overwhelming evidence of climate change, and the cost of inaction is devastating.

ExxonMobil funded climate denial years after its own scientists understood the existential threat of climate change. Its campaign of misinformation was one that it conducted not alone, but through an association with others to help carry out its message of doubt, even though its own internal documents and records make clear that Exxon's own scientists had concluded that carbon pollution caused climate change and other environmental harms. Even so, Exxon and others continued to dispute scientific findings linking carbon pollution with climate change, with the knowledge that their assertions were false.

In 1999, after Congress failed to enact any statute regulating tobacco, and following its own civil investigation, the U.S. Justice Department sued the major manufacturers of cigarettes in a civil case based upon the Racketeer Influenced and Corrupt Organizations Act, RICO, and two other federal statutes. The court allowed only the RICO case to proceed, dismissing the other two statutes. In its complaint, the Justice Department asserted the existence of a decades-long conspiracy to deceive the American public about the health effects and addictiveness of smoking cigarettes.

The parties engaged in significant discovery, amassing evidence regarding 50 years of industry fraud; the 9-month trial resulted in judgment for the United States. The similarities between the liability findings in *United States v. Philip Morris, et al.* and the conduct of the petroleum industry solidly support a conclusion that RICO is a viable cause of action to consider asserting against the petroleum industry. In the tobacco litigation, the Justice Department argued and the district judge found that the companies' repeated, consistent, and false denial of the existence of adverse health effects from smoking, as well as the industry's efforts to distort the scientific evidence demonstrating the relationship to smoking and disease by claiming that the link between the two was still an "open question," was fraudulent.

Basis of a RICO Action

RICO makes it unlawful for "any person . . .associated with an enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(c). Thus, in a § 1962(c) suit defendants are the "persons" who conduct the affairs of the "enterprise" through racketeering activity. Because the RICO statute defines "person" as including "any individual or entity capable of holding a legal or beneficial interest in property," corporations as well as individuals can be liable if they conduct an enterprise's affairs through a pattern of racketeering activity. The statute also provides that "enterprise" includes any individual partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity.

The fossil fuel industry's understanding of climate science and their actions to conceal that information from the public in order to increase its profits and avoid regulation, throughout a pattern of racketeering activity involving other entities, is sufficient to plead a RICO cause of action. If the government prevailed in that action, the U.S. District Court would be empowered to order remedies that would prevent and restrain further RICO violations.

Conclusion

Given all that we now know, Congress should not remain silent about climate change, rather, it should take a leadership role in investigating the issues discussed at this hearing. Investigative hearings will provide further evidentiary support for the actions that Congress may take, expeditiously, to address climate change.

I have received no financial compensation or anything of value from any person or from any organization for my time or testimony given in these proceedings.

ADDENDUM

ADDENDUM

Supporting Documents Addendum

Fossil Fuel Industry Leaders Understood the Threat of Climate Change

a. *1965 Frank Ikard, the American Petroleum Institute President, annual remarks:* Ikard refers to the climate change findings of the 1965 report from the Environmental Pollution Panel of the President's Science Advisory Committee. http://www.documentcloud.org/documents/5348130-1965-API-Proceedings.html#document/p11

b. *1978 presentation by researcher James Black to Exxon Corporation Management Committee*: Executives are made aware of climate forcers, predicted impacts, and the short window to act (5-10 years) http://www.climatefiles.com/exxonmobil/1978-exxon-memo-on-greenhouse-effect-for-exxon-corporation-management-committee/

c. *1979 Exxon memo, "Controlling the CO2 Concentration in the Atmosphere"*: Scenarios for future concentration of CO2, including potentially severe impacts are presented in detail. https://www.documentcloud.org/documents/2805569-1979-Exxon-Memo-on-Potential-Impact-of-Fossil.html

d. *1980 meeting minutes and presentation from API CO2 and Climate Task Force, "The CO2 Problem"*: Industry begins to grapple with the costs of climate impacts of CO2 emissions, including "globally catastrophic effects" by 2067 . http://www.climatefiles.com/climate-change-evidence/1980-api-climate-task-force-co2-problem/

e. *1981 memo from Exxon scientist Roger Cohen reviewing draft report on emissions consequences*: Cohen finds assessment of CO2 emissions too reassuring, noting distinct possibility effects will be "catastrophic". http://www.climatefiles.com/exxonmobil/1981-exxon-memo-on-possible-emission-consequences-of-fossil-fuel-consumption/

f. *1982 memo from Cohen summarizing internal climate modeling and the CO2 greenhouse effect*: Exxon research agrees with the scientific consensus, and the company has an ethical responsibility to report findings. https://www.documentcloud.org/documents/2805575-1982-Exxon-Memo-Summarizing-Climate-Modeling-and.html

g. *Shell Internationale Petroleum, Greenhouse Effect Working Group, "The Greenhouse Effect" (May 30, 1988)*

Report marked "confidential", summarizing the findings of a 1981-86 internal company study, Shell's report calls for climate change action, even in the face of uncertainty: "With very long time scales involved, it would be tempting for society to wait until then to begin doing anything. The potential implications for the world are, however, so large, that policy options need to be considered much earlier."

The Shell report states that while modeling could not exactly predict the impacts, "by the time the global warming becomes detectable it could be too late to take effective countermeasures to reduce the effects or even to stabilize the situation."

h. *Research, Engineering and Environmental Affairs, Mobil Foundation, "1994 Mobil Foundation Grant Recommendations," Jul. 1993*

A recently discovered 1994 grant proposal to the Mobil Foundation from Columbia University's Lamont-Doherty laboratory reveals a keen interest across the oil industry in climate modeling "particularly in light of recent findings." The document shows Exxon, Shell, Texaco, and others supporting the lab's modeling as "critical to improving global climate models and to improving the prediction of global warming." The document states, "Global warming is likely to be the key international environmental issue of the 1990s" and in the face of "regulations limiting emissions of greenhouse gases … Technical information and understanding will be key to Mobil's ability to participate in the debate on these regulations."

The "Benefits" section of the grant proposal notes Lamont-Doherty's private seminars on its research for sponsors where "Mobil scientists involved" could "gain first hand understanding" and "develop personal relationships" with key experts.

i. *M.B. Glaser, Exxon Research and Engineering Company, "CO2 'Greenhouse' Effect," Nov. 12, 1982 & Coordination and Planning Division, Exxon Research and Engineering Company, "CO2 Greenhouse Effect: A Technical Overview," Apr. 1, 1982*

There is clear evidence not only that industry scientists knew the dangers but also that they briefed top executives. For example, two 1982 internal Exxon memos lay out the results of the company's own comparative climate modeling, with designations like "Exxon 21st Century Study High Growth scenario" graphing the "Most Probable Temperature Increase" through 2080. One of the memos states, "this material has been given wide circulation to Exxon management" and, while a fine basis for discussion, the material "should be restricted to Exxon personnel and not distributed externally."

j. *Shell Group, Publicity Services, "Group Scenarios 1998-2020: TINA Above and Below," 1998*

These internal Shell documents predict lawsuits based on what their scientists knew. Scenarios evaluated in the documents anticipate changes in energy consumption, social cohesion, and a "series of violent storms" hitting the United States' east coast. "Following the storms," the authors continue, "a coalition of environmental NGOs brings a class-action suit against the US government and fossil-fuel companies on the grounds of neglecting what scientists (including their own) have been saying for years: that something must be done. A social reaction to the use of fossil fuels grows, and individuals become 'vigilante environmentalists' in the same way, a generation earlier, they had become fiercely anti-tobacco. Direct-action campaigns against companies escalate. Young consumers, especially, demand action …"

Fossil Fuel Industry Funds a Deception Campaign

a. *Joseph M. Carlson, Exxon Public Affairs "The Greenhouse Effect" (Aug. 3, 1988)*

This memo summarizes Exxon's internal knowledge of the issue and lays out what appears to be the default "Exxon position" at the time: to "emphasize the uncertainty in scientific conclusions regarding the potential enhanced greenhouse effect" and to "Resist the overstatement and sensationalization of potential greenhouse effect which could lead to the non economic development of non fossil fuel resources."

b. *Bill Brier, Edison Electric Institute, "Information Council for the Environment Test Market Ad Materials," May 2, 1991*

The first U.S. corporate climate denial campaign was started in 1991 by electric utilities and the Western Fuels Association, a coal lobby group. A campaign document explicitly states the goal to "Reposition global warming as theory (not fact)." The campaign had polling showing that vast majority of Americans believed climate change was a threat. They designed an ad campaign targeting "less educated males from large households" and "lower income women" as being pliable.

c. *1995 draft Global Climate Coalition primer for public distribution*: Discourages CO2 mitigation efforts and reviews alternate, contrarian theories for climate change

d. *D.J. Devlin, Exxon Biomedical Sciences, Inc., "Purported Impact of Climate Change on Human Health," Sep. 19, 1996*

Presented to an industry group, the Global Climate Coalition, by D.J. Devlin, a scientist from Exxon Biomedical Services, Inc., this presentation warns the "International attention focused on relationships among greenhouse gases, climate change, ecological stress and human health." Raising reports by the National Academy of Sciences, the IPCC, in medical journals and in the "popular press," Devlin offers a "minority view" that "Climate change is likely a marginal factor…. He outlines "potential next steps" including: "Identify scientific leaders with diverse views…encourage active participation in debate" and "Promote the concept of relative risk…Significance of climate impacts vs. other disease factors."

e. *Joe Walker, American Petroleum Institute, "Global Climate Science Communications Action Plan," Apr. 3, 1998*

The 1998 "Global Climate Science Communications Plan" from the American Petroleum Institute (API) was leaked that year and exposed by the *New York Times* with an article sub-headlined, "Draft Proposal Seeks to Depict Global Warming Theory as a Case of Bad Science."

The API plan was designed and developed by representatives from Exxon, Chevron and the Southern Company, an electric utility. The plan includes a multi-million dollar, multi-year budget to install "uncertainty" in the public policy arena. Target audiences are detailed including media, policy makers and specifically, science teachers. "Victory will be achieved when average citizens understand uncertainties in climate science…" Other corporate trade associations, think tanks and front groups involved with the plan included Americans for Tax Reform and the Advancement of Sound Science Coalition. "Potential Funding sources" were identified as API; Business Roundtable (BRT); Edison Electric Institute (EEI); Independent Petroleum Association of America (IPAA); and the National Mining Association (NMA); plus the members of all those organizations. "Potential fund allocators" were identified as the American Legislative Exchange Council (ALEC), Committee for a Constructive Tomorrow (CFACT), Competitive Enterprise Institute, Frontiers of Freedom and The George C. Marshall Institute.

f. *1997 Exxon grant to CEI, http://www.climatefiles.com/exxonmobil/1997-report-on-exxons-financial-contributions/*

A $95,000 grant in 1997 from Exxon to Competitive Enterprise Institute titled "Global Climate Change Program and other support" likely seeded the Cooler Heads Coalition, the longest running climate denial coalition, which described itself as an "informal and ad-hoc group focused on dispelling the myths of global warming…"

j. Cooler Heads Coalition Funding and other Exxon funding documents, https://docs.google.com/spreadsheets/d/1B4_Ly4aHvePqEboG5hc5vuSYxYKw8LtuD4SUbQ6oRwM/edit - gid=813567127

From 1997, for roughly all decade, Exxon wrote grants of over $11 million to organizations that joined the Cooler Heads Coalition. This included almost $3 million in grants to those organizations that were specifically earmarked for climate change in Exxon documents.

ExxonMobil funding to climate denial groups including Competitive Enterprise Institute, ALEC, Heartland Institute and George C. Marshall Institute grew between 2000 and 2004.

k. Justin Gillis and John Schwartz, The New York Times, "Deeper Ties to Corporate Cash for Doubtful Climate Researcher," Feb. 21, 2015 and M.G. Dyck, W. Soon, R.K. Baydock, D.R. Legates, S. Baliunas, T.F. Ball, and L.O. Hancock, Ecological Complexity, "Polar bears of western Hudson Bay and climate change ... ," Sep. 2007.

ExxonMobil and others funded denier scientist Willie Soon through 2010 and George Marshall Institute through 2011. Dr. Soon received over $1.2 million dollars from fossil fuel interests between 2001 and 2015. This includes $273,611 from American Petroleum Institute, $230,000 from Charles Koch Foundation, $335,106 from ExxonMobil, and $409,754 from Southern Company. An investigation revealed that Soon was showing donors peer reviewed articles he had authored as "deliverables" on their grants, while neglecting to report this financial support to the scientific journals.

While Fostering Public Denial of Climate Change, Fossil Fuel Companies Changed Practices to Adapt to or Take Advantage of Climatic Change

a. G.R. Gervasi, Esso Eastern Inc., "CO2 Emissions: Natuna Gas Project," Feb. 3, 1981 and http://www.climatefiles.com/exxonmobil/1983-natuna-gas-project-environmental-background-paper/

ExxonMobil in 2017 announced it would not pursue development of the large Natuna natural gas find in Borneo, Indonesia, for which it had signed a joint venture agreement back in 1980. The company publicly explained that developing the project would be "uneconomical." Exxon scientists designed a number of ways to "dispose" of the CO_2, but realized that it would be the largest point source of carbon on Earth. This realization was at least a decade ahead of any plausible international greenhouse gas regulatory regime.

b. *Greenhouse Effect: Shell Anticipates A Sea Chang*e, New York Times (Dec. 20, 1989), https://www.nytimes.com/1989/12/20/business/greenhouse-effect-shell-anticipates-a-sea-change.html.

   Shell raised its offshore drilling platforms because of rising seas.

c. Amy Lieberman and Susanne Rust, *Big Oil braced for global warming while it fought regulations*, Los Angeles Times (Dec. 31, 2015), http://graphics.latimes.com/oil-operations/

   Sea ice and Mackenzie drilling operations