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# An Inconvenient Trial: Using the Nuremberg Trials as a Mock Judicial Framework to Force Human-Caused Climate-Change Proponents to Plead and Prove Their Best Case with Proposed Remedies under the Burden of Proof of Their Choosing

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## ARTICLE

# AN INCONVENIENT TRIAL: USING THE NUREMBERG TRIALS AS A MOCK JUDICIAL FRAMEWORK TO FORCE HUMAN-CAUSED CLIMATE-CHANGE PROPONENTS TO PLEAD AND PROVE THEIR BEST CASE WITH PROPOSED REMEDIES UNDER THE BURDEN OF PROOF OF THEIR CHOOSING

*Tory L. Lucas*<sup>†</sup>

### I. INTRODUCTION

Do you believe in global warming? Global cooling? How about climate change? Notice that none of these questions asks about the causes of or solutions to climate change. They simply are generalized political slogans that loosely deal with changes in global temperatures. Perhaps it is better to be more precise by asking whether you believe in human-caused climate change. It appears as though the serious and complicated questions of climate change (whether global temperatures are rising or falling), what causes climate change, and what specific solutions will remedy climate change have been generalized and politicized. Many politicians postulate that the greatest threat facing humanity's existence is human-caused climate change (as opposed to lesser threats such as nuclear proliferation, biological or chemical weapons, terrorism, civil war, world war, famine, or genocide). On a daily basis, the media barrages an unsuspecting public with overflowing reams of articles dedicated to the issue of climate change.<sup>1</sup> But it is difficult to track

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1. See, e.g., Coral Davenport & Nick Wingfield, *Bill Gates Takes On Climate Change With Nudges and a Powerful Rolodex*, N.Y. TIMES (Dec. 8, 2015), <http://www.nytimes.com/2015/12/09/business/energy-environment/bill-gates-takes-on-climate-change-with-nudges-and-a-powerful-rolodex.html>; Jody Warrick & Chris Mooney, *196 countries approve historic climate agreement*, WASH. POST (Dec. 12, 2015), <https://www.washingtonpost.com/news/energy-environment/wp/2015/12/12/proposed-historic-climate-pact-nears-final-vote/>;

and fully comprehend all of the various claims and proposed solutions to climate change. For example, climate change as a theory—whether political or scientific—has morphed over time, evolving from fears over global cooling to global warming to simply the catch-all phrase climate change. It also is challenging to decipher the level of scientific confidence on specific claims and proposals as opposed to mere generalizations.

Even though the causes of and solutions to climate change are amorphous and complicated, the politicized rhetoric has been ratcheted up against anyone who questions “scientific consensus” on the issue. Anyone who expresses doubt about what causes climate change, what remedies will stop climate change, or in the existence of human-caused climate change is derisively deemed a “climate-change denier.” This derogatory term chills questioning of “settled science.” And the use of the term “denier” is not an accident. After World War II, the Allied Powers claimed that the leaders in Nazi Germany had engaged in serious and unspeakable crimes, including the systematic extermination of millions of Jewish people through the Holocaust. The Allies feared that history could mischaracterize these claims as mere propaganda by the war victors, enabling “Holocaust deniers” to change the historical record by claiming that the Holocaust never occurred. In response to the risk that history could mischaracterize atrocious crimes and unspeakable genocide, the Allies sought to use the judicial process to prove that the Nazis had engaged in crimes against humanity and to create an impenetrable record of the atrocities as a historical fact. To accomplish this monumental judicial task, the Allies created the International Military Tribunal that led to the famous Nuremberg Trials.<sup>2</sup> These trials were a huge success in bringing evil men (i.e., Nazi war criminals) to justice while ensuring that “Holocaust deniers” forever would be confronted with an impenetrable historical record.<sup>3</sup>

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Justin Gillis, *New Study Links Weather Extremes to Global Warming*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/28/science/new-study-links-weather-extremes-to-global-warming.html>.

2. Even though the judicial effort to prosecute Nazi war criminals expanded beyond the Nuremberg Trials, this Article uses the phrase “Nuremberg Trials” generally for ease of reference. For more information on the Nuremberg Trials, see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992). When I served as a visiting faculty member at Stetson University College of Law, my office contained an archive of the record of the Nuremberg Trials. Perhaps that experience was the deep-seeded inspiration for this Article.

3. The importance of the impenetrable historical record of the Holocaust created by the Nuremberg Trials was displayed in the case of *Irving v. Penguin Books, Ltd.*, 2000 WL 362478 (EWHC (QB) 2000). In that case, David Irving sued Deborah E. Lipstadt under a defamation theory for calling Irving a Holocaust denier in her book, *Denying the Holocaust: The Growing*

Given the complexity of global climate change and the heated politicization of the issue, the steady hand of the adversarial judicial process might aid the universal search for truth on climate change. In essence, climate-change proponents allege environmental crimes against humanity, which historically track in terms of international significance with the crimes against humanity at the heart of the Nuremberg Trials. This Article proposes the use of the judicial framework utilized in the Nuremberg Trials to seek truth and justice while building a historical record on claims of climate change. To carry out this industrious idea, this Article seeks to track the judicial process created for the Nuremberg Trials. A key difference is that this effort would utilize a mock judicial process without any tribunal enjoying actual legal authority or jurisdiction to enforce remedies.<sup>4</sup> The judicial procedures employed, however, will be fully transparent and entirely adversarial and include a charging complaint, answer, full discovery, a mock trial, a detailed written judgment, and an appeal.<sup>5</sup> All evidence will be

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*Assault on Trust and Memory* (1993). Lipstadt won. See Deborah Lipstadt, *Irving v. Penguin UK and Deborah Lipstadt: Building a Defense Strategy*, 27 *NOVA L. REV.* 243, 243 n.\* (2002) (recounting that the trial had “done for the new century what the Nuremberg tribunals or the Eichmann trial did for earlier generations,” that “history has had its day in court and scored a crushing victory,” and that Irving was found “to be a Holocaust denier, a falsifier of history, a racist, an antisemite, and a liar”). The judicial framework utilized in the Nuremberg Trials has stood the test of time by constructing an impenetrable historical record. That is why this Article proposes to adopt that judicial framework to put on trial the issue of global climate change.

4. An obvious criticism of this proposal is that if the judicial process is only mock and no court has authority to enforce remedies, then there is little motivation to expend resources to support this effort. If climate-change proponents are able to prove their case, but the court does not have the authority to enforce remedies, then you might ask why even bother with this proposal. These are valid points, but my main response is that a mock climate-change tribunal would use the adversarial judicial process to seek the truth on climate change by examining all climate-change claims, theories, evidence, testimony, witnesses, and proposed remedies in a single forum while creating an exhaustive, detailed record and international clearinghouse. As important, climate change will be removed from the political process, obscure government agencies, and various scientific journals and placed before the entire world to witness in the transparent, truth-seeking spotlight of a trial. This Article contends that if this proposal is successful, then more people will pay attention to and participate in the climate-change discussion.

5. See *U.S. ex rel. Burt v. State of N.J.*, 475 F.2d 234, 239 (3d Cir. 1973) (applauding “society’s interest in using the methods of the adversarial process to discover truth”); *Vance v. Rice*, 524 F. Supp. 1297, 1300 (S.D. Iowa 1981) (describing how “[s]eeing justice done is the ultimate goal of the judicial process” and that “[a] lawsuit is a search for the truth”); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521, 524 (D.D.C.), *aff’d*, 498 F.2d 725 (D.C. Cir. 1974) (explaining that “the truth can only emerge from full disclosure” and that facts “should be developed in an orderly fashion during adversary

discoverable and accessible in an international clearinghouse, and every testifying witness will be subject to the truth-seeking spotlight of cross-examination.<sup>6</sup> This Article contends that the best way to seek the truth behind claims of climate change is to force its proponents to plead and prove their best case on what specific conduct contributes to climate change, what impact that conduct has on the global climate, what remedies they seek, and what impact those remedies will have in resolving their claims. That is, climate-change proponents must prove specific claims of what precise conduct causes climate change and what precise remedies will undo climate change.

A key feature of this process will be to force climate-change proponents to proclaim openly their level of confidence in their theories by choosing the burden of proof for each contested claim and remedy. If climate-change proponents believe strongly in their case, then they undoubtedly will choose to be held to the high criminal standard of beyond a reasonable doubt. If proponents lack conviction in their theories, on the other hand, then they can ratchet down their burden of proof to clear and convincing evidence or even to the more-likely-than-not-preponderance-of-evidence standard. Finally, if climate-change proponents have little faith in their theories, they can choose to prove their claims by a mere scintilla of evidence. But I doubt that such trivial evidence would support such lofty claims or be worthy of a trial.

If the framework of seeking justice used in the Nuremberg Trials is utilized in the climate-change context, it will create a historical record of the highly politicized issue of climate change. Given the judicial process's expertise in seeking truth and creating a full and transparent record—traits uncommon in the political process—the issues swirling around climate change will be better understood, analyzed, and adjudged. Climate-change proponents and “climate-change deniers” alike readily should adopt this proposal. They should work together to carry out this Article's proposal. The world will be watching!<sup>7</sup>

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proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected”).

6. See *Bronston v. Rees*, 773 F.2d 742, 745 (6th Cir. 1985) (recognizing that “the heart of the adversarial process is the principle that each side's account of the facts must be held up to the light and scrutinized,” and that “[t]he very purpose of cross-examination is to accomplish this scrutiny, and to enable the jury to determine the truth”).

7. This Article has nothing to prove and carries no burden of proof on the issues of climate change. It simply seeks a trusted forum that is truth-exposing and justice-seeking. And I can think of no better process than the judicial one at collecting evidence, examining witnesses, getting to the truth, understanding facts, adjudging theories, and creating an impenetrable record. Conversely, I can think of no worse process than the political one to accomplish these goals.

## II. CLIMATE-CHANGE CLAIMS

A. *Climate-Change Proponents Issue Dire Warnings*

Climate-change proponents are sounding alarms of a planetary emergency in which human conduct—past, present, and future—threatens the existence of humanity. In the 2015 State of the Union Address, President Barack H. Obama asserted that human-caused climate change is the greatest threat facing the United States:

*[N]o challenge . . . poses a greater threat to future generations than climate change. . . . I know a lot of really good scientists at NASA,<sup>8</sup> and NOAA,<sup>9</sup> and at our major universities. The best scientists in the world are all telling us that [human] activities are changing the climate, and if we do not act forcefully, we'll continue to see rising oceans, longer, hotter heat waves, dangerous droughts and floods, and massive disruptions that can trigger greater migration, conflict, and hunger around the globe. The Pentagon says that climate change poses immediate risks to our national security.<sup>10</sup>*

As a Senator speaking on the Senate floor, current Secretary of State John F. Kerry declared that climate change “is as *dangerous as any of the sort of real crises* that we talk about . . . Syria, . . . Iran, and nuclear weapons and the

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8. NASA stands for the National Aeronautics and Space Administration, whose vision is to “reach for new heights and reveal the unknown for the benefit of humankind.” *About NASA*, NASA, <http://www.nasa.gov/about/index.html> (last visited Feb. 25, 2016).

9. NOAA stands for the National Oceanic and Atmospheric Administration, whose mission is “[t]o understand and predict changes in climate, weather, oceans and coasts; [t]o share that knowledge and information with others; and [t]o conserve and manage coastal and marine ecosystems and resources.” *About NOAA*, NOAA, <http://www.noaa.gov/our-mission-and-vision> (last visited Feb. 25, 2016).

10. *State of the Union 2015: Full transcript*, CNN POLITICS (Jan. 20, 2015), <http://www.cnn.com/2015/01/20/politics/state-of-the-union-2015-transcript-full-text/index.html> (emphasis added). Although the President argued that climate change is the biggest threat to America, he opened his speech with other threats such as the September 11, 2001, terrorist attacks on the United States, “two long and costly wars,” and “a vicious recession.” *Id.* More recently, President Obama promised more pain and suffering unless the world responds more aggressively on climate change: “entire nations will find themselves under severe, severe problems: More drought. More floods. Rising sea levels. Greater migration. More refugees. More scarcity. More conflict.” Halimah Abdullah & M. Alex Johnson, *Obama on Climate Change: Act Now or Condemn World to a Nightmare*, NBC NEWS (Sep. 1, 2015), <http://www.nbcnews.com/news/us-news/obama-climate-change-act-now-or-condemn-world-nightmare-n419071>.

possibility even of a war[,] . . . because it affects life itself on the planet.”<sup>11</sup> In his 2006 book about global warming, former Vice President Albert A. Gore wrote, “I have learned that, beyond death and taxes, there is at least one absolutely indisputable fact: Not only does human-caused global warming exist, but it is also *growing more and more dangerous*, and at a pace that has now made it a *planetary emergency*.”<sup>12</sup> Gore has predicted that “[t]he environmental challenge of our time—which, next to the threat of nuclear war, may be *the issue with the greatest impact on all time* to come—is more urgent than ever.”<sup>13</sup> Indeed, Gore exclaimed, “Global warming is no longer a distant threat; it’s as real, as clear and present an issue, with profound effects on people’s lives, as war and peace or recession and prosperity—and the effects are only just beginning to be felt.”<sup>14</sup>

If these politicians’ warnings over the past two-plus decades are not dire enough, a recent scientific journal decried that human-caused global

11. Kerry: ‘Climate Change’ As Much of a Threat as Iran’s Nukes, BREITBART (Aug. 3, 2012), <http://www.breitbart.com/video/2012/08/03/sen-john-kerry-climate-change-as-much-of-a-threat-as-irans-nukes/> (emphasis added). See also John Parnell, *Secretary of Hope: John Kerry on climate change*, CLIMATE HOME, <http://www.climatechangenews.com/2012/12/17/secretary-of-hope-john-kerry-on-climate-change/> (last updated Dec. 18, 2012, 1:35 AM). Kerry is emphatic that climate-change science “is unequivocal, and those who refuse to believe it are simply burying their heads in the sand,” going so far as to ridicule his opponents by exclaiming that there is no “time for a meeting anywhere of the Flat Earth Society.” Brian Hughes, *John Kerry calls climate change deniers members of ‘Flat Earth Society,’* WASH. EXAM’R (Feb. 16, 2014), <http://www.washingtonexaminer.com/john-kerry-calls-climate-change-deniers-members-of-flat-earth-society/article/2544106>. Kerry further proclaimed, “We should not allow a tiny minority of shoddy scientists and science and extreme ideologues to compete with scientific facts.” *Id.* Former Secretary of State Hillary Clinton agrees that climate-change problems are “the most consequential, urgent, sweeping collection of challenges we face, . . . [n]o matter what deniers say.” Alex Seitz-Wald, *Hillary Clinton calls out climate change deniers*, MSNBC (Sep. 9, 2014), <http://www.msnbc.com/msnbc/hillary-clinton-calls-out-climate-deniers>.

12. AL GORE, *AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT* 8 (2006) (emphasis added). By the way, I did not select the title of this Article because I believe that a mock climate-change trial in the Nuremberg tradition will be inconvenient. Instead, I simply adapted the title of Al Gore’s popular book on climate change to create a catchy title.

13. AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT*, xi (1992) (emphasis added).

14. *Id.* at xiv. Gore did not throw up a white flag of surrender; instead, he tried to harness the human spirit by explaining that human beings are the only species “with the self-knowledge and the capacity to protect its own future.” *Id.* at xii. Because the climate-change “crisis was made by our human carelessness,” Gore asserted that “it can and must be solved by our human initiative.” *Id.* at xxiv. This worldview seems to express the belief that humans control the global thermostat.

warming, pollution, and deforestation, among other things, will cause mass extinction:

[M]odern extinction rates are exceptionally high, . . . are increasing, and . . . suggest a *mass extinction [is] under way*—the sixth of its kind in Earth’s 4.5 billion years of history. . . . The evidence is incontrovertible that recent extinction rates are unprecedented in human history and highly unusual in Earth’s history. Our analysis emphasizes that our global society has started to destroy species of other organisms at an accelerating rate, initiating a mass extinction episode unparalleled for 65 million years. If the currently elevated extinction pace is allowed to continue, humans will soon (in as little as three human lifetimes) be deprived of many biodiversity benefits. On human time scales, this loss would be effectively permanent because in the aftermath of past mass extinctions, the living world took hundreds of thousands to millions of years to rediversify. *Avoiding a true sixth mass extinction will require rapid, greatly intensified efforts to conserve already threatened species and to alleviate pressures on their populations—notably habitat loss, overexploitation for economic gain, and climate change. All of these are related to human population size and growth, which increases consumption (especially among the rich), and economic inequity. However, the window of opportunity is rapidly closing.*<sup>15</sup>

Not to be trivial, but it would be nearly impossible to discuss the damage wrought by climate change without mentioning polar bears, whose photos and plight seemingly dominate the coverage of climate change.<sup>16</sup> In 2008, polar bears were the first species listed as threatened under the Endangered Species Act due to global warming.<sup>17</sup> A recent report from the Department of

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15. Gerardo Ceballos et al., *Accelerated modern human-induced species losses: Entering the sixth mass extinction*, SCI. ADVANCES, Vol. 1, no. 5 (2015) (emphasis added).

16. See, e.g., James Gorman, *For Polar Bears, a Climate Change Twist*, N.Y. TIMES (Sep. 22, 2014), <http://www.nytimes.com/2014/09/23/science/for-polar-bears-a-climate-change-twist.html>; *The Consequences of Global Warming On Wildlife*, NAT. RESOURCES DEF. COUNS., <http://www.nrdc.org/globalwarming/fcons/fcons3.asp> (last visited Feb. 25, 2016); G. TYLER MILLER JR., *LIVING IN THE ENVIRONMENT: PRINCIPLES, CONNECTIONS, AND SOLUTIONS* (11th ed. 2000) (using a photo of a huge polar bear to grace the entire front cover of this environmental textbook).

17. Felicity Barringer, *Polar Bear Is Made a Protected Species*, N.Y. TIMES (May 15, 2008), <http://www.nytimes.com/2008/05/15/us/15polar.html>; *Environmental Conservation Online System*, U.S. FISH & WILDLIFE SERV., [http://ecos.fws.gov/tess\\_public/reports/ad-hoc-species-report?kingdom=V&kingdom=I&status=](http://ecos.fws.gov/tess_public/reports/ad-hoc-species-report?kingdom=V&kingdom=I&status=)



the Interior shared the U.S. Fish and Wildlife Service's recovery plan for the polar bear. This scientific report paints a bleak future for polar-bear populations, concluding that human-caused greenhouse gas emissions cause global warming that in turn reduces the polar bear's summer sea ice habitat which will lead to population decline.<sup>18</sup> These scientists contend that by about 2025, one-third of the world's polar bears will be in imminent danger.<sup>19</sup> Alaska's Director for the Center for Biological Diversity exclaimed, "Polar bears are in big trouble. . . . [I]n the long run, the only way to save polar bears in the Arctic is to reduce greenhouse gas emissions."<sup>20</sup>

These warnings paint a bleak and desperate picture of humanity's ability to survive in an industrial world. Given these high stakes, it is critical that climate-change proponents clearly articulate and prove every claim as to the causes of and solutions to climate change, especially with humankind's existence hanging in the balance. But climate change has been relegated to scientific journals and closed sessions among politicians. This Article proposes that the climate-change debate step into the glaring, truth-seeking sunlight of the adversarial judicial process.<sup>21</sup> Climate-change proponents must prove their best case under the burden of proof of their choosing before a mock climate-change tribunal with the entire world watching.

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18. Endangered and Threatened Wildlife and Plants; Notice of Availability of Draft Polar Bear Conservation Management Plan, 80 Fed. Reg. 38,458, 38,458-59 (Jul. 6, 2015).

19. *Polar bears could be in danger by 2025 due to global warming: study*, THE ASSOCIATED PRESS (Jul. 3, 2015, 9:16 AM), <http://www.nydailynews.com/life-style/polar-bears-die-2025-due-global-warming-stu-article-1.2280338>.

20. *Id.*

21. "But the path of the just is as the shining light, that shineth more and more unto the perfect day." *Proverbs* 4:18 (King James); see also Tory L. Lucas, *To Catch a Criminal, To Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct*, 89 NEB. L. REV. 219 (2010) (utilizing sunlight language).

B. *Basic Theory of Climate Change*<sup>22</sup>

The basic thrust behind the theory of human-caused climate change is that the Earth's atmosphere is thin and we are thickening it.<sup>23</sup> As the Sun's energy enters our atmosphere in the form of light waves, it heats our planet.<sup>24</sup> Although some heat radiates into space in the form of infrared waves, some of this infrared radiation gets naturally trapped in our atmosphere.<sup>25</sup> The trapped radiation from human-caused carbon dioxide and other greenhouse gas emissions thickens the thin layer of our atmosphere.<sup>26</sup> The thicker atmosphere traps more infrared heat because the infrared radiation can no longer escape into space.<sup>27</sup>

Climate-change proponents predict that because of this trapped heat, the average annual global temperature will rise and our oceans will warm.<sup>28</sup> Climate-change proponents also assert that 2,500 of the world's leading climate experts have reached consensus on climate change.<sup>29</sup> Even though claims of consensus seem to lack precision on what exactly causes climate change and what will remedy climate change, it appears that consensus has developed around the theory that from 1880 to 2012, the global average annual temperature has increased by about 1.5 degrees Fahrenheit.<sup>30</sup> It is further claimed that by the end of this century, human consumption of fossil fuels will lead to extreme levels of carbon dioxide in our atmosphere not seen in the last 65 million years, with the last time being the "toasty days of the dinosaurs."<sup>31</sup> To combat this warming, the goal seems to be to reduce

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22. It is important to note what is obvious—I am not a climatologist or scientist. It is equally important to note again that this Article carries no burden to prove anything when it comes to climate change. Instead, this Article simply invites those who sound the climate-change alarm to use a mock judicial process to prove their cataclysmic claims. In any event, it seems prudent to explain the basic theory of climate change at this point.

23. GORE, *supra* note 12, at 24-25.

24. *Id.* at 26.

25. *Id.*

26. *Id.* at 27, 67.

27. *Id.* at 27.

28. *See id.*

29. MILLER, *supra* note 16, at 510.

30. *See Climate Change And President Obama's Action Plan*, <https://www.whitehouse.gov/climate-change> (last visited Feb. 25, 2016) [hereinafter *Obama's Action Plan*].

31. BRUCE E. JOHANSEN, *THE GLOBAL WARMING COMBAT MANUAL: SOLUTIONS FOR A SUSTAINABLE WORLD* xiii (2008).

greenhouse gas emissions by 80% by 2050.<sup>32</sup> The only other alternative seems to be global catastrophe and mass human suffering.<sup>33</sup>

### C. *Climate-Change Proponents Construct Cataclysmic Claims*<sup>34</sup>

We have been told for decades that if we do not act forcefully to combat global climate change, then the fallout will be cataclysmic. The world's people will endure or die from hotter temperatures, massive heat waves, terrible wildfires, powerful storms, hurricanes, rising seas, mass flooding, severe drought, famine, desperate poverty, new diseases, and the spread of malaria.<sup>35</sup>

32. Jeffery Thaler, *Fiddling as the World Floods and Burns: How Climate Change Urgently Requires a Paradigm Shift in the Permitting of Renewable Energy Projects*, 42 ENVTL. L. 1101, 1104-05 (2012). In a September 2015 article in *The Wall Street Journal*, Robert Bryce, a senior fellow at the Manhattan Institute, opined that the "climate-change agenda . . . to cut carbon-dioxide emissions by 80% by 2050" will lower the standard of living for Americans. Robert Bryce, *Op-Ed., How to Lower U.S. Living Standards*, WALL ST. J., Sept. 22, 2015, at A15. Bryce's argument depended on correlating current carbon emissions with standards of living. Bryce explained that "the world per capita average for carbon-dioxide emissions is 4.51 tons a year," the "2012 per capita carbon dioxide emissions in the U.S. totaled 16.15 tons," California residents emit "9.42 tons a year," North Koreans emit "1.83 tons of carbon dioxide," and Mexicans "emit 3.72 tons" per year. *Id.* Bryce then equated carbon emissions to standards of living based on per capita gross domestic product (GDP) statistics, revealing that North Koreans have a per capita GDP of \$1,800 per year, Mexico's per capita GDP is \$10,400 per year, and Americans enjoy a staggering per capita GDP of \$54,600. *Id.* If Americans cut their carbon emissions by 80% by 2050, Bryce claimed, then we would reduce our per capita carbon output per year from 16.15 tons to 3.23 tons, which would be less than Mexico's output. *Id.* Similarly, if Californians met the 80% reduction, they would go from 9.42 tons per year to 1.88 tons, roughly equivalent of the output of North Koreans. *Id.* In addition to arguing that carbon-cutting will drastically reduce the standard of living enjoyed by Americans, Bryce also argued that America will be required to spend more than \$5 trillion to reach its carbon-cutting goal. *Id.*

33. William C. Tucker, *The Big Lie: Is Climate Change Denial a Crime against Humanity?*, 7 INTERDISC. J. HUM. RTS. L. 91, 92-93 (2012-2013).

34. It is worth realizing that the greater the amount of fear that is peddled by climate-change proponents, the more likely that the cataclysmic claims will fall on deaf ears: "More than a decade's worth of research suggests that fear-based appeals about climate change inspire denial, fatalism and polarization." Ted Nordhaus & Michael Shellenberger, *Global Warming Scare Tactics*, N.Y. TIMES (Apr. 8, 2014), [http://www.nytimes.com/2014/04/09/opinion/global-warming-scare-tactics.html?\\_r=0](http://www.nytimes.com/2014/04/09/opinion/global-warming-scare-tactics.html?_r=0). "While the urgency that motivates exaggerated claims is understandable, turning down the rhetoric and embracing solutions like nuclear energy will better serve efforts to slow global warming." *Id.*

35. Remarks by the President in State of the Union Address, WHITE HOUSE (Jan. 20, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [hereinafter *State of the Union*]; Gillis, *supra* note 1 (claiming that

Wildlife are in jeopardy, and extinction rates will rise along with the temperature.<sup>36</sup> Coral reefs will die, and freshwater shortages will negatively impact food production.<sup>37</sup> Sea ice and glaciers will melt.<sup>38</sup> We can expect mass human migration of biblical proportions, with claims that 50 to 150 million people will be considered environmental refugees by 2050, all victims of human-caused climate change.<sup>39</sup> And the worst apparently is not some distant possibility; instead, climate-change proponents contend that human-caused climate change is already causing human misery. Climate-change proponents claim that human conduct caused Superstorm Sandy, the Nigerian drought that led to the terrorist group Boko Haram, and the drought and crop failures that led to higher food prices that fueled the unrest in Syria that led to civil war.<sup>40</sup> To boil down the claims, humans cause

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“moderate global warming . . . has quadrupled the frequency of certain heat extremes . . . and . . . failure to bring greenhouse gases under control could eventually lead to a 62-fold increase in such heat blasts”); *Obama’s Action Plan*, *supra* note 30 (“We can choose to believe that superstorm Sandy, and the most severe drought in decades, and the worst wildfires some states have ever seen were all just a freak coincidence. Or we can choose to believe in the overwhelming judgement of science—and act before it is too late.”); STEPHANE HALLEGATTE ET AL., *SHOCK WAVES: MANAGING THE IMPACTS OF CLIMATE CHANGE ON POVERTY* xi, 2, 5, 119, 179, 191 (World Bank Group 2016) (estimating that “climate change could force more than 100 million people into extreme poverty by 2030” and that 100 million people “could be at risk of malaria . . . because of climate change . . .”).

36. Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ELR 10,230, 10,234, Vol. 39 Issue 3 (2009).

37. GORE, *supra* note 12, at 164; SMART SOLUTIONS TO CLIMATE CHANGE COMPARING COSTS AND BENEFITS 1 (Bjørn Lomberg ed. 2010).

38. GORE, *supra* note 12, at 190-92.

39. MILLER, *supra* note 16, at 514.

40. See, e.g., *State of the Union*, *supra* note 35. Additionally, former Democratic presidential candidate Martin O’Malley argued that climate change and the rise of ISIS are related:

One of the things that preceded the failure of the nation state of Syria and the rise of ISIS was the effect of climate change and the mega-drought that affected that nation, wiped out farmers, drove people to cities, created a humanitarian crisis that created the symptoms—or rather, the conditions—of extreme poverty that has led now to the rise of ISIS and this extreme violence.

Sahil Kapur, *Martin O’Malley Clashes With GOP Over Link Between Climate Change, Islamic State*, BLOOMBERG POL. (July 22, 2015), <http://www.bloomberg.com/politics/articles/2015-07-22/o-malley-clashes-with-republicans-over-link-between-climate-change-and-isis>.

Democratic presidential candidate Bernie Sanders agrees, stating that it is absolutely a fact that “climate change is directly related to the rise of global terrorism.” Nick Gass, *Sanders doubles down: ‘Climate change is directly related to the rise of global terrorism’*, POLITICO (Nov. 14, 2015), <http://www.politico.com/blogs/live-from-des-moines/2015/11/bernie-sanders-climate-change-terrorism-215874#ixzz3rmZkGII9>. Secretary Kerry also ties climate change to

cataclysmic global climate change that causes mass human suffering and death, but humans have the ability to control global temperatures and end climate-change suffering if we act now.

Notably, claims of climate change are nothing new. Nearly one hundred years ago, the *Washington Post* reported on global warming:

The Arctic [O]cean is warming up, icebergs are growing scarcer and in some places the seals are finding the water too hot. . . . Reports . . . point to a radical change in climatic conditions and hitherto unheard-of temperatures in the Arctic zone. . . . Great masses of ice have been replaced by moraines of earth and stones, . . . while at many points well known glaciers have entirely disappeared.<sup>41</sup>

Forty years ago—and a half-century after the *Washington Post* sounded the global-warming alarm—*Time* magazine foretold of global cooling and a pending Ice Age.<sup>42</sup> The article reported that “a growing number of scientists are beginning to suspect that many seemingly contradictory meteorological fluctuations are actually part of a global climatic upheaval” that reveals how global atmospheric temperatures have “been growing gradually cooler for the past three decades” with “no indication of reversing.”<sup>43</sup> Reporting that climatologists “are becoming increasingly apprehensive,” the article dramatically predicted that “the weather aberrations . . . may be the *harbinger*

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terrorism: “It’s not a coincidence that immediately prior to the civil war in Syria, the country experienced its worst draught on record. As many as 1.5 million people migrated from Syria’s farms to its cities, intensifying the political unrest that was just beginning to roil and boil in the region.” Niraj Chokshi, *Prince Charles blames the Syrian war on climate change. He has a point*. WASH. POST (Nov. 24, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/24/prince-charles-blames-the-syrian-war-on-climate-change-he-has-a-point/>. Finally, Prince Charles has joined the chorus and chimed in on the belief that human-caused climate change causes global terrorism. *Id.*

41. *Arctic Ocean Getting Warm; Seals Vanish And Icebergs Melt*, WASH. POST, Nov. 2, 1922. The *Washington Post*’s story ran after an article was published in the *Monthly Weather Review* laying out the climate-change claims in further detail. See George Nicolas Ifft, *The Changing Arctic*, MONTHLY WEATHER REV. (Nov. 1, 1922) (stating that an October 10, 1922, report was submitted by the American consul at Bergen, Norway, to the U.S. State Department that claimed that the eastern Arctic Ocean “seems to be warming up,” various reports “point to a radical change in climatic conditions, and hitherto unheard-of high temperatures in that part of the [E]arth’s surface,” and in connection with this claim of a warming Arctic Ocean, the report also claimed that a sea captain with fifty-four years of sailing experience explained that the eastern Arctic region “has steadily gotten warmer, and that to-day the Arctic of that region is not recognizable as the same region of 1865 to 1917”).

42. *Another Ice Age?*, TIME, June 24, 1974, at 86.

43. *Id.*

of another ice age.”<sup>44</sup> Indeed, the article estimated that “[s]ince the 1940s the mean global temperature has dropped about 2.7° F.”<sup>45</sup> One theory posited that human beings “may be somewhat responsible for the cooling trend” by causing various particles to be “released into the atmosphere as a result of farming and fuel burning” which may “block[] more and more sunlight from reaching and heating the surface of the [E]arth.”<sup>46</sup> The article ominously concluded:

Whatever the cause of the cooling trend, its effects could be extremely serious, if not catastrophic. Scientists figure that only a 1% decrease in the amount of sunlight hitting the [E]arth’s surface could tip the climatic balance, and *cool the planet enough to send it sliding down the road to another ice age within only a few hundred years.*<sup>47</sup>

One alarmed climatologist predicted, “I don’t believe that the world’s present population is sustainable if there are more than three years like 1972 in a row.”<sup>48</sup> Indeed, many sources reported that humans were sealing their own doom by causing global cooling and squealed about an upcoming ice age.<sup>49</sup>

44. *Id.* (emphasis added).

45. *Id.*

46. *Id.* Another theory explained that global cooling was being caused by a Sunspot Cycle, which explains that the energy that the Earth’s surface receives from the Sun is not constant because the amount of solar radiation depends on the Earth’s tilt and distance from the Sun. *Id.*

47. *Id.* (emphasis added).

48. *Id.* Interestingly, Time reported that “in the past 700,000 years, there have been at least seven major episodes of glaciers spreading over much of the planet” and that global “[t]emperatures have been as high as they are now only about 5% of the time.” *Id.*

49. See, e.g., Walter Sullivan, *Scientists Ask Why World Climate Is Changing; Major Cooling May Be Ahead*, N.Y. TIMES, May 21, 1975 (reporting that the global climate has been the warmest in 5,000 to 7,000 years, that the climate in the Northern Hemisphere “has been getting cooler since about 1950,” and that specialists claim “that a new ice age is on the way”); Betty Friedan, *The Coming Ice Age: A True Scientific Detective Story*, HARPER’S MAG., Sept. 1, 1958, at 39 (reporting that “the world is now heading into another Ice Age” and that “rising of the ocean waters may flood most of our port cities within the foreseeable future,” which “will be followed by the growth of a vast glacier which may eventually cover much of Europe and North America”); Peter Gwynne, *The Cooling World*, NEWSWEEK (Apr. 28, 1975) (stating that a survey “reveal[ed] a drop of half a degree in average ground temperatures in the Northern Hemisphere between 1945 and 1968 . . . [a]nd a study . . . by two NOAA scientists notes that the amount of sunshine reaching the ground in the continental U.S. diminished by 1.3 per cent between 1964 and 1972”); John H. Douglas, *Climate Change: Chilling Possibilities*, SCI. NEWS, vol. 107 at 139 (Mar. 1, 1975) (claiming that “the cooling since 1940 has been large enough

Recently, however, the focal point is global warming, often couched in the generalized term of climate change.<sup>50</sup> The American Meteorological Society issued *The State of the Climate in 2014*, which is the 25th annual edition of this peer-reviewed series. The paper reported that in 2014 the Earth's changing climate continued its warming trend along with "rising land and ocean temperature, sea levels and greenhouse gases," and all of these set new records.<sup>51</sup>

#### D. Claimed Causes of and Proposed Solutions to Climate Change

If human activity produces carbon dioxide and greenhouse gas emissions that risk the survival of humanity, then it is fair to ask what precise human activity must be eliminated or regulated. Although it is not easy to predict precisely who will be allowed to do what in the future under potential climate-change regulations, there are some generally reported causes of global climate change. The burning of fossil fuels like coal, oil, and gasoline are the main culprits.<sup>52</sup> To that end, using any of these energy sources to produce electricity, heat or cool homes or offices, power automobiles, or enable factories to operate must be curtailed.<sup>53</sup> It appears that the entirety of the post-World War II economic expansion caused global warming.<sup>54</sup> Industries such as aviation, shipping, and farming cause climate change.<sup>55</sup> Landfills, wastewater treatment operations, and livestock all contribute to a warming planet.<sup>56</sup> Even the number of humans who inhabit our planet is cause for concern.<sup>57</sup> When read generally, it appears that just about everyone and everything contributes to the climate-change problem.

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and consistent enough that it will not soon be reversed, and we are unlikely to quickly regain the 'very extraordinary period of warmth' that preceded it").

50. See *State of the Union*, *supra* note 35; GORE, *supra* note 12, at 10.

51. See *International report confirms: 2014 was Earth's warmest year on record*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (July 16, 2015), <http://www.noaanews.noaa.gov/stories2015/071615-international-report-confirms-2014-was-earths-warmest-year-on-record.html>; *State of the Climate in 2014*, AM. METEOROLOGICAL SOC'Y (July 2015), <http://ametsoc.org/SOC-2014.pdf>.

52. Steven E. Koonin, *Climate Science Is Not Settled*, WALL ST. J. (Sep. 19, 2014), <http://www.wsj.com/articles/climate-science-is-not-settled-1411143565>.

53. Steven Ferrey, *Why Electricity Matters, Developing Nations Matter, And Asia Matters Most Of All*, 15 N.Y.U. ENVTL L.J. 113, 122-23 (2007).

54. See GORE, *supra* note 12, at 38.

55. JOHANSEN, *supra* note 31, at 33, 39, 61-62.

56. GORE, *supra* note 12, at 28.

57. Ernest Callenbach, *Values*, in *ECOLOGICAL LITERACY: EDUCATING OUR CHILDREN FOR A SUSTAINABLE WORLD* 48 (Michael K. Stone & Zenobia Barlow eds., 2005).

There are various proposed solutions to climate change. The most pressing is to ban the burning of fossil fuels, particularly coal.<sup>58</sup> Energy of the future will no longer be powered by fossil fuels such as coal, oil, or gasoline; instead, humanity's survival will depend on energy-efficient living and renewable energy resources such as wind, solar, geothermal, hydroelectric, and perhaps biofuels and nuclear.<sup>59</sup> Another proposed solution is to reduce deforestation and/or increase reforestation.<sup>60</sup> Sustainable agriculture is touted as another way to combat climate change.<sup>61</sup> Some claim that slowing global population growth will fix the climate crisis, and solutions in this area might depend on the distribution of more condoms, increased access to abortions, or even lower fertility rates.<sup>62</sup> Many deem automobiles as a root problem, arguing that we must redesign our cities to eliminate them.<sup>63</sup> In their place, bicycles are an option; even working from home might help.<sup>64</sup> Some even claim that fat people contribute to climate change, and America is often cited as a fat nation with one-third of Americans weighing in as obese.<sup>65</sup> To climate-change proponents, fat people require more energy from fossil fuels to transport them, make their food, eliminate their waste, and dispose of the waste from all of the livestock that feed them.<sup>66</sup> We are told that even a ten percent decrease in the obesity rate could decrease carbon dioxide emissions by 0.7%.<sup>67</sup> Some even propose to do away with animal

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58. See generally JOHANSEN, *supra* note 31, at xi-xii; MILLER, *supra* note 16, at 516.

59. See Callenbach, *supra* note 57, at 26-27; Ferrey, *supra* note 53, at 123.

60. Steven Ferrey, *The Failure of International Global Warming Regulation to Promote Needed Renewable Energy*, 39 B.C. ENVTL. AFF. L. REV. 67, 100 (2010); Johansen, *supra* note 31, at 121-22.

61. USDA, SCIENTIFIC REPORT OF THE 2015 DIETARY GUIDELINES ADVISORY COMMITTEE 375-76, <http://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf> (stating that "global production of food is responsible for 80 percent of deforestation, more than 70 percent of fresh water use, and up to 30 percent of human-generated greenhouse gas (GHG) emissions").

62. See BRIAN SUSSMAN, CLIMATEGATE: A VETERAN METEOROLOGIST EXPOSES THE GLOBAL WARMING SCAM 163 (2010); *One Planet, How Many People? A Review of Earth's Carrying Capacity*, U.N. ENVIRONMENTAL PROGRAMME at 3, [https://na.unep.net/geas/archive/pdfs/geas\\_jun\\_12\\_carrying\\_capacity.pdf](https://na.unep.net/geas/archive/pdfs/geas_jun_12_carrying_capacity.pdf) (stating that "the majority [of sixty-five different population-study] estimates put the Earth's limit at or below 8 billion people, a number that we will exceed in about 15 years") (emphasis in original).

63. JOHANSEN, *supra* note 31, at 1.

64. See *id.* at 22-23.

65. J. Squalli, *Is obesity associated with global warming?*, PUBLIC HEALTH, Vol. 128 Issue 12 at 1087 (2014).

66. *Id.*

67. *Id.* at 1091.



livestock and move to diets based on insects.<sup>68</sup> When it comes to regulating human conduct to combat global climate change, there seem to be as many proposed solutions as there are proponents and problem-solvers.

Despite the extensive focus on how to mandate change in human conduct, technology might present some compelling and fascinating tools to combat climate change.<sup>69</sup> And science fiction has nothing when it comes to ideas on how technology can solve the climate-change crisis. One idea is to fertilize our oceans with iron, which would stimulate the growth of marine algae that would remove carbon dioxide from the atmosphere.<sup>70</sup> Another idea is to use a space shade by unfurling giant, foil-surfaced sun mirrors in space to reduce the solar input to our atmosphere.<sup>71</sup> Along those lines, solar-radiation management could include injecting sunlight-reflecting sulfate particles into the stratosphere to help cool our atmosphere (apparently, this is what happens naturally when volcanoes erupt).<sup>72</sup> Another idea is to employ marine-cloud whitening by using fine mists of sea water to form a sea-salt aerosol that will help cool our planet.<sup>73</sup> Some claim that we can capture carbon and bury it in the ground; a similar idea is to capture carbon and bury it in sea-based sinks, a process referred to as ocean sequestration of carbon.<sup>74</sup> An idea from another world—literally—would be to employ moon dust (i.e., we would mine dust from the moon) to create huge dust storms that would shade our planet from sunlight.<sup>75</sup> Finally, technological advancements might include the creation and production of various polymers that simply absorb

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68. See Sarah van Broekhoven et al., *Growth performance and feed conversion efficiency of three edible mealworm species (Coleoptera: Tenebrionidae) on diets composed of organic by-products*, J. INSECT PHYS., Vol. 73 at 2 (2015).

69. One interesting use of technology is Sir Richard Branson's offer of \$25,000,000 in the Virgin Earth Challenge to incentivize "scalable and sustainable ways of removing greenhouse gases from the atmosphere." *The Prize*, <http://www.virginearth.com/the-prize/> (last visited Dec. 21, 2015); see also Joe Nocera, *Chemo for the Planet*, N.Y. TIMES (May 19, 2015), [http://www.nytimes.com/2015/05/19/opinion/joe-nocera-chemo-for-the-planet.html?\\_r=0](http://www.nytimes.com/2015/05/19/opinion/joe-nocera-chemo-for-the-planet.html?_r=0) (advocating "[t]he deliberate use of technology to manipulate the environment" through geoengineering); Davenport & Wingfield, *supra* note 1 (noting that Bill Gates has "prodded governments to increase spending on research and development of clean technologies" and has already committed to invest \$1 billion in clean-energy start-ups).

70. MILLER, *supra* note 16, at 516.

71. *Id.* at 517.

72. *Id.*

73. SMART SOLUTIONS TO CLIMATE CHANGE, *supra* note 37, at 16-17.

74. See Nocera, *supra* note 69; JOHANSEN, *supra* note 31, at 170.

75. JOHANSEN, *supra* note 31, at 167.

carbon dioxide or bioengineered organisms that could feed on carbon dioxide.<sup>76</sup>

Because there are many potential causes of and solutions to climate change, the judicial process would separate the valid causes and solutions from the invalid causes and solutions. It also would allow all viewpoints on climate change to participate fully. Finally, the judicial process would create a clearinghouse of all evidence and testimony relating to the issue of climate change.

#### *E. Dissenters Voice Concern over Climate Science and Proposed Solutions*

Even though a very strong chorus harmonizes that climate science is settled, there are pockets of scientists who do not fall in line with mainstream climate-change dogma.<sup>77</sup> There reportedly are some 400 scientists from twenty nations who object to the generalized assertion of scientific consensus on the amorphous issue of climate change.<sup>78</sup> Many of these scientists allege that bad science is driving the climate-change agenda, contending that the collection methods for global temperatures over the past one hundred years have led to faulty data which has distorted various climate-change models leading to inaccurate projections.<sup>79</sup> Similarly, some claim that the computer

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76. *Id.* at 174, 176-77.

77. See Koonin, *supra* note 52 (arguing that the popular claim that climate science is settled “is misguided,” has “distorted our public and policy debates on issues related to energy, greenhouse-gas emissions and the environment,” and “has inhibited the scientific and policy discussions that we need to have about our climate future”).

78. RALPH B. ALEXANDER, GLOBAL WARMING FALSE ALARM: THE BAD SCIENCE BEHIND THE UNITED NATIONS’ ASSERTION THAT MAN-MADE CO<sub>2</sub> CAUSES GLOBAL WARMING 3 (2009).

79. *Id.* at 11. The journal *Science* recently published an online paper to dispute claims that there has been a hiatus in global warming over the past fifteen years. Thomas R. Karl et al., *Possible artifacts of data biases in the recent global surface warming hiatus*, *SCIENCE* (June 4, 2015); *Science publishes new NOAA analysis: Data show no recent slowdown in global warming*, NOAA (June 4, 2015), <http://www.noaanews.noaa.gov/stories2015/noaa-analysis-journal-science-no-slowdown-in-global-warming-in-recent-years.html>; Justin Gillis, *Global Warming ‘Hiatus’ Challenged by NOAA Research*, N.Y. TIMES (June 4, 2015), [http://www.nytimes.com/2015/06/05/science/noaa-research-presents-evidence-against-a-global-warming-hiatus.html?\\_r=0](http://www.nytimes.com/2015/06/05/science/noaa-research-presents-evidence-against-a-global-warming-hiatus.html?_r=0). This paper admitted that the evidence of historical global temperatures has not been reliable, but went on to explain how NOAA has developed a new way of adjusting historical data. Karl et al., *supra*. Because Earth’s oceans cover seventy percent of the surface of the planet, the temperature of the oceans is critical data in determining global temperatures. Gillis, *supra*. Until the mid-20th century, ocean temperatures were measured by various sailors scooping buckets of seawater and measuring the water’s temperature in the bucket. *Id.* After the 1970s, buoys were used to measure water temperature. *Science publishes new NOAA analysis, supra*. Based on the adjusted data, NOAA contends that the world has

models that predict catastrophic climate change are so complex that they need more study and testing.<sup>80</sup> Others claim that climate change has become so political that scientific discovery and discussion are being thwarted.<sup>81</sup> Some scientists point out that human activity accounts for only 2% of carbon and greenhouse gas emissions, while the overwhelming 98% of such emissions are naturally occurring.<sup>82</sup> To that end, some scientists ask whether climate change is simply natural.<sup>83</sup> Another way to state this question is to ask if we implement every promoted regulation on human conduct, will it even matter if the natural causes of global warming end in the same result? Is human conduct less significant than we might believe when it comes to impacting the global temperature?<sup>84</sup>

Some scientists claim that climate-change proponents only seek evidence to support their theories while dismissing evidence that does not fit their political narrative.<sup>85</sup> For example, there is a claim that current climate consensus on global warming ignores the 400-year Medieval Warm Period that the Vikings endured from 900 to 1300 A.D. and the Little Ice Age that lasted from the 14th century to the late 19th century.<sup>86</sup> Many scientists do not necessarily doubt the existence of human-caused climate change, but simply ask that science be given more time to study the issue with better data and

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warmed 1.65 degrees Fahrenheit from 1880 until today. Gillis, *supra*. Curiously, the articles cited do not list global temperatures before 1880.

80. ALEXANDER, *supra* note 78, at 73, 122.

81. Koonin, *supra* note 52.

82. SUSSMAN, *supra* note 62, at 69-70.

83. Koonin argues that asking whether the climate is changing is not a crucial scientific question for policy purposes, because it is “settled” that the “climate has always changed and always will.” Koonin, *supra* note 52. He contends that likewise asking whether human conduct influences the climate is also not a crucial question, because it “is no hoax” and there “is little doubt” that greenhouse gas emissions “are influencing the climate.” *Id.* To Koonin, “the crucial, unsettled scientific question for policy [purposes] is, ‘How will the climate change over the next century under both natural and human influences?’” *Id.* This question might be a central focus in a climate-change trial.

84. Assume that we could travel back to 1880 and implement every climate-change proposal that we hear today so that there were no human-caused carbon and greenhouse gas emissions in the twentieth century (impossible, of course, but bear with the hypothetical). Would the global temperature have stayed absolutely constant for the last century without any heating or cooling? Would the people of the world have enjoyed the same precise global temperature for an entire century? If so, would that then mean that climate change never would have entered the scientific and public consciousness? Undoubtedly, if every current climate-change claim is true, then that is precisely what we must believe.

85. See generally ALEXANDER, *supra* note 78, at 24-29.

86. *Id.* at 24-27; Jennie Cohen, *Little Ice Age, Big Consequences*, HISTORY (Jan. 31, 2012), <http://www.history.com/news/little-ice-age-big-consequences>.

more accurate computer models before implementing costly and burdensome solutions.<sup>87</sup> Similarly, some scientists assert that global temperatures are driven by what happens in our oceans and that we simply do not know enough about our oceans to take action now.<sup>88</sup> Many skeptical scientists even assert that the march to consensus on climate-change issues is itself not scientific.<sup>89</sup> These scientists bristle at the very notion that climate science is settled, arguing that certainty is not a scientific motivator; instead, uncertainty is traditionally what motivates science and produces action.<sup>90</sup>

This Article does not take sides in the climate-change debate. Instead, it presents polar viewpoints to set the stage for an international trial on all climate-change theories. A Mock International Climate-Change Tribunal would afford a proper venue for the transparent, adversarial pursuit of truth while creating a historical record on all-things climate change. Even though this Article does not take sides on the scientific search for truth on climate change, it does caution that governments will abuse their accumulated power to combat global climate change if governmental power is not checked.

### III. CONCERN THAT UNRESTRAINED GOVERNMENT WILL DAMAGE LIBERTY AND FREE MARKETS

I am not altogether skeptical of generalized assertions of human-caused climate change. Instead, any skepticism emanates from the exceeding difficulty I have in fully comprehending two aspects of the climate-change debate. First, I am not skeptical that there are scientific theories that plausibly maintain that human activity is impacting our climate.<sup>91</sup> I struggle, however, to sift through all of the political noise and generalized assertions to understand what precisely causes climate change (whether natural or human-caused) and what precisely will combat it. In struggling to get past the vague generalities and political assertions, I seek to learn the level of certainty that climate-change proponents have in their theories. I want to know precisely what they claim causes climate change, what specific

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87. Speaking of burdens, one climate-change skeptic predicts that America's cost to fight climate change will be more than \$2 trillion, which is more than half of what we spent during World War II. ALEXANDER, *supra* note 78, at 109.

88. Koonin, *supra* note 52.

89. See generally ALEXANDER, *supra* note 78; Koonin, *supra* note 52.

90. Koonin, *supra* note 52.

91. There is no doubt that human-caused pollution causes human suffering. See, e.g., Dan Levin, *Study Links Polluted Air in China to 1.6 Million Deaths a Year*, N.Y. TIMES (Aug. 13, 2015), [http://www.nytimes.com/2015/08/14/world/asia/study-links-polluted-air-in-china-to-1-6-million-deaths-a-year.html?\\_r=0](http://www.nytimes.com/2015/08/14/world/asia/study-links-polluted-air-in-china-to-1-6-million-deaths-a-year.html?_r=0).

solutions they propose to combat climate change, and their level of certainty in each claim. This skepticism forms the foundation for my proposal to use a Mock International Climate-Change Tribunal to try all climate-change theories.

My second area of skepticism probably will not be remedied by a climate-change trial, but I will share it nonetheless. To be blunt, I *absolutely* am skeptical that the massive amounts of power that various governments seek to accumulate in their fight against global climate change will not be abused.<sup>92</sup> I have trouble envisioning a future in which the climate-change discussion officially ends. I fear that the authority that people give to their governments to regulate human conduct to regulate global temperatures will never be returned to the people. I fear that individual liberty and free markets will never regain their footing once colluding, worldwide governments begin to dictate what human activities are allowed and disallowed based on various theories and models of climate change.<sup>93</sup>

Given my distaste for the complex issue of climate change being clouded by political noise, these next few paragraphs appear hypocritical because I use conservative political assertions to explain the basic root of my fear that accumulated government power rarely dissipates. But no matter if this Article is hypocritical or if you disagree with these principles, it should not dampen the Article's goal to unite all of us—liberal or conservative, climate-change proponent or skeptic, scientist or laymen—to embrace the use of a climate-change trial to seek the truth on climate-change claims while creating a historical record.

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92. See, e.g., Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), <http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html>; Warrick & Mooney, *supra* note 1. With the world's governments responding to the climate-change crisis, I can almost hear the prophetic advice of President Obama's first Chief of Staff, Rahm Emanuel: "You never want a serious crisis to go to waste. Things that we had postponed for too long, that were long-term, are now immediate and must be dealt with. This [financial] crisis provides the opportunity for us to do things that you could not do before." Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J. (Nov. 21, 2008), <http://www.wsj.com/articles/SB122721278056345271>.

93. It might be fair to say that Vice President Becky Norton Dunlop of The Heritage Foundation, who served on the Symposium panel with me, made this type of argument. At the Symposium, she distributed materials that argue that "[t]he most successful environmental policies flow from liberty." *Land of Liberty: Stewardship of America's Environment and Energy—By The People*, HERITAGE FOUND., [http://thf\\_media.s3.amazonaws.com/2014/pdf/LandOfLiberty-Brochure.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/LandOfLiberty-Brochure.pdf) (last visited Dec. 22, 2015). The Heritage Foundation contends, "Free people, not centralized policies and mandates, come up with superior solutions to environmental problems." *Id.*

In Ronald Reagan's October 1964 speech about conservative principles,<sup>94</sup> he argued, "No government ever voluntarily reduces itself in size. So governments' programs, once launched, never disappear. Actually, a government bureau is the nearest thing to eternal life we'll ever see on this earth."<sup>95</sup> Following Reagan's lead, I predict that there will be an everlasting war on global climate change. Once worldwide government programs are created to combat climate change, they never will be dismantled. They will be the closest things to eternal life on earth.

In addition to the everlasting nature of government programs, Reagan's speech contained other cautionary warnings about the power amassed by government. Indeed, the weight of Reagan's speech falls heavily on my mind as I watch climate-change proponents seek unlimited government power to regulate human conduct to monitor the global climate. As politicians seek more power to save humanity from global warming,<sup>96</sup> I listen intently for markers on how we will know when the climate-change battle is over. It is almost as if I can hear Reagan quizzically asking if governments ever will declare that their massive programs can end in victory:

For three decades [and now eight decades], we've sought to solve . . . problems . . . through government planning, and the more the plans fail, the more the planners plan.

. . . .

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94. The formal title of Reagan's speech was "A Time for Choosing," but it has become known simply as "The Speech." Ronald Reagan, *A Time For Choosing (The Speech, Oct. 27, 1964)*, <http://www.reagan.utexas.edu/archives/reference/timechoosing.html> (last visited Dec. 22, 2015) [hereinafter *A Time for Choosing*]. To me, Reagan's fifty-year old speech is a timeless dissertation of conservative principles that have merit in today's climate-change debate. Reagan's principles caution against an unrestrained and unaccountable government combating global warming as much today as they did to other efforts and promises made by governments in the middle of the twentieth century.

95. *Id.*

96. Chris Mooney, *Countries just adopted a historic climate change accord. Here's what happens next*, WASH. POST (Dec. 12, 2015), <https://www.washingtonpost.com/news/energy-environment/wp/2015/12/12/countries-just-adopted-a-historic-climate-change-accord-heres-what-happens-next/> ("The world will now have a new and comprehensive regime in place to shape how its diverse nations go about the urgent task of reducing their greenhouse gas emissions."); *The Paris agreement marks an unprecedented political recognition of the risks of climate change*, ECONOMIST (Dec. 12, 2015), <http://www.economist.com/news/international/21683990-paris-agreement-climate-change-talks> (stating that "[t]here are processes in the agreement designed to ratchet up the level of global action, but although they are more demanding than some had expected, they are not in themselves enough to make good the current gap").

So they're going to solve all the problems of human misery through government and government planning. Well, now, if government planning and welfare had the answer—and they've had almost 30 [now 80] years of it—*shouldn't we expect government to read the score to us once in a while? Shouldn't they be telling us about the decline each year in the number of people needing help?*

....

But the reverse is true. *Each year the need grows greater; the program grows greater.*<sup>97</sup>

I predict that climate-change proponents *never* will declare victory in the global war against climate change and return all of the power accumulated during that war.<sup>98</sup> Liberty will never be fully restored. The need for government intervention will grow greater; the scope and reach of governmental programs endlessly will grow greater; the war will never end. Even if all fossil fuels are banished from our world forever, there still will be government programs fighting climate change. What will be the goal of these governmental programs at that point? Will population control become the primary weapon in the war against climate change?<sup>99</sup> Will governments then

97. *A Time For Choosing*, *supra* note 94 (emphasis added). For a recent example, notice how President Obama takes credit for how much his programs already have done in combating climate change. *See generally State of the Union*, *supra* note 35 (“In Beijing, we made a historic announcement: The United States will double the pace at which we cut carbon pollution. And China committed, for the first time, to limiting their emissions.”); *Obama's Action Plan*, *supra* note 30. Is the President closer to declaring success such that he will wind down his war on global warming in the near future? Absolutely not. As his programs expand and as he engages in more planning, the need and urgency simply grow as the plans grow.

98. In various governmental wars against societal problems over the years, the problems seemingly grow larger in perpetuity requiring more government power to continue to fight the problems. It might not be much of a revelation that I harbor a healthy distrust of governmental authority and concentrated power regardless of who wields that power. Suffice it to say that I shudder when thinking about governmental power and force being used to dictate human conduct in the global war against climate change if that kind of power lands in the lap of leaders like Adolph Hitler, Joseph Stalin, or any of the other evil leaders who amass enormous power from time to time. Can you imagine Hitler having climate-change authority to combat overpopulation concerns?

99. *One Planet, How Many People? A Review of Earth's Carrying Capacity*, *supra* note 62. In his Encyclical Letter, Pope Francis explained that “concern for the protection of nature is also incompatible with the justification of abortion.” Pope Francis, Encyclical Letter, *Laudato Si': On Care for Our Common Home*, at para. 120 (May 24, 2015) [hereinafter *Laudato Si'*]. Pope Francis asked, “How can we genuinely teach the importance of concern for other vulnerable beings, however troublesome or inconvenient they may be, if we fail to protect a human embryo, even when its presence is uncomfortable and creates difficulties?” *Id.* Along

focus the climate-change war on such issues as the concentration of wealth, income inequality, or the disparate and unfair use of natural resources?<sup>100</sup> The unintended consequences of forceful climate-change regulations are too many to imagine.

Finally, Reagan explained how dissenters get treated when they question the wisdom of the massive accumulation of government power to combat society's ills:

Yet anytime you and I question the schemes of the do-gooders, we're denounced as being against their humanitarian goals. They say we're always "against" things—we're never "for" anything. Well, the trouble with our liberal friends is not that they're ignorant; it's just that they know so much that isn't so.<sup>101</sup>

Climate-change proponents boast consensus on climate change. They boldly proclaim that an existential crisis is unfolding unless governments respond with massive programs limiting the activities of billions of people. What if climate-change proponents have just a touch of ignorance when it comes to what conduct causes climate change, whether the climate is changing due to natural events or human conduct, or what remedies will solve the climate-change problem such that we can declare victory and end the war on climate change? What if, as Reagan claimed, climate-change proponents know so much that simply is not so? That is, what if some of the claims made by climate-change proponents simply are false? What if climate-change scientists' sophisticated and proprietary models are not accurate? What if the underlying assumptions and data are incomplete? What if climate-change proponents have various conflicts of interest that cloud their search for truth on climate science? These types of skeptical questions will be fully vetted in a judicial process that forces climate-change proponents to clearly and fully articulate and prove all of their theories and claims. Until then, any skeptical questions or dissenting viewpoints are derisively met with pejorative labels. "Climate-change denier" is the demeaning and bullying phrase of choice among climate-change proponents.

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these lines, Pope Francis warned that any attempt to "blame population growth" for climate change "is one way of refusing to face the issues." *Id.* at para. 50.

100. See *Laudato Si'*, *supra* note 99, at para. 181-83.

101. *A Time For Choosing*, *supra* note 94.



#### IV. CLIMATE-CHANGE PROPONENTS CAST DISSENTERS AS CLIMATE-CHANGE DENIERS

Powerful political forces should not control—or even cloud—the climate-change discussion.<sup>102</sup> But that is exactly what is happening, and the political rhetoric surrounding climate change is mostly hostile. Even though the causes of and solutions to the problems of climate change are amorphous, complicated, and politicized, the rhetoric has been ratcheted up against anyone who dares to question “scientific consensus” on the issue. Indeed, anyone who expresses doubt about what causes climate change or what action will stop climate change is derisively deemed a “climate-change denier.” For example, President Obama openly disdains anyone who questions his climate-change agenda, “I don’t have much patience for anyone who denies that this challenge is real.”<sup>103</sup> Others have joined this loud chorus of depicting anyone who questions the “settled science” of human-caused climate change as “climate deniers.”<sup>104</sup> Some have even called for criminal

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102. Also, the climate-change debate will not, cannot, and should not be won in obscure academic journals and scientific magazines. Billions of people must believe that they are causing damage and that they should fix it.

103. Barack Obama, *Remarks by the President on Climate Change*, WHITE HOUSE (June 25, 2013, 1:45 PM), <https://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>. President Obama has also stated, “Any leader willing to take a gamble on a future like that, any leader who refuses to take [climate change] seriously or treats it like a joke, is not fit to lead.” Abdullah & Johnson, *supra* note 10. Standing firm, the President declared, “The time to heed the critics and the cynics and the deniers is past. The time to plead ignorance is surely past. Those who want to ignore the science, they are increasingly alone, they are on their own shrinking island.” Maria L. La Ganga, *Obama in Alaska: Climate-change deniers ‘are on their own shrinking island’*, L.A. TIMES (Aug. 31, 2015), <http://www.latimes.com/nation/la-na-alaska-obama-climate-change-20150831-story.html>.

104. Seitz-Wald, *supra* note 11 (reporting that former Secretary of State Hillary Clinton refers to those who question climate change as “deniers . . . who want to pretend we don’t have a crisis . . .”); John Carpenter, *SXSW: Gore says climate-change deniers should pay political price*, CHI. TRIB. (Mar. 15, 2015), <http://www.chicagotribune.com/bluesky/originals/chi-sxsw-al-gore-penny-pritzker-bsi-20150313-story.html> (stating that former Vice President Al Gore referred to climate skeptics as part of a “denial industry”); Philip Swarts, *Biden: Denying climate change ‘almost like denying gravity’*, WASH. TIMES (Mar. 7, 2015), <http://www.washingtontimes.com/news/2015/mar/7/joe-biden-denying-climate-change-almost-denying-gr/> (reporting that Vice President Joe Biden stated that questioning climate change is “almost like denying gravity”). President Barack Obama’s climate-change website invites people to call out climate-change deniers. ORGANIZING FOR ACTION, <https://www.barackobama.com/stand-with-science/#/> (last visited Dec. 22, 2015). The website also states that “it’s hard to take action when so many of our elected officials are still publicly in denial about the basic science.” *Id.* It might be dangerous to control and discourage climate-change debate while encouraging mass thinking. See JOHN STEINBECK, *EAST OF EDEN* 131

prosecution of anyone who voices skepticism about climate change.<sup>105</sup> California Governor Jerry Brown declared that presidential candidates who do not agree with his views on climate change are unfit to hold office.<sup>106</sup>

This Article contends that the intentional use of the term “climate-change denier” is not used to muster support for climate-change theories. Instead, I believe that the use of this demeaning, bullying, and derogatory term is intended to chill questioning of “settled science.” I likewise maintain that the coordinated use of this term is meant to pave an unobstructed path to governmental intervention to “solve” the climate-change threat. *And the use of the term “denier” is not an accident.* After World War II, the Allied Powers claimed that Nazi Germany had engaged in unspeakable crimes, including the systematic extermination of millions of Jewish people through the Holocaust. The Allies feared that history could mischaracterize these claims as mere propaganda by the war victors, enabling “Holocaust deniers” to change the historical record by claiming that the Holocaust never occurred.<sup>107</sup>

(1952) (“When our food and clothing and housing all are born in the complication of mass production, mass method is bound to get into our thinking and to eliminate all other thinking.”).

105. *Prosecuting Climate Dissent*, WALL ST. J. (Nov. 8, 2015), <http://www.wsj.com/articles/prosecuting-climate-dissent-1447020219>.

106. Hunter Schwarz, *Ted Cruz unfit to run for president because of his views on climate change, Jerry Brown says*, WASH. POST (Mar. 22, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/03/22/ted-cruz-unfit-to-run-for-president-because-of-his-views-on-climate-change-jerry-brown-says/>.

107. In April 1945, General Dwight D. Eisenhower, the Supreme Allied Commander, described a horrific scene as he described a Nazi horror camp near Gotha, Germany:

I have never felt able to describe my emotional reactions when I first came face to face with *indisputable evidence of Nazi brutality and ruthless disregard of every shred of decency*. Up to that time I had known about it only generally or through secondary sources. I am certain however, that I have never at any other time experienced an equal sense of shock.

I visited every nook and cranny of the camp because *I felt it my duty to be in a position from then on to testify at first hand about these things in case there ever grew up at home the belief or assumption that “the stories of Nazi brutality were just propaganda.”* Some members of the visiting party were unable to go through the ordeal. I not only did so but as soon as I returned to [General] Patton’s headquarters that evening I sent communications to both Washington and London, urging the two governments to send instantly to Germany a random group of newspaper editors and representative groups from the national legislatures. I felt that the evidence should be immediately placed before the American and the British publics in a fashion that would *leave no room for cynical doubt*.

DWIGHT D. EISENHOWER, *CRUSADE IN EUROPE* 408-09 (1948) (emphasis added); see also DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND*

In response to the risk that history could mischaracterize such unspeakable genocide,<sup>108</sup> the Allies sought to use the judicial process—and notably not the political process—to prove that the Nazis had engaged in crimes against humanity while creating an impenetrable record of the atrocities as a historical fact.<sup>109</sup> To accomplish this monumental judicial task, the Allies conducted the Nuremberg Trials. These trials were a huge success in bringing

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MEMORY 20 (1993) (“The deniers’ selection of the name *revisionist* to describe themselves is indicative of their basic strategy of deceit and distortion and of their attempt to portray themselves as legitimate historians engaged in the traditional practice of illuminating the past.”).

108. Unfortunately, there had been misinformation and propaganda about German conduct during World War I, which aided the German effort to deny the Holocaust:

[T]oo many people responded to reports about German killings of Jewish civilians [in World War II] by comparing these reports to news stories about German atrocities . . . during World War I. The British media in World War I charged that the German occupation was monstrous, that German soldiers committed many outrages against defenseless civilians in German-occupied Belgium[, including stories that] German soldiers bayoneted babies, disfigured women, and killed civilians with military-issued poison gas. It turned out after the war that the Allies had invented many of those stories in order to maximize popular support for the war effort. As a result of that experience, many people were skeptical of reports of mass murder operations during World War II.

*Holocaust Encyclopedia, Combating Holocaust Denial: Origins of Holocaust Denial*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007273> (last visited Dec. 23, 2015).

109. The United States Holocaust Memorial Museum’s *Holocaust Encyclopedia* asserts that the “lasting legacy” of the Nuremberg Trials is “the deliberate assembly of a public record of the horrific crimes, including those of the Holocaust, committed by the Germans and their collaborators during World War II.” *Holocaust Encyclopedia, Combating Holocaust Denial: Evidence of the Holocaust Presented at Nuremberg*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007271> (last visited Dec. 26, 2015). “Taken together, the documents, photographs, film, and perpetrator and survivor testimony at postwar trials provided an inescapable and undeniable documentation of the Holocaust.” *Id.* Video evidence of the Nazi atrocities is a critical piece of the historical record:

On November 29, 1945, the [International Military Tribunal] prosecution introduced an hour-long film titled “The Nazi Concentration Camps.” When the lights came up in the Palace of Justice all assembled sat in silence. The human impact of this visual evidence was a turning point in the Nuremberg trial. It brought the Holocaust into the courtroom.

*Id.* The French Centre de Documentation Juive Contemporaine (CDJC)—or Center of Contemporary Jewish Documentation—created a Jewish historiography on World War II; much of its evidence was used in the Nuremberg Trials, and much of the evidence at the Nuremberg Trials ended up at CDJC. Georges Bensoussan, *The Jewish Contemporary Documentation Center (CDJC) and Holocaust Research in France, 1945-1970*, in *HOLOCAUST HISTORIOGRAPHY IN CONTEXT: EMERGENCE, CHALLENGES, POLEMICS AND ACHIEVEMENTS* 245-54 (David Bankier and Dan Michman, eds., 2008).

evil men to justice while ensuring that “Holocaust deniers” forever would be confronted with an impenetrable historical record.<sup>110</sup> To put it mildly, the use of the term Holocaust denier, therefore, is not complimentary.<sup>111</sup> This Article

110. In his final report to the President, Chief United States Prosecutor Justice Robert H. Jackson declared that the Nuremberg Trials created an impenetrable historical record that would ensure that nobody could deny what happened in Nazi Germany:

We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people. No history of this era can be entitled to authority which fails to take into account the record of [Nuremberg]. While an effort was made by [criminal defendants] to portray themselves [differently from how their accusations portray them, the historical record from the Trial left] no ground for future admiration of their characters and their fate leaves no incentive to emulation of their examples.

*Report to the President by Mr. Justice Jackson* (Oct. 7, 1946), <http://avalon.law.yale.edu/imt/jack63.asp> [hereinafter *1946 Report to the President*]. Climate-change proponents who condemn climate-change deniers have the same opportunity to create this type of impenetrable record by using the judicial framework that was used in the Nuremberg Trials.

111. Poignant, broad, and belittling terms often characterize Holocaust deniers:

While some people today are misled as a result of the Nazi policies described above into doubting the reality of the Holocaust, others deny the Holocaust for more overtly racist, political, or strategic reasons. These deniers begin with the premise that the Holocaust did not happen. . . . They deny the Holocaust as an article of faith and no amount of rational argumentation can dissuade them. This denial is irrational, largely unrelated either to the facts of the history or to the enormity of the event.

. . . .

Holocaust denial, then, unites a broad range of radical right-wing hate groups in the United States and elsewhere . . . .

. . . .

Holocaust deniers want to debate the very existence of the Holocaust as a historical event. They want above all to be seen as legitimate scholars arguing a historical point. They crave attention, a public platform to air what they refer to as “the other side of the issue.” *Because legitimate scholars do not doubt that the Holocaust happened, such assertions play no role in historical debates. Although deniers insist that the idea of the Holocaust as myth is a reasonable topic of debate, it is clear, in light of the overwhelming weight of evidence that the Holocaust happened, that the debate the deniers proffer is more about antisemitism and hate politics than it is about history.*

*Holocaust Encyclopedia, Combating Holocaust Denial: Origins of Holocaust Denial*, *supra* note 108 (emphasis added). This is the context for the modern-day use of the term climate-change denier. Climate-change proponents use the derogatory term against anyone who disagrees with their claims—whether as to cause or solution—with full knowledge of the historical antecedent for the term that connotes hate and ignorance.

proposes that we learn the historical lesson from the Nuremberg Trials by adopting that judicial framework to try climate-change theories.

In his book *Night*, Holocaust Survivor and Nobel Peace Prize Winner Eli Wiesel openly struggled with the proper response to the Holocaust at Auschwitz.<sup>112</sup> Wiesel confessed that not only did he not know the proper response, but that he did not “even know if a tragedy of this magnitude *has* a response.”<sup>113</sup> In the end, however, Wiesel explained that he absolutely knew “that there is ‘response’ in responsibility.”<sup>114</sup>

What is the proper response to the claims of global climate change? Wiesel survived the horrors of Nazi Germany and its crimes against humanity. The Nuremberg Trials certainly were a part of the correct response in carrying out collective responsibility to war crimes committed by Nazis. Wiesel captured my thoughts on how best to approach an issue of such magnitude as climate change. Specifically, I see parallels between the claims that the Germans had committed crimes against humanity with today’s claims of environmental crimes against humanity. If human conduct is responsible for climate change which directly causes catastrophic harm to others, then it seems that there must be a response as part of our collective responsibility. Our response likewise must be responsible. To begin a more responsible response to the global issue of climate change, let’s use the Nuremberg Framework as a mock judicial process to seek the truth on climate-change theories while creating an international clearinghouse of all evidence and claims of climate change to create a historical record.<sup>115</sup>

If we place the Holocaust in historical context without having the benefit of the impenetrable record that was created by the Nuremberg Trials, it becomes clearer why this Article proposes an international climate-change

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112. ELIE WIESEL, *NIGHT* xv (2006).

113. *Id.* (emphasis in original).

114. *Id.*

115. The use of a mock judicial process to seek the truth on climate change before making drastic and force-based policy choices is consistent with the thoughts of my co-panelist, Professor John Copeland Nagle. In his article in this Symposium Issue, Professor Nagle argued that all participants in the climate-change debate must have humility when it comes to environmental law. John Copeland Nagle, *Humility and Environmental Law*, 10 LIBERTY U. L. REV. 335, 363-67 (2016). First, Professor Nagle explained that “[h]umility toward the *environment* emphasizes the need for restraint and for care in light of our lack of knowledge about the environmental impacts of our actions.” *Id.* at 336 (emphasis in original). Second, Professor Nagle contended that “[h]umility toward the *law* cautions against exaggerated understandings of our ability to create and implement legal tools that will achieve our intended results.” *Id.* (emphasis in original). I contend that the use of the Nuremberg Trials framework to conduct a mock trial on climate-change claims would address Professor Nagle’s competing theories of humility.

trial. Claims of environmental crimes against humanity are no less sensational and hard to believe than were claims of the Nazi's war crimes against humanity. As Justice Robert H. Jackson, Chief United States Prosecutor, prepared to prosecute Nazi leaders for crimes against humanity before the International Military Tribunal, he challenged the international community not to "forget that when the Nazi plans were boldly proclaimed they were so extravagant that the world refused to take them seriously."<sup>116</sup> He maintained that because the generalized accusations of unspeakable crimes against humanity committed by Nazi Germany were so incredible, there was a risk that people would not, or could not, believe that the accusations could be true.<sup>117</sup> He insisted that the prosecution of Nazi war criminals "must be factually authentic and constitute a well-documented history" of their barbarous conduct.<sup>118</sup> Justice Jackson explained that the determination of guilt—or innocence, for that matter—could be accomplished only "after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear."<sup>119</sup> He cautioned that unless the record was created "with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war."<sup>120</sup> Justice Jackson used beautiful and timeless language to encapsulate his fear that without an appropriate record being created by the Nuremberg Trials, history could misjudge the evil acts perpetrated by the Nazis: "*We must establish incredible events by credible evidence.*"<sup>121</sup>

That encapsulates my thinking on why a mock international climate-change trial is so fundamentally important, no matter if you are a climate-change proponent or a climate-change skeptic. Some of the generalized climate-change assertions are so incredibly difficult to believe that many believe that they are not true. Also, some of the climate-change proposals are

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116. *Report to the President by Mr. Justice Jackson* (June 6, 1945), <http://avalon.law.yale.edu/imt/jack08.asp> (last visited Dec. 24, 2015) [hereinafter *1945 Report to the President*].

117. *Id.* This is understandable even while it is unbelievable and unprecedented: "Yet the psychological barriers to accepting the existence of the Nazi killing program were considerable. The Holocaust was unprecedented and irrational. It was inconceivable that an advanced industrial nation would mobilize its resources to kill millions of peaceful civilians, including women and children, the elderly, and the very young." *Holocaust Encyclopedia, Combating Holocaust Denial: Origins of Holocaust Denial*, *supra* note 108.

118. *1945 Report to the President*, *supra* note 116.

119. *Id.*

120. *Id.*

121. *Id.* (emphasis added).

so extravagant that many people might not take them seriously.<sup>122</sup> No matter how confident you are that human-caused climate change is causing cataclysmic damage and that human solutions can control the global climate, it is imperative that we establish these incredible events by credible evidence with clarity and precision. Generalized and politicized assertions will not meet the needs of current or future public opinion.

The debate over climate change will not, cannot, and should not be won in obscure academic journals and scientific magazines. Nor should politicians behind closed doors at lavish conferences in far-distant lands control the debate. Let's follow history's guide from the Nuremberg Trials. If a Holocaust denier resists the Holocaust as a historical fact, then the Nuremberg Trials proved it to be true and assembled an impenetrable historical record that stands guard against such denial. This Article presents climate-change proponents with the same type of historic opportunity to seek justice, pursue truth, and create an impenetrable record to support their claims on climate change.

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122. Challenging questions seem to be how much climate change is naturally occurring and how much is caused by human conduct. Similarly, how much can we do to combat climate change? Do human beings have the ability to control global temperature, adjusting the global thermostat at will? During discovery and at trial, climate-change proponents will answer these and other questions as they inform the public on every aspect of their theories. They will prove that all current views toward human-caused climate change can be reconciled with other scientific views. For example, climate-change proponents will have the full opportunity in an adversarial forum to explain why it is not paradoxical to claim that in a single industrialized-century human conduct dramatically altered the global temperature of an entire planet that they claim was created from a chaotic and randomized walk through billions of years. To an ill-informed observer, that worldview seems to suggest that the Earth was designed or created with such precision as to make it an ideal setting for human life subject to the control of human conduct. These types of claims sound like the Christian worldview, which, of course, places human beings in God's image at the center of God's creation with a stewardship role over the planet. *See, e.g., Genesis* 1:26-28 ("And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."); *Psalms* 95:3-5 ("For the LORD is a great God, and a great King above all gods. In his hand are the deep places of the earth: the strength of the hills is his also. The sea is his, and he made it: and his hands formed the dry land."); *Colossians* 1:16-17 ("For by him were all things created, that are in heaven, and that are in earth, visible and invisible, whether they be thrones, or dominions, or principalities, or powers: all things were created by him, and for him: And he is before all things, and by him all things consist."). Climate-change proponents will have the opportunity to prove that their theories are correct under the burden of proof of their choosing.

V. ADOPTING THE NUREMBERG TRIALS AS A JUDICIAL FRAMEWORK TO  
ADJUDICATE CLIMATE-CHANGE THEORIES AND PROPOSED REMEDIES  
BEFORE A MOCK INTERNATIONAL CLIMATE-CHANGE TRIBUNAL

A. *Basic Proposal to Establish a Mock International Climate-Change  
Tribunal to Conduct a Mock Trial on Climate-Change Theories while  
Creating a Historical Record of All Climate-Change Evidence*

The United States should lead the effort to depoliticize the climate-change debate by adopting the Nuremberg framework to adjudicate all climate-change theories within a mock judicial process under a single tribunal.<sup>123</sup> The creation and use of a mock judicial process will help determine what and who we are to believe on all issues of climate change. The Nuremberg Trials used an open and transparent forum for the entire world to witness the prosecution of the men who were the face of evil and challenged humanity's existence. The Nuremberg Trials sought truth and justice against those responsible for unspeakable crimes against humanity. In the search for truth and justice, the Nuremberg Trials had a critical byproduct—an impenetrable historical record of unspeakable crimes against humanity.

The Owen M. Kuperschmid Holocaust and Human Rights Project Seventh International Conference brought together “six men who prosecuted the biggest crime in history” by “assembl[ing] and present[ing] the evidence and the argument in what we know today as the Nuremberg Trials.”<sup>124</sup> One of the prosecutors explained the importance of the historical record created in the Nuremberg Trials:

[T]he Nuremberg Trials have an important symbolic value [and made] . . . distinct and important contributions. The first was to *create an indisputable historical record of the Nazi regime's*

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123. Although I cannot count Pope Francis as a supporter of my idea (yet?), he has advocated for a clear legal framework devoid of politics to address climate change. See generally *Laudato Si'*, *supra* note 99, para. 53 (“The establishment of a legal framework which can set clear boundaries and ensure the protection of ecosystems has become indispensable, otherwise the new power structures based on the techno-economic paradigm may overwhelm not only our politics but also freedom and justice.”); see also Lucia A. Silecchia, “*Social Love*” as a Vision for Environmental Law: *Laudato Si'* and the Rule of Law, 10 LIBERTY U. L. REV. 371, 376, (2016) (explaining that Pope Francis’s encyclical letter “invites all people to consider the role of law” while articulating “a positive role for legal institutions and for the role of law on a local, national, and international level” because law is perhaps “the only force strong enough and comprehensive enough to serve as a bulwark against an economic system that he believes has been destructive of human and natural ecology”).

124. Allan A. Ryan, Jr., *Judgements on Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors*, 16 B.C. THIRD WORLD L.J. 193, 193-94 (1996).



*atrocities* and conduct during World War II, beginning with planned and flagrant aggressions, and including what has come to be called the Holocaust.<sup>125</sup>

After the Nuremberg Trials, Holocaust deniers would be forever disposed as illegitimate relics of a false and dangerous narrative.<sup>126</sup>

Many climate-change proponents claim that climate change poses as significant a threat to humanity as did the Nazis in World War II. Even though political actors cast anyone skeptical of the climate-change agenda as climate-change deniers, climate-change proponents have not been forced to use the judicial process to prove their specific charges that human beings are committing environmental crimes against humanity by such conduct as burning fossil fuels for energy, overpopulating the planet, or even using livestock as food sources. Climate-change proponents have not been forced to plead and prove what specific human conduct causes climate change and

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125. *Id.* at 211 (emphasis added).

126. In January 2009, Congresswoman Sheila Jackson Lee of Texas introduced in the U.S. House of Representatives a Concurrent Resolution that expressed the importance of the Nuremberg Trials in creating a historical record of crimes against humanity:

[T]hat the people of the United States should grieve for the loss of life that defined the Third Reich and celebrate the continued education efforts for tolerance and justice, reaffirming the commitment of the United States to the fight against intolerance and prejudice in any form, and honoring the legacy of transparent procedure, government accountability, the rule of law, the pursuit of justice, and the struggle for universal freedom and human rights.

H.R. Cong. Res. 7, 111th Cong. (2009). This resolution underscored the historical importance of the impenetrable record created by the Nuremberg Trials:

[T]he Nuremberg Trials, conducted before the International Military Tribunal in the Palace of Justice in Nuremberg, Germany, from November 20, 1945, until the verdicts were delivered on October 1, 1946, were intended to judge crimes against peace, war crimes, and crimes against humanity publicly and transparently, on the basis of individual culpability, and to set precedents in international law to document such crimes in historical records and to bring a measure of justice for the victims of atrocities by calling to account future perpetrators before an international court of law . . . .

*Id.* Further, the resolution declared that “documentation and eyewitness testimony presented at the Nuremberg Trials laid the initial foundation for what we know about the Holocaust, including the killing apparatus at Auschwitz, the atrocities committed by the Einsatzgruppen (mobile killing units), and the destruction of the Warsaw ghetto, and for what we know about other Nazi crimes; . . .” *Id.* Finally, the Nuremberg Trials offered evidence to create a record of “the first statistical estimate that the Nazis and their collaborators systematically murdered six million Jews,” and that “the precedent set by the Nuremberg Trials has been held as a standard for special international tribunals to try perpetrators for crimes against humanity and crimes of genocide . . . .” *Id.*

what specific remedies will end climate change. There is no single historical record of these claims. The judicial process is the most effective method to adjudicate climate-change theories while creating an international clearinghouse and database of all evidence and witnesses on climate change. To be sure, the judicial process will create a historical record that every human can access. Just as Holocaust deniers are confronted with the judicial record from the Nuremberg Trials, climate-change deniers likewise would be confronted with a judicial record of all claims of climate change. With the world watching, it is time to establish a tribunal in the Nuremberg tradition to force climate-change proponents to plead and prove their best case. It is time to create a Mock International Climate-Change Tribunal.

*B. America's President Should Appoint a Chief Prosecutor to Plead and Prove all Climate-Change Theories before a Mock International Climate-Change Tribunal*

While Nazi Germany was surrendering in May 1945 and World War II was winding down, the Allies were forming a plan to create an International Military Tribunal to use the judicial process to hold Axis leaders accountable for their atrocious crimes against humanity.<sup>127</sup> On May 2, 1945, President Harry S. Truman appointed Associate Supreme Court Justice Robert H. Jackson as the Chief United States Prosecutor to prepare and prosecute all war crimes before an international military tribunal.<sup>128</sup> Under this presidential appointment, Justice Jackson received no additional

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127. See *1945 Report to the President*, *supra* note 116 (“Over a month ago the United States proposed to the [Allies] a specific plan, in writing, that these four powers join in a protocol establishing an International Military Tribunal, defining the jurisdiction and powers of the tribunal, naming the categories of acts declared to be crimes, and describing those individuals and organizations to be placed on trial. Negotiation of such an agreement between the four powers is not yet completed.”).

128. Exec. Order No. 9547; see also *Exec. Order by President Truman* (May 2, 1945), <http://avalon.law.yale.edu/imt/jack03.asp> (last visited Dec. 23, 2015); *Nuremberg Trial, International Military Tribunal, 1945—1946*, <https://www.roberthjackson.org/nuremberg-timeline/> (last visited Dec. 23, 2015); *The Supreme Court Historical Society*, [http://supremecourthistory.org/timeline\\_robertjackson1941-1945.html](http://supremecourthistory.org/timeline_robertjackson1941-1945.html) (last visited Dec. 23, 2015). Jackson had an amazing career. Although he never attended college and only studied in a law school for one year, he practiced law for twenty years and served as Assistant General Counsel in the Bureau of Internal Revenue at the Department of Treasury, Assistant United States Attorney General, Solicitor General, and Attorney General of the United States. *The Supreme Court Historical Society*, *supra*. President Franklin D. Roosevelt nominated Jackson to the Supreme Court on July 11, 1941, and, remarkably under today’s standards, the Senate confirmed the appointment the same day; Justice Jackson served thirteen years on the Supreme Court. *Id.*

compensation apart from his Supreme Court salary, but President Truman gave Justice Jackson enormous latitude to design, implement, and staff the appropriate prosecution of Nazi war criminals.<sup>129</sup>

On June 6, 1945, which was about a month after being appointed to the lofty part-time, unpaid position as Chief Prosecutor of Nazi war criminals, Justice Jackson delivered a preliminary report to President Truman.<sup>130</sup> Justice Jackson described the enormous amount of work that he had done in the previous month and expressed his views on how the United States should proceed in leading the international prosecution of Nazi war criminals.<sup>131</sup> Justice Jackson shared that he had visited Europe to meet with military leaders; selected his staff from various federal agencies; developed a plan to prepare and try all cases; instructed staff members on how to collect evidence; and worked with the United Kingdom's Attorney-General on a joint prosecution.<sup>132</sup> The stage was being set for the Nuremberg Trials to seek justice against evil men who threatened all of humanity while creating a historical record of their evil deeds.

President Obama or his successor should follow President Truman's bold leadership. If climate change threatens humanity as did Nazi Germany in World War II, then we should follow the effective judicial model that created the highly successful Nuremberg Trials. To do that, the President's first order of business should be to appoint a world-class attorney or judge to serve as Chief Prosecutor, who will lead the prosecution of all climate-change theories before a mock international tribunal. Similarly, the President should appoint an equally impressive attorney or judge to serve as Chief Defense Counsel, who will lead the defense of the case. It is inspiring to look upon Justice Jackson as the example of public service, and perhaps inspiring figures will rise to the challenge to lead this international effort at this time. Although some might contend that highly qualified people will shirk this opportunity as too burdensome, I doubt that will be the case. Taking part in a historic climate-change trial might be the highlight of an entire career. Once again, the Nuremberg Trials might serve as a historic guide. It is remarkable to recount that a career as successful as Justice Jackson's, which included his historic rise to the Supreme Court, reached its pinnacle during the Nuremberg Trials. Indeed, Justice Jackson characterized his service as Chief Prosecutor in the Nuremberg Trials as "the greatest opportunity ever

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129. Exec. Order No. 9547.

130. *1945 Report to the President*, *supra* note 116.

131. *Id.*

132. *Id.*

presented to an American lawyer.”<sup>133</sup> I have no doubt that present leaders likewise will see this climate-change proposal as a historic opportunity.<sup>134</sup> While selecting the persons to lead the prosecution and defense teams is the first order of business, another requirement is equally important—securing an international agreement that establishes a Mock International Climate-Change Tribunal.

C. *Nations Should Forge an Agreement to Establish a Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity*

While Justice Jackson was preparing to lead the effort to prosecute Nazi war criminals, the international community simultaneously worked to create the framework that would pursue justice and create a historical record of Nazi war crimes. The Allied Powers—the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics—worked quickly to forge the London Agreement on August 8, 1945.<sup>135</sup> The London Agreement sought to carry out justice by prosecuting Nazi war criminals for “their abominable deeds.”<sup>136</sup> The seven-article London Agreement authorized, among other

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133. *1946 Report to the President*, *supra* note 110.

134. Following President Truman’s lead, the American President could search within the federal and state judiciaries and justice departments for qualified judges and attorneys to serve in this historic mock judicial process on climate change (other nations, of course, would perform the same task). Perhaps a personal anecdote is appropriate. When I clerked for Judge William Jay Riley of the United States Court of Appeals for the Eighth Circuit, he took a number of cases in the United States District Court for the District of Nebraska and at least one in the United States District Court for the Southern District of Iowa. Not only did he perform his job as a federal appellate judge, but he also sat by designation as a federal trial judge with no additional compensation. Additionally, he served for years as an adjunct professor teaching trial practice to law students at two different schools. Public servants like Judge Riley would be perfect candidates to volunteer their time and talent to tackling a historic challenge like climate change through a mock judicial process.

135. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis [hereinafter London Agreement], *International Conference on Military Trials: London, 1945 Agreement and Charter* (Aug. 8, 1945), <http://avalon.law.yale.edu/imt/imtchart.asp> (last visited Dec. 23, 2015). It is important to recognize that, in addition to the four nations that established the London Agreement, nineteen additional nations adhered to it. *1946 Report to the President*, *supra* note 110. To Justice Jackson, this level of support signified that the Nuremberg Trials “represent[ed] the combined judgments of the overwhelming majority of civilized people” and resulted in “a basic charter in the International Law of the future.” *Id.*

136. London Agreement, *supra* note 135.

things, the “International Military Tribunal for the trial of war criminals”; required that a Charter establish the “constitution, jurisdiction and functions of the International Military Tribunal”; authorized any government of the United Nations to adhere to the London Agreement; and ensured that the creation of the International Military Tribunal would not “prejudice the jurisdiction or the powers of any national” court to try war criminals.<sup>137</sup>

Following this straightforward and simple model, the United States should join with its allies to forge an international agreement that will establish a Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity. This agreement should track the London Agreement by (1) requiring the creation of a Charter that establishes the constitution, jurisdiction, and functions of this mock tribunal; (2) authorizing any nation to join this effort to use the judicial process to seek the truth of climate-change theories while creating a historical record and international clearinghouse of all climate-change evidence and witnesses; and (3) ensuring that the use of the Mock International Climate-Change Tribunal would not in any way prejudice the actual jurisdiction and authority of various courts throughout the world.<sup>138</sup> Once the basic agreement is forged, the international community can establish the actual charter for this mock international court to try climate-change claims.<sup>139</sup>

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137. *Id.* at Art. 1, 2, 5, 6.

138. Justice Jackson said that the London Agreement “devised a workable procedure for the trial of crimes which reconciled the basic conflicts in Anglo-American, French, and Soviet procedures.” *1946 Report to the President, supra* note 110. Nations should recognize those challenges exist today and attempt to reconcile them.

139. Although my proposal might appear straightforward, it is fraught with difficulties from every angle. But the international community overcame similar challenges to conduct the Nuremberg Trials, even though they contained as many or more difficulties than present themselves today:

The law is a contentious profession and a litigation offers countless occasions for differences even among lawyers who represent the same clients and are trained in a single system of law. When we add the diversities of interests that [] exist among our four nations, and the differences in tradition, viewpoint and language, it will be seen that our cooperation was beset with real difficulties. My colleagues, [from] the United Kingdom, France, and the Soviet Union, exemplified the best professional tradition of their countries and have earned our gratitude for the patience, generosity, good will and professional ability which they brought to the task. It would be idle to pretend that we have not had moments of difference and vexation, but the steadfast purpose of all delegations that this first international trial should prove the possibility of successful international cooperation in use of the litigation process, always overcame transient irritations.

*D. Nations Should Establish a Charter of the Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity*

Operating under the London Agreement, the Allies established the Charter of the International Military Tribunal.<sup>140</sup> This thirty-article charter covered seven general sections—Constitution of the International Military Tribunal; Jurisdiction and General Principles; Committee for the Investigation and Prosecution of Major War Criminals; Fair Trial for Defendants; Powers of the Tribunal and Conduct of the Trial; Judgment and Sentence; and Expenses.<sup>141</sup> The international community should work together to establish the Charter of the Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity. This twenty-first century charter generally should track the Charter of the International Military Tribunal.<sup>142</sup> Because any modern Agreement and Charter must be negotiated by many nations, there is no practical reason to attempt to create those documents here.<sup>143</sup> Instead, this Article simply will outline the international approach taken in the 1940s to prosecute crimes against humanity to serve as a modern-day guide to prosecuting today's claims of environmental crimes against humanity.<sup>144</sup>

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*1946 Report to the President, supra* note 110. I would hope that the twenty-first century would present an opportunity for the international community to work together successfully to present the first international mock trial on climate change.

140. Charter of the International Military Tribunal (Aug. 8, 1945), <http://avalon.law.yale.edu/imt/imtconst.asp>.

141. *Id.*

142. Confronted with creating from scratch a judicial framework that could try Nazi war criminals, Justice Jackson shared his appreciation for Justice Benjamin Cardozo's wisdom that "[t]he power of the precedent is the power of the beaten path." *1946 Report to the President, supra* note 110. The Allies did not have the power of precedent for what they were trying to accomplish after World War II. Justice Jackson lamented, "One of the chief obstacles to [the Nuremberg Trials] was the lack of a beaten path." *Id.* Fortunately, my proposal does not face the same obstacle of a lack of a beaten path. We should borrow freely from the lessons learned from the Nuremberg Trials.

143. It might be wise, however, to note that Justice Jackson described the Charter of the International Military Tribunal Charter as having "set up a few simple rules which assured all of the elements of fair and full hearing, including counsel for the defense." *Id.* Simplicity should guide a fair-and-full trial on climate-change claims.

144. If I were appointed to serve on a newly formed Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity, then I happily would help draft the appropriate Agreement and Charter that would guide the use of this mock judicial process to try climate-change claims. Should this footnote be considered a subtle hint or an application for work?

### 1. Constitution of the Mock International Climate-Change Tribunal

Acting under the requirements of the London Agreement, the Allies agreed on a Constitution of the International Military Tribunal that “established an International Military Tribunal . . . for the just and prompt trial and punishment of the major war criminals of the European Axis.”<sup>145</sup> The Constitution required that the Allies staff the International Military Tribunal by each appointing one member and one alternate member such that the Tribunal would have four members and four alternate members.<sup>146</sup> For the Tribunal to operate, the Constitution required that each member, or that member’s alternate, be present for business, and that the Tribunal’s members were required to select a President of the Tribunal.<sup>147</sup> Additionally, the Constitution required the Tribunal to make decisions based on a majority vote of the members, with the President’s vote being decisive when votes were evenly divided, except in decisions for convictions and sentences, which required three-member votes.<sup>148</sup>

Similarly, allied nations should agree on a Constitution of the Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity. This Constitution should provide the basic staffing structure for the Tribunal. The number of members of the Tribunal depends on the number of nations that take the lead in this effort to use the judicial process to aid the international search for truth and justice on climate-change claims. No matter how many nations appoint members and alternate members to lead this Tribunal, the Tribunal should not operate unless every member (or alternate) is present. Additionally, the members should select, by majority vote, one member to serve as President of the Tribunal. As the Tribunal begins its important work of seeking truth and justice on all climate-change claims, the members should aspire for unanimity in all decisions. Because many bodies struggle to obtain unanimous decisions, however, the Constitution should set forth how many members must vote to make a decision on behalf of the Tribunal. Following the International Military Tribunal’s approach, a simple majority vote could be required to make decisions with the Tribunal’s President having the final say when votes are tied. Finally, the nations should negotiate whether the Constitution should address how many votes would be required to reach a decision on whether the prosecution met its burden of proof on its claims. I

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145. Charter of the International Military Tribunal, *supra* note 140, at sec. I, art. 1.

146. *Id.* at sec. I, art. 2.

147. *Id.* at sec. I, art. 4(a), (b).

148. *Id.* at sec. I, art. 4(c).

leave what undoubtedly will be a contentious—and highly political—decision to the negotiating process.

The creation of the Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity is an obligation of the highest order. If this Tribunal is not staffed with world-class attorneys and judges of the highest levels of intelligence, integrity, and energy, then this entire effort would be a monumental waste of time. Each participating nation should appoint highly qualified and diligent professionals who wish to work together to seek truth and justice on all climate-change claims while forging a historical record.<sup>149</sup>

## 2. Jurisdiction of the Mock International Climate-Change Tribunal

In the section on Jurisdiction and General Principles, the Charter provided jurisdiction to the International Military Tribunal over crimes against peace, war crimes, and crimes against humanity as specifically defined in the Charter.<sup>150</sup> The Charter further required that in order for the International Military Tribunal to exercise its jurisdiction, it first had to draft governing procedural rules that were consistent with the Charter.<sup>151</sup>

It will be a critical step in the use of a mock judicial process to establish the appropriate jurisdiction of the Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity. The basic thrust of the Tribunal's jurisdiction will be to force climate-change proponents to

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149. Although the appropriate staffing of the Mock International Climate-Change Tribunal presents a significant challenge (and, likewise, a significant opportunity), the staffing requirements to conduct the Nuremberg Trials were an equally daunting challenge. Here is how Justice Jackson characterized the response to the challenge:

As authorized by [President Truman's] Executive Order, it was my policy to borrow professional help from Government Departments and agencies . . . . The War Department was the heaviest contributor, but many [generous] loans were also made by the State, Justice, and Navy Departments and . . . by the Office of Strategic Services. . . . The United States staff directly engaged on the case at [Nuremberg], including lawyers, secretaries, interpreters, translators, and clerical help numbered at its peak 654, 365 being civilians and 289 military personnel. British, Soviet and French delegations aggregated approximately the same number. Nineteen adhering nations also sent representatives, which added thirty to fifty persons to those actively interested in the case. The press and radio had a maximum of 249 accredited representatives who reported the proceedings to all parts of the world. During the trial over 60,000 visitors' permits were issued. . . . Guests included leading statesmen, jurists, and lawyers, military and naval officers, writers, and invited representative Germans.

1946 Report to the President, *supra* note 110.

150. Charter of the International Military Tribunal, *supra* note 140, at sec. II, art. 6.

151. *Id.* at sec. II, art. 13.



plead and prove every climate-change claim and proposed remedy under the burden of proof of their choosing. Once that requirement is detailed in the Charter, the next order of business would be to require the Tribunal to draft all governing procedural rules. These procedural rules would ensure that a transparent and fair judicial process would be pursued rather than a political process that seeks division and advantage.

The most obvious shortcoming—but perhaps the source of its greatest strength—is that the Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity will not enjoy actual legal jurisdiction over any defendants. It will not have the authority to mete out punishment, enforce remedies, or monitor compliance with any mandate. Instead, its sole purpose will be to use the key attributes of the judicial process to seek truth and create a record on all-things climate change. To date, the use of various courts with actual jurisdiction has not been a very appealing course of action when it comes to climate-change issues. Given the global scope of climate change with billions of participants in hundreds of sovereign nations, it should come as no surprise that individual courts have faced obvious challenges such as jurisdiction and justiciability concerns.<sup>152</sup>

American courts have long been asked to use their authority to take sides in the climate-change debate.<sup>153</sup> And so have courts of other nations.<sup>154</sup> But courts have been reluctant to use their limited jurisdiction and authority to engage in an issue of such complex, global significance as climate change. Indeed, the issue of standing runs counterfactual to any notion that a local court with limited jurisdiction could impact a global problem. The size and scope of the global nature of climate change make every individual court ill-suited to exercise its jurisdiction in any meaningful way, because there are

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152. See, e.g., *Ctr. for Bio. Div. v. U.S. Dep't of the Interior*, 563 F.3d 466 (D.C. Cir. 2009); *Gulf Restoration Network, Inc. v. Nat'l Marine Fisheries, Serv.*, 730 F. Supp. 2d 157 (D.D.C. 2010); *Native Vill. of Point Hope v. Salazar*, 730 F. Supp. 2d 1009 (D. Alaska 2010); *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088 (Alaska), *reh'g denied* (Oct. 28, 2014); *Ctr. for Bio. Div. v. Cal. Dep't of Fish & Wildlife*, 361 P.3d 342 (Cal. 2015); *Rialto Citizens for Responsible Growth v. Rialto*, 146 Cal. Rptr. 3d 12 (Cal. Ct. App. 2012); *Ballona Wetlands Land Trust v. Los Angeles*, 134 Cal. Rptr. 3d 194 (Cal. Ct. App. 2011); *Williamson v. Mont. Pub. Serv. Comm'n*, 272 P.3d 71 (Mont. 2012); *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015); *Chernaik v. Kitzhaber*, 328 P.3d 799 (Or. Ct. App. 2014); *Funk v. Commw.*, 71 A.3d 1097 (Pa. Commw. Ct. 2013); *Okeson v. Seattle*, 150 P.3d 556 (Wash. 2007).

153. See, e.g., cases cited *supra* note 152; *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410 (2011); *Mass. v. EPA et al.*, 549 U.S. 497 (2007); *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012).

154. *Gray v. Minister for Planning*, [2006] NSWLEC 720; *Urgenda Found. v. Neth. (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196.

nearly unlimited defendants in every corner of the globe who could be charged with contributing to global climate change. That is, what one court tries to accomplish in a single jurisdiction could be easily undone by conduct in another jurisdiction. That is the nature of a global, international issue like climate change.

A recent example of climate-change litigation involved five teenagers<sup>155</sup> and two organizations—Kids vs. Global Warming<sup>156</sup> and Wildearth Guardians<sup>157</sup>—who sued the Administrator of the U.S. Environmental Protection Agency (“EPA”), the Secretary of the U.S. Department of the Interior, the Secretary of the U.S. Department of Agriculture, the Secretary of the U.S. Department of Commerce, the Secretary of the U.S. Department of Energy, and the Secretary of the U.S. Department of Defense for collectively failing to reduce greenhouse gas emissions.<sup>158</sup> These youngsters alleged that these federal agencies “have violated their fiduciary duties to preserve and protect the atmosphere as a commonly shared public trust resource under the public trust doctrine.”<sup>159</sup> The adolescents were not shy in

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155. *The Atlantic* magazine described the lead plaintiff, Alec Loorz, in interesting detail: tall, lanky, seventeen-year old high school student with Attention Deficit/Hyperactivity Disorder who plays Ultimate Frisbee, “became a climate activist at age 12” after watching *An Inconvenient Truth* “twice in one evening,” and founded Kids vs. Global Warming. Katherine Ellison, *An Inconvenient Lawsuit: Teenagers Take Global Warming to the Courts*, *THE ATLANTIC* (May 9, 2012), <http://www.theatlantic.com/national/archive/2012/05/an-inconvenient-lawsuit-teenagers-take-global-warming-to-the-courts/256903/>. I think that it is admirable that teenagers want to make a positive impact on humanity. While I agree that the use of a mock adversarial and transparent judicial process can seek truth on climate change while creating a historical record of all climate-change evidence, I do not agree that actual courts—in any jurisdiction across the globe—have the institutional authority and jurisdiction to adjudicate issues impacting global temperatures or to enforce global mandates on human conduct. I would be inspired, however, if young people refused to turn to governments—whether political or judicial—to solve climate-change problems, but instead turned to their collective intellect, energy, resources, and lives to harness the power of technology and free markets to innovatively solve the problems they have identified. That type of collective approach, in my estimation, is superior to using the sheer, brute force of government to issue mandates.

156. “Kids vs Global Warming is a non-profit organization whose membership includes thousands of youth from around the country ‘who are concerned about how human-made climate change is affecting and will continue to affect them and their future.’” Alec L. v. Jackson, 863 F. Supp. 2d 11, 12 n.1 (D.D.C. 2012).

157. “Wildearth Guardians is a non-profit conservation organization that is dedicated to ‘protecting and restoring wildlife, wild rivers, and wild places in the American West, and to safeguarding Earth’s climate and air quality.’” *Id.* n.2.

158. *Id.*

159. *Id.*

seeking maximum court intervention on the issue of global climate change, asking a lone federal trial court in the United States for the following relief:

to declare that the atmosphere is a public trust resource and that the United States government, as a trustee, has a fiduciary duty to refrain from taking actions that waste or damage this asset. . . . [To] declare that, to date, [the federal government trustees] have violated their fiduciary duties by contributing to and allowing unsafe amounts of greenhouse gas emissions into the atmosphere. . . . [T]o further define [these] fiduciary duties [as requiring] federal agencies . . . to reduce global atmospheric carbon dioxide levels to less than 350 parts per million during this century. . . . [And] to issue an injunction directing the six federal agencies to take all necessary actions to enable carbon dioxide emissions to peak by December 2012 and decline by at least six percent per year beginning in 2013.<sup>160</sup>

As if that amount of federal court intervention was not enough for these young people, they further asked the trial court for an order requiring the federal government to submit to the court:

annual reports setting forth an accounting of greenhouse gas emissions originated by the United States and its citizens; annual carbon budgets that are consistent with the goal of capping carbon dioxide emissions and reducing emissions by six percent per year; and a climate recovery plan to achieve Plaintiffs' carbon dioxide emission reduction goals.<sup>161</sup>

Without a hint as to how long this relief would take, the plaintiffs asked the court to retain jurisdiction over the matter until all of the relief could be granted.<sup>162</sup>

The district court dismissed the case for lack of subject matter jurisdiction, holding that either the case did not arise under federal law because the public trust doctrine is a matter of state law or, in the alternative, that any such federal common law claim had been preempted by the Clean Air Act when it comes to the "abatement of carbon-dioxide emissions."<sup>163</sup> The court stressed that federal courts are not the proper place to determine the proper levels of atmospheric carbon dioxide and how to implement a plan to reach those

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160. *Id.* at 13-14.

161. *Id.* at 14.

162. *Id.* at n.6.

163. *Id.* at 15-16.

levels.<sup>164</sup> Instead, the court asserted that these determinations “are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the ‘primary regulator of greenhouse gas emissions.’”<sup>165</sup> Providing the young citizens with a lesson in basic civics, the court explained that “this case is about the fundamental nature of our government and our constitutional system, just as much—if not more so—than it is about emissions, the atmosphere or the climate.”<sup>166</sup> Displaying restraint by explaining that not “every dispute is one for the federal courts to resolve” and that “a sweeping court-imposed remedy is [not] the appropriate medicine for every intractable problem,” the court invited all of the parties in the litigation to talk to each other to reach the “laudable goal” of “protecting and preserving the environment.”<sup>167</sup> The court even “urge[d] everyone involved to seek (and perhaps even seize) as much common ground as courage, goodwill and wisdom might allow to be discovered.”<sup>168</sup>

My main contention is that the exclusive use of the political process is the least appealing, yet most utilized, option in adjudging and addressing climate-change claims. But a close second is that individual courts in thousands of jurisdictions also are not the appropriate forums to litigate global climate-change claims. Given the unappealing political process and the ineffective jurisdiction held by individual courts in multiple jurisdictions worldwide, this Article contends that the creation of a mock tribunal would be the most effective method to use the truth-seeking benefits of the adversarial judicial process without getting mired in the niceties of jurisdiction. Thus, any apparent shortcoming in utilizing a mock tribunal without actual jurisdiction and authority should not diminish its usefulness in seeking truth on climate-change claims while creating a historical record.

### 3. Committee for the Investigation and Prosecution of Environmental Crimes against Humanity

The Charter’s next section involved the critical task of creating the Committee for the Investigation and Prosecution of Major War Criminals, which required that the Allies each “appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.”<sup>169</sup> Acting as a committee, the Chief Prosecutors were tasked to

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164. *Id.* at 16-17.

165. *Id.* at 17.

166. *Id.*

167. *Id.*

168. *Id.*

169. Charter of the International Military Tribunal, *supra* note 140, at sec. III, art. 14.

agree upon a plan of work for each of them and their staffs; to designate the major war criminals who were to be tried by the International Military Tribunal; to approve the Indictment and other documents that were to be used to try the war criminals; to lodge the Indictment and the accompanying documents with the Tribunal; and to draft and recommend procedural rules that would govern the Tribunal (with the Tribunal having the ultimate authority over the procedural rules).<sup>170</sup> In carrying out these tasks, the Committee was instructed to act based on majority vote.<sup>171</sup> Additionally, the Chief Prosecutors were tasked individually—but while acting collaboratively—to investigate, collect, and produce all necessary evidence; to prepare indictments that would be approved by the Committee; to conduct preliminary examinations of all necessary witnesses and defendants; to serve as prosecutors at the trial; to appoint staff members to carry out assigned duties; and to do anything else necessary to prepare for and conduct the trial.<sup>172</sup>

Following the lead of the August 1945 Charter's creation of the Committee for the Investigation and Prosecution of Major War Criminals, modern-day allies should likewise form a Committee for the Investigation and Prosecution of Environmental Crimes against Humanity. This Committee is a critical element of my proposal, because it will be tasked with investigating climate-change claims; interviewing witnesses; collecting evidence; preparing the case for trial; and presenting the case in front of the entire world in an adversarial and transparent trial under a burden of proof of their choosing. This Committee's work product will form the cornerstone upon which the entire climate-change case will rest.

The Committee's first order of business would be to direct that each nation appoint its Chief Prosecutor, who would form his or her staff.<sup>173</sup> The Chief Prosecutors would agree on a plan of work that would guide the investigation and prosecution of their case. Each prosecutorial staff individually would pursue all climate-change theories by investigating, collecting, and producing all necessary evidence on climate-change claims; examining all necessary witnesses; and drafting a document such as an Indictment that would plead their best case on what specific conduct causes climate change and what specific remedies they seek to resolve their claims. To be clear,

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170. *Id.*

171. *Id.*

172. *Id.* at sec. III, art. 15.

173. Each nation should pay its team of prosecutors, but the source of those payments—whether public or private—would be left to each nation. This issue would be addressed in the Expenses section.

climate-change prosecutors must make specific claims of what precise conduct causes climate change and what precise remedies will undo climate change (i.e., vague, politicized assertions will have no place in this trial). Another key requirement will be that the Indictment created individually by each Chief Prosecutor must proclaim the level of confidence in their climate-change theories by choosing the burden of proof for each contested claim and theory.<sup>174</sup> If a Chief Prosecutor believes strongly in his or her case, then we would expect that Chief Prosecutor to choose the beyond-a-reasonable-doubt burden of proof.<sup>175</sup> If a Chief Prosecutor harbors doubts in his or her climate-change theories, however, then the Prosecutor might choose lesser burdens of proof such as preponderance of the evidence or clear and convincing evidence.<sup>176</sup> Once all Chief Prosecutors publicly disclose their Indictments, then the Chief Prosecutors would work collaboratively to combine their cases into a single case. The Chief Prosecutors would then release one Indictment. Collectively, they will announce all of their detailed climate-change claims and remedies. The world will be watching as these Chief Prosecutors of the climate-change case choose their theories, make their claims, plead their proposed remedies, and select their burden of proof.<sup>177</sup>

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174. Generally speaking, burden of proof commonly refers to “(1) the duty to prove a charge by a degree of proof such as a preponderance of evidence, clear and convincing proof, or beyond a reasonable doubt; and (2) the duty to go forward with the evidence.” *Nw. Elec. Co. v. Fed. Power Comm’n*, 134 F.2d 740, 743 (9th Cir. 1943), *aff’d*, 321 U.S. 119 (1944). When it comes to persuasion, burden of proof “is meaningless unless it is also said how strongly a person must be persuaded.” *Id.*

175. “In criminal cases, proof of guilt must be ‘beyond a reasonable doubt’, which implies a still greater degree of proof. It is one thing to be merely convinced of a fact, and another to be convinced beyond a reasonable doubt.” *Id.*

176. *See id.* (explaining that the burden to prove something by clear and convincing evidence requires “greater convincing force” than simply preponderance of the evidence). If the Chief Prosecutors fully investigate all climate-change claims and determine that these claims are supported by a mere scintilla of evidence, then the Chief Prosecutors probably should announce that they will not move forward with the prosecution of their case. *See generally* *Mendenhall v. Aldous*, 196 P.3d 352, 354 (Idaho 2008) (explaining that a case supported with a “mere scintilla of evidence” cannot proceed to a jury trial); *Cavacos v. Sarwar*, 545 A.2d 46, 51 (Md. 1988) (quoting *Fowler v. Smith*, 213 A.2d 549, 553-54 (Md. 1965)) (stating that a party with the burden of proof “cannot sustain this burden by offering a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture,” because this amount of evidence is not “of legal probative force and evidential value”).

177. It should be obvious that if the Chief Prosecutors choose a burden less than beyond a reasonable doubt, the world will know that the political noise on settled science and persecution of deniers was a bit overblown.

As the American Chief Prosecutor begins his or her investigation into climate-change claims, it might be prudent to listen to Justice Jackson's timeless wisdom as a guide. In his first letter to President Truman after being appointed Chief Prosecutor, Justice Jackson explained that the United States held the responsibility to investigate and prosecute culpable Germans for crimes against humanity: "The American case is being prepared on the assumption that an inescapable responsibility rests upon this country to conduct an inquiry, preferably in association with others, but alone if necessary, into the culpability of those whom there is probable cause to accuse of atrocities and other crimes."<sup>178</sup> The analogy here is that an American Chief Prosecutor should take the lead to investigate and prepare a legal case on all climate-change theories. Because the judicial process will utilize a mock trial without actual jurisdiction or authority to enforce a judgment, the primary goals of the Tribunal are to search for truth on climate-change claims, create a list of every witness, collect all relevant climate-change evidence in a single international database, and develop a historical record on climate change.

It seems like climate-change proponents and politicians have indicted almost every facet of human conduct. It will be interesting to witness a full and transparent investigation into, and prosecution of, detailed conduct to see what can be proven. No government or world leader will be immune from scrutiny. In prosecuting Nazi war criminals, sovereign nations were setting up an international criminal court to try leaders of another sovereign nation. Notwithstanding such high political stakes, Justice Jackson explained that no German defendant would be afforded the opportunity to assert a political immunity defense:

Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. . . . We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the law."<sup>179</sup>

To that end, the Mock Trial of Environmental Crimes against Humanity will enjoy every privilege to shine a spotlight on how the activities of political

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178. 1945 Report to the President, *supra* note 116.

179. *Id.*

leaders, heads of state, royalty, and government impact the climate and what remedies would undo those effects.

Although there is a lot to digest here, the main thrust is that the Chief Prosecutor of the climate-change case must maintain focus on the common-sense theories that impact all of humanity. Any inkling to gain a political advantage or use histrionics to obscure the evidence should be muted. Each Chief Prosecutor should be guided by the most solid and reliable evidence of what causes climate change and what, if anything, can be done to stop it. In a very simple and eloquent statement, Justice Jackson explained that his entire approach to prosecuting Nazi war criminals would be based on common sense:

The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.<sup>180</sup>

Along those lines, Justice Jackson voiced concern of the “real danger that trials of this character will become enmeshed in voluminous particulars of wrongs committed by individual Germans throughout the course of the war, and in the multitude of doctrinal disputes which are part of a lawyer’s paraphernalia.”<sup>181</sup> To avoid those pitfalls, Justice Jackson advised keeping in sight the overall goal rather than the minor nuances:

We can save ourselves from those pitfalls if our test of what legally is crime gives recognition to those things which fundamentally outraged the conscience of the American people and brought them finally to the conviction that their own liberty and civilization could not persist in the same world with the Nazi power.<sup>182</sup>

Justice Jackson wanted to ensure that all criminal charges focused solely on “[t]hose acts which offended the conscience of our people [that] were criminal by standards generally accepted in all civilized countries,” equating America’s “traditions of fairness” with international norms of “standards of just conduct.”<sup>183</sup> In recounting all of the barbaric and morally corrupt acts of Nazi leaders that had no rational connection to any notion of the lawful

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180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*



conduct of war, Justice Jackson recognized that “[t]he feeling of outrage grew in” America.<sup>184</sup> While outrage grew, Justice Jackson explained, “it became more and more felt that these were crimes committed against us and against the whole society of civilized nations . . . .”<sup>185</sup> Justice Jackson wholeheartedly believed that the instincts of the American people to try war criminals were the right instincts.<sup>186</sup> And to that end, he pleaded that those rights-based instincts “should guide us as the fundamental tests of criminality,” proposing then “to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.”<sup>187</sup>

In a mock climate-change trial, the focus ought to remain on the big picture of what we clearly know and don’t know when it comes to climate-change theories. Trusting the instincts and common sense of the common citizen, there should be no attempt to overly complicate or obfuscate matters. The proof for and against climate change should be fairly and clearly presented in a way that anyone can readily digest and comprehend. Truth seeks no shelter in convoluted theories and elaborately complex evidence.

If you are a rabid climate-change proponent who castigates anyone who denies that you have the answers to complex issues of climate change (whether as to cause or solution), then you might reject any notion that my proposal has merit. You quizzically might ask why bother with an arduous mock judicial process when any knowledgeable person already knows beyond doubt that human conduct causes climate change and that humans and their governments can fix it. Indeed, the use of the term “climate-change denier” is not meant to persuade anyone; it is meant to humiliate them into submission and silence. But how effective and satisfying is that strategy?

In his 1992 book *Earth in the Balance*, Al Gore asserted that as the evidence of global warming is making it “constantly clearer” that “global pollution not only risks our quality of life but could rend the fabric of life itself.”<sup>188</sup> Even though Gore has little tolerance for climate-change deniers, he indicated a willingness to take them head-on in proving his global-warming claims:

After years of debate and attempts to convince skeptics that the time for delay is over, I am resigned to the idea that even though we already know more than enough, we must also thoroughly investigate any significant scientific uncertainty that impedes our ability to come together and face this crisis. The knowledge thus

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184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. GORE, *supra* note 13, at xi.

gained will not only deprive the skeptics of some of their excuses for procrastination, it will also help us choose strategies for responding to the crisis, identify the most effective and least costly solutions, and solidify public support for the increasingly comprehensive changes that will be necessary.<sup>189</sup>

Perhaps Gore would support the use of a Mock International Climate-Change Tribunal to prove his climate-change theories. Perhaps my proposal could bring together every viewpoint—whether proponent or skeptic—and all of the evidence and every witness in a single forum to seek the truth on climate change while creating a historical record on the issue.<sup>190</sup>

#### 4. Fair and Transparent (Albeit Mock) Trial

The next step in moving toward the Nuremberg Trials was establishing a guarantee of a fair and transparent trial. But this path required persuasion. While the Allies were discussing what to do with the captured Germans who committed atrocities (even under war standards), Justice Jackson openly pondered various options:

What shall we do with [the prisoners in our possession]? We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But indiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is

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189. *Id.* at 37.

190. As an anecdote, National Geographic produced a short video on climate change that featured Jerry Meehl, a climatologist at the National Center for Atmospheric Research. Jerry Meehl, *Has Global Warming Stopped or Slowed?*, NAT'L GEO. (Apr. 25, 2014), <http://video.nationalgeographic.com/video/short-film-showcase/140425-climate-warming-debate-evt?source=relatedvideo>. Discussing climate change and global warming, Meehl likened his job as a climatologist to that of a detective. In order to answer the question of why the climate is warming, he must discover evidence that supports various theories. Just like a detective must take his evidence and data that supports various legal theories to a judge and jury to convince them of what actually happened, Meehl stressed, "This is exactly how science works." *Id.* We literally can use this analog to test various climate-change theories by presenting climate-change evidence and data to judges in an adversarial judicial process. We can merge the truth-seeking elements of science and law in a single case before a single tribunal on all issues of climate change.

*to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.*<sup>191</sup>

In choosing to use the judicial process to determine guilt or innocence, as opposed to the political process, Justice Jackson explained that trials against Nazi war criminals “must not be regarded in the same light as a trial under our system, where defense is a matter of constitutional right.”<sup>192</sup> Recognizing that defendants in ordinary American criminal trials often resort to “obstructive and dilatory tactics,” Justice Jackson wanted to ensure that these tactics could be banned.<sup>193</sup> Notwithstanding the fact that German war criminals would not enjoy all of the rights afforded to criminal defendants in American trials, Justice Jackson nevertheless wanted to ensure that the Nazi war criminals were given fair trials: “Fair hearings for the accused are, of course, required to make sure that we punish only the right men and for the right reasons.”<sup>194</sup>

These principles light the path for a climate-change trial. Every climate-change theory, piece of evidence, and witness will be examined under a bright and probing spotlight in full view of an interested world. A centralized record on climate change will emerge through an adversarial, truth-seeking, dispassionate judicial process. An open record will be far more useful than the current political records and agreements being secretly forged each day without an exacting analysis of their reasons and motives. The political process has unleashed decades of climate-change proposals without being subjected to exacting and probing public scrutiny. A fair and transparent trial on climate-change theories has the potential to do in a short period what politicians have been unable to do for decades: seek the truth on all climate-change theories, create a historical record, and accomplish all of this in plain sight of the viewing public.

How did the Charter attempt to ensure that Nazi war criminals would receive fair trials and not be subject to the whims of the political mob? Section IV of the Charter sought to ensure a fair trial through five basic procedures.<sup>195</sup> First, each indictment was required to “include full particulars specifying in detail the charges against the Defendants.”<sup>196</sup> Copies of these indictments and all accompanying documents were required to be translated into each

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191. *1945 Report to the President, supra* note 116 (emphasis added).

192. *Id.*

193. *Id.*

194. *Id.*

195. Charter of the International Military Tribunal, *supra* note 140, at sec. IV, art. 16.

196. *Id.* at sec. IV, art. 16(a).

defendant's language and served on each defendant at a reasonable time before the trial.<sup>197</sup> In the climate-change trial, the Chief Prosecutor will be required to follow suit. The Indictment on Climate Change must include full particulars specifying in detail all climate-change charges and proposed remedies. By simply reading the Indictment, one will know precisely what conduct is alleged to cause climate change and what specific remedies are proposed to end climate change.

Second, each defendant was guaranteed the right at any preliminary examination or trial "to give any explanation relevant to the charges made against him."<sup>198</sup> Third, each defendant was guaranteed that his language would be used in his preliminary examination and trial.<sup>199</sup> The Climate-Change Chief Defense Counsel will be afforded these same rights to publicly rebut any claims made by the Chief Prosecutor. The judicial process will utilize the full protection of an open and adversarial process. Political posturing, one-sided political reporting, and the use of bullying pejoratives will have no quarter in this open trial that simply seeks to expose the truth while creating an impenetrable and apolitical record.

Fourth, each defendant was given "the right to conduct his own defense before the Tribunal or to have the assistance of Counsel."<sup>200</sup> Fifth, each defendant had the right to present evidence at his trial to support his defense and to cross-examine any witness called by the prosecution.<sup>201</sup> One-sided prosecution of the climate-change case will be impossible, because the Climate-Change Chief Defense Counsel will have every opportunity to present his or her case after fully challenging the Chief Prosecutor's case. Every viewpoint, claim, theory, piece of evidence, exhibit, witness, and proposed remedy will be fiercely examined from every angle in a search for the truth on climate change. A full record on climate change will be created, which will serve as an international clearinghouse and database on climate change. The entire world will have full access to the entire record for all time. The truth should emerge.

##### 5. Powers of the Mock International Climate-Change Tribunal and Conduct of the Trial

Section V of the Charter dealt with the Powers of the Tribunal and Conduct of the Trial. The Committee for the Investigation and Prosecution

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197. *Id.*

198. *Id.* at sec. IV, art. 16(b).

199. *Id.* at sec. IV, art. 16(c).

200. *Id.* at sec. IV, art. 16(d).

201. *Id.* at sec. IV, art. 16(e).

of Environmental Crimes against Humanity should likewise adopt a Charter of the Mock International Climate-Change Tribunal for the Trial of Environmental Crimes against Humanity that includes a similar section detailing the Powers of the Mock International Climate-Change Tribunal and Conduct of the Trial. No analysis is needed here. Instead, simply use the procedures below as guideposts to inform you on what a climate-change trial would look like procedurally.

Section V of the Charter gave the International Military Tribunal the following authority:

- (a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them[;]
- (b) to interrogate any Defendant[;]
- (c) to require the production of documents and other evidentiary material[;]
- (d) to administer oaths to witnesses[;]
- (e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.<sup>202</sup>

Section V also required that the Tribunal confine each trial “strictly to an expeditious hearing of the cases raised by the charges”; “take strict measures to prevent any action which will cause reasonable delay”; “rule out irrelevant issues and statements of any kind whatsoever”; and “deal summarily with any contumacy” through the use of appropriate punishment, including excluding a defendant or his counsel from the proceedings so long as it could be done without prejudice to the determination of the charges.<sup>203</sup> Section V made clear that the Tribunal would “not be bound by technical rules of evidence.”<sup>204</sup> Instead, the Tribunal was instructed to “adopt and apply to the greatest possible extent expeditious and nontechnical procedure” and to “admit any evidence which it deems to be of probative value.”<sup>205</sup> In considering admissible evidence, however, the Tribunal was granted authority to require that it “be informed of the nature of any evidence before it is entered so that it may rule upon [its] relevance . . . .”<sup>206</sup>

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202. *Id.* at sec. V, art. 17.

203. *Id.* at sec. V, art. 18.

204. *Id.* at sec. V, art. 19.

205. *Id.*

206. *Id.* at sec. V, art. 20.

Section V established Berlin, Germany, as the Tribunal's permanent seat, but it required that the first trial be held in Nuremberg, Germany.<sup>207</sup> As to the conduct of the trial, the Charter authorized that one or more Chief Prosecutors could take part in the trials, but that it was up to each Chief Prosecutor to discharge his duties personally or through his agents.

Next, section V charted the course for trial proceedings as follows:

- (a) The Indictment shall be read in court.
- (b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty."
- (c) The prosecution shall make an opening statement.
- (d) The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
- (e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.
- (f) The Tribunal may put any question to any witness and to any defendant, at any time.
- (g) The Prosecution and the Defense shall interrogate and may cross[-]examine any witnesses and any Defendant who gives testimony.
- (h) The Defense shall address the court.
- (i) The Prosecution shall address the court.
- (j) Each Defendant may make a statement to the Tribunal.
- (k) The Tribunal shall deliver judgment and pronounce sentence.<sup>208</sup>

Finally, the Charter required that all official documents and transcripts of court proceedings be produced in the language of the Allies (i.e., English, French, and Russian) and of each defendant.<sup>209</sup> Interestingly, in a nod to the transparency of open trials, the Charter allowed the Tribunal to decide also to translate the record "into the language of any country in which the

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207. *Id.* at sec. V, art. 22.

208. *Id.* at sec. V, art. 24.

209. *Id.* at sec. V, art. 25.

Tribunal is sitting, as the Tribunal is sitting, as the Tribunal considers desirable in the interests of the justice and public opinion.”<sup>210</sup>

As mentioned above, Section V of the Charter guided the Nuremberg Trials, and it should provide the judicial framework for the Climate-Change Trial. Again, there is no reason to lay out here the specific procedures for a mock climate-change trial. Those detailed procedures will be formed once this proposal takes shape and is staffed.

At this point, it is natural to wonder how long it would take to perform all of the tasks proposed by this Article, i.e., to utilize the full judicial process to try climate-change claims while creating a historical record. This is nothing new. Time and timing were issues after World War II as well. In outlining his proposal on how the International Military Tribunal would operate, Justice Jackson addressed the pressing question of “when can this trial start and how long will it take.”<sup>211</sup> Fully appreciating that time was of the essence and that the patience of the American people—and perhaps the people of the world—would not tolerate a burdensome and lengthy trial of war criminals, Justice

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210. *Id.* Only a few short months after World War II ended and the Allies entered into the London Agreement, on August 8, 1945, the International Military Tribunal convened as the first international criminal court of its kind in Nuremberg, Germany, at the Palace of Justice. John Q. Barrett, *The Nuremberg Trial Begins* 1 (2015), <http://thejacksonlist.com/wp-content/uploads/2015/12/20151120-Jackson-List-Nuremberg-Trial-Begins.pdf>. Prosecutors charged twenty-four persons and six Nazi organizations with various crimes, each defendant was then served with an indictment, and each defendant had thirty days to secure counsel and prepare his defense for trial. *Id.* The United States paid for the housing and staffing of defense counsel. *Id.* at 2. Given the various languages, the logistics created some challenges. *See id.* Each person in the courtroom had access to the Allied languages—English, Russian, and French—as well as German. *Id.* The first order of business was to take each defendant’s plea. *Id.* at 3. And then just over a month later, on November 20, 1945, the first trial began in Nuremberg, thus beginning the legacy of the Nuremberg Trials. *Id.* Sir Geoffrey Lawrence of the United Kingdom read an opening statement. *Id.* Senior United States Prosecutor Sidney Alderman read Count One of the Indictment that charged defendants with the crime of common plan or conspiracy. *Id.* United Kingdom Deputy Prosecutor Sir David Maxwell Fyfe read Count Two that charged defendants with crimes against peace. *Id.* Count Three, which charged defendants with war crimes, was read by French Assistant Prosecutors Pierre Mounier and Charles Gerthoffer and Soviet Assistant Prosecutors J.A. Ozol and V.V. Kuchin. *Id.* Count Three was the first official document to use the word “genocide,” and when Mounier read his part of the indictment, it was the first official public utterance of that word. *Id.* Lastly, Kuchin read Count Four, which charged defendants with crimes against humanity. *Id.* Finally, Alderman read Indictment Appendix A, which stated who was individually responsible for the crimes, and Indictment Appendix B, which stated which groups and organizations had committed crimes, followed by Fyfe’s reading of Indictment Appendix C, which recounted violations of various treaty and agreements. *Id.*

211. 1945 Report to the President, *supra* note 116.

Jackson attempted to explain the importance of balancing swift justice with full and fair justice:

I know that the public has a deep sense of urgency about these trials. Because I, too, feel a sense of urgency, I have proceeded with the preparations of the American case before completion of the diplomatic exchanges concerning the Tribunal to hear it and the agreement under which we are to work. *We must, however, recognize the existence of serious difficulties to be overcome in preparation of the case. . . .* We must now sift and compress within a workable scope voluminous evidence relating to a multitude of crimes committed in several countries and participated in by thousands of actors over a decade of time. The preparation must cover military, naval, diplomatic, political, and commercial aggressions. The evidence is scattered among various agencies and in the hands of several armies. The captured documentary evidence—literally tons of orders, records, and reports—is largely in foreign languages. Every document and the trial itself must be rendered into several languages. An immense amount of work is necessary to bring this evidence together physically, to select what is useful, to integrate it into a case, to overlook no relevant detail, and at the same time and at all costs to avoid becoming lost in a wilderness of single instances. Some sacrifice of perfection to speed can wisely be made and, of course, urgency overrides every personal convenience and comfort for all of us who are engaged in this work.

Beyond this I will not go in prophecy. The task of making this record complete and accurate, while memories are fresh, while witnesses are living, and while a tribunal is available, is too important to the future opinion of the world to be undertaken before the case can be sufficiently prepared to make a creditable presentation. Intelligent, informed, and sober opinion will not be satisfied with less.

The trial must not be protracted in duration by anything that is obstructive or dilatory, but *we must see that it is fair and deliberative and not discredited in times to come by any mob spirit.* Those who have regard for the good name of the United States as



a symbol of justice under law would not have me proceed otherwise.<sup>212</sup>

Even though Justice Jackson disclaimed a gift of prophecy, his countenance and forethought apply with great force as the world struggles to understand the complex issues of global climate change. Every word quoted above impacts the ability of a climate-change tribunal to investigate climate-change claims, gather evidence, examine witnesses, prepare the prosecution and defense cases for trial, and conduct an actual trial in multiple languages. The primary goal of the climate-change tribunal will not be expediency, and a mob spirit will do nothing to compel it. Instead, the fair and deliberate pursuit of truth backed by intelligent, informed, and sober opinion will create a record that is worth the international effort. Justice—and not politics—will finally examine all issues of climate change in its probing search for truth.

As this critical section of my Article winds down, let me once again turn to Justice Jackson for inspiration for a climate-change trial. In presenting the first-ever prosecution of war criminals before an international criminal court, Justice Jackson made a powerful impression as he began his historic opening statement on November 21, 1945:

May it please Your Honors, The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and

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212. *1945 Report to the President*, *supra* note 116 (emphasis added). At the end of the Nuremberg Trials, Justice Jackson applauded how well nations worked together to seek justice under the law despite significant obstacles:

In a world torn with hatreds and suspicions where passions are stirred by the “frantic boast and foolish word,” the [Allies] have given the example of submitting their grievances against these men to a dispassionate inquiry on legal evidence. The atmosphere of the Tribunal never failed to make a strong and favorable impression on visitors from all parts of the world because of its calmness and the patience and attentiveness of every Member and Alternate on the Tribunal. The nations have given the example of leaving punishment of individuals to the determination of independent judges, guided by principles of law, after hearing all of the evidence for the defense as well as the prosecution. It is not too much to hope that this example of full and fair hearing, and tranquil and discriminating judgment will do something toward strengthening the processes of justice in many countries.

*1946 Report to the President*, *supra* note 110.

voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>213</sup>

The Chief Prosecutor of the climate-change case should heed Justice Jackson's example. Climate-change proponents make cataclysmic claims about how human conduct affects the climate. It has been arguably implied by various political rhetoric that the claims of the heinous acts of Nazi war criminals actually pale in comparison to the various and sundry claims made about environmental crimes against humanity. We are told that humanity's very existence hinges on how we respond to the cataclysmic climate-change claims. If the Chief Prosecutor believes in these claims, then he or she certainly will assert that these acts are so malignant and devastating that civilization cannot ignore them. Instead of gathering powerful political forces against conduct that causes climate change, all claims, theories, evidence, and witnesses will voluntarily submit to the steady, reasoned, and informed judgment of the law. Finally, even though there presumably will be a mountain of claims, evidence, witnesses, and staffs in this climate-change trial, that is no different than what took place during the Nuremberg Trials.

To that effect, Justice Jackson declared that "the United States would expect one trial of the top criminals to suffice to document the war and to establish the principles for which we contend[] . . . ."<sup>214</sup> One trial on all climate-change claims certainly should create a sufficient record<sup>215</sup> and

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213. *Nazi Conspiracy and Aggression, Volume 1, Chapter V*, [http://avalon.law.yale.edu/imt/chap\\_05.asp](http://avalon.law.yale.edu/imt/chap_05.asp) (last visited Feb. 9, 2016). On July 26, 1946, Justice Jackson delivered his closing argument before the International Military Tribunal in Nuremberg. *Nuremberg Trial Proceedings Volume 19*, <http://avalon.law.yale.edu/imt/07-26-46.asp> (last visited Feb. 9, 2016).

214. *1946 Report to the President*, *supra* note 110.

215. The importance of creating a historical record of climate-change claims cannot be overstated. That is a lasting legacy of the Nuremberg Trials. But the question of who controls that record must be addressed as well. Justice Jackson addressed who should have permanent custody of various documents:

In the hands of the prosecution and of various agencies there are large numbers of documents in addition to those that have been used which have not been examined or translated but which probably contain much valuable information. These are the property of the United States. They should be collected, classified, and indexed. . . . [A]ll of them should be available ultimately to the public. Unless . . . one qualified agency, such as the Library of Congress, is made responsible for this work and authorized to take custody on behalf of the United States, there is considerable danger that these documents will become scattered, destroyed, or buried in specialized archives.

establish the proper principles on which to base the entire climate-change approach.

#### 6. Judgment, Sentence, and Appeal

In section VI on Judgment and Sentence, the Charter required that the Tribunal's judgment on each defendant's guilt be supported by "the reasons on which it is based, and shall be final and not subject to review."<sup>216</sup> There was no right to appeal the Tribunal's judgment.

Justice Jackson unabashedly proclaimed that the London Agreement and Nuremberg Trials "put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution."<sup>217</sup> He even went so far as to declare that in a world with a depressing outlook, "it is possible that the [Nuremberg] trial may constitute the most important moral advance to grow out of this war."<sup>218</sup> Another moral advance would be to use the Nuremberg framework to try climate-change claims today.

At the conclusion of the climate-change trial, the Tribunal will issue its written judgment. This written decision will thoroughly address every charge and proposed remedy and fully explain the rationale for its judgment. It will point to the record for support. If members of the Tribunal do not agree with the Tribunal's judgment, then each member has the authority to write separately to explain his or her dissenting views. Every viewpoint will be heard. No bullying pejoratives or castigating opponents will squelch a full and open discussion of the issues.

Deviating from the Nuremberg framework, however, the judicial procedures employed in the climate-change context will not end after the trial and upon the issuance of the judgment. Instead, an appeal will be required that will continue the search for truth through additional analysis and examination. To that end, a Mock Court of Appeals must be created and staffed (with perhaps nine judges) to hear the appeal. There will be a full, adversarial briefing schedule followed by oral arguments. After oral arguments, the appellate court will issue its written decision along with any

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*Id.* Similarly, the entire record from the climate-change trial must be made available at all times to everyone in the world. The issue of who should have permanent custody of the record can be determined later.

216. Charter of the International Military Tribunal, *supra* note 140, at sec. VI, art. 26. Additionally, Section VI gave the Tribunal the authority to sentence convicted defendants to "death or such other punishment as shall be determined by [the Tribunal] to be just." *Id.* at sec. VI, art. 27.

217. 1946 Report to the President, *supra* note 110.

218. *Id.*

concurring or dissenting opinions. This extra step in the judicial process should better seek the truth by providing more sunlight on climate-change claims while ensuring that all issues have been fully analyzed and vetted.<sup>219</sup>

### 7. Expenses

The Charter's final article dealt with expenses: "The expenses of the Tribunal and of the Trials, shall be charged by the Signatories against the funds allotted for maintenance of the Control Council of Germany."<sup>220</sup> And the expenses were extensive. Justice Jackson recounted some of the logistical challenges and costs associated with the Nuremberg Trials:

On the United States fell the obligations of host nation at [Nuremberg]. The staffs of all nations, the press, and visitors were provided for by the United States Army. . . . The Army provided air and rail transportation, operated a motor pool for local transportation, set up local and long distance communications service for all delegations and the press, and billeted all engaged in the work. It operated messes and furnished food for all, the Courthouse cafeteria often serving as many as 1,500 lunches on Court days. The United States also provided security for prisoners, judges, and prosecution, furnished administrative services, and provided such facilities as photostat, mimeograph, and sound recording. Over 30,000 photostats, about fifty million pages of typed matter, and more than 4,000 record discs were produced. The Army also met indirect requirements such as dispensary and hospital, shipping, postal, post exchange, and other servicing. It was necessary to set up for this personnel every facility not only for working, but [also] for living . . . .<sup>221</sup>

It is fair to ask who will foot the bill to pay for my industrious idea. Should the costs be borne by the public sectors? Should the private sector contribute

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219. See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (stating that "[a]ppellate review has now become an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant"); *id.* at 23 (Frankfurter, J., concurring) (contending that the "Court would have to be willfully blind not to know that there have in the past been prejudicial trial errors which called for reversal"); see also *Nix v. Whiteside*, 475 U.S. 157, 174 (1986) (explaining that courts and officers of courts must be "dedicated to a search for truth"); Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 67 (2007) ("For litigants, appellate process is inherently part of procedural justice. Appeals correct errors and enhance accuracy; 'appeals, like trials, are a search for truth.'") (quoting *U.S. v. Brown*, 50 F.R.D. 110, 112 (D.D.C. 1970)).

220. Charter of the International Military Tribunal, *supra* note 140, at sec. VII, art. 30.

221. 1946 Report to the President, *supra* note 110.

to this cause? Or should there be some type of public-private partnership to bear the burdens of this truth-seeking proposal? This Article does not proffer an answer, other than to assert that a tremendous amount of public and private resources already have been squandered on climate-change issues. I suspect that centralizing and focusing the climate-change discussion in a mock judicial process will be worth the expense no matter who bears the cost. But I cannot imagine that the amount of money being spent by various governments alone on climate change does not already far exceed any costs that would be associated with conducting a mock climate-change trial.<sup>222</sup>

#### VI. THE NEXT STEP—CAN THIS PROPOSAL WORK?

If you are still reading this Article, then you probably have reached your own conclusion as to the viability and value of adopting and pursuing my proposal.<sup>223</sup> If you support the general idea of using a mock judicial process to seek the truth on climate-change claims while creating a historical record, then that is an accomplishment in that it starts the discussion.<sup>224</sup> But you still might oppose my proposal by thinking that the task would be too great. That is, you might conclude that the benefits gained from this process would be

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222. I suspect that there are a multitude of public and private entities that are capable of leading the effort to utilize the Nuremberg judicial framework to seek the truth on climate-change claims. One organization that jumps out is the Intergovernmental Panel on Climate Change (IPCC), which is a scientific body working under the United Nations as “the leading international body for the assessment of climate change.” See *Organization*, IPCC, <http://www.ipcc.ch/organization/organization.shtml> (last visited Feb. 9, 2016). In 1988, the United Nations Environment Programme and the World Meteorological Organization established the IPCC “to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.” *Id.* To carry out its mission, the IPCC “reviews and assesses the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change,” but it “does not conduct any research nor does it monitor climate related data or parameters.” *Id.*

223. If you do not support this proposal, then ask yourself three questions. First, are you content with the issue of global climate change being a political one? Second, what are the benefits (and perhaps think about the best-case scenario) if climate-change theories are tried before a Mock International Climate-Change Tribunal? Third, what are the risks (and perhaps think about the worst-case scenario) if climate-change theories are tried before a Mock International Climate-Change Tribunal? I believe that my proposal offers a tremendous upside with a miniscule downside, i.e., the benefits substantially outweigh any burdens.

224. Please feel free to discuss my proposal openly and share this Article with as many people as you can.

outweighed by its burdens. If the existence of humanity hangs in the balance, then that would be an unfortunate conclusion.<sup>225</sup>

In calculating the value of using a mock judicial process on climate-change claims, let us once again turn to the Nuremberg Trials as a historic analog. On October 7, 1946, a mere seventeen months after his appointment and upon the completion of the Nuremberg Trials, Justice Jackson returned to Washington and to the Supreme Court. He delivered his final report as Chief of Counsel, along with his letter of resignation, to President Truman.<sup>226</sup> In this report, Justice Jackson left behind a trove of helpful advice that could be used to inspire and direct the Mock International Climate-Change Tribunal. As we are confronted with the question of whether the burdens would be too great to conduct a prosecution of alleged environmental crimes against

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225. In response to the trepidation of rising to meet a daunting and costly challenge to use judicial procedures to seek the truth on climate-change claims, I hear in my head the timeless and inspiring words spoken by President John F. Kennedy at his Inaugural Address:

For I have sworn before you and Almighty God the same solemn oath our forebears prescribed nearly a century and three-quarters ago. The world is very different now. For man holds in his mortal hands the power to abolish all forms of human poverty and all forms of human life. And yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state but from the hand of God. We dare not forget today that we are the heirs of that first revolution. Let the word go forth from this time and place, to friend and foe alike, that the torch has been passed to a new generation of Americans—born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage—and unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world. *Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe [in order] to assure the survival and the success of liberty.*

Inaugural Address of President John F. Kennedy (Jan. 20, 1961) (emphasis added), <http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/JFK-Quotations/Inaugural-Address.aspx> (last visited Dec. 26, 2015). Recently, Secretary of State John Kerry gave a climate-change speech in which he stated that doing the right thing is always worth the cost: “Nor should we allow any room for those who think that the costs of doing the right thing outweigh the benefits.” Hughes, *supra* note 11. If climate-change claims rise to even a fraction of the cataclysmic level predicted by its proponents, then they should be more than willing to bear any burden to prove to the world the veracity of their claims.

226. See *1946 Report to the President*, *supra* note 110. It is fascinating to recall that the Nuremberg Trials of the major Nazi war criminals utilized the first international criminal court in history. *Id.* The International Military Tribunal found nineteen of the twenty-two criminal defendants guilty of various charges, dispensing sentences of death by hanging, life imprisonment, and four shorter sentences. *Id.* The Tribunal also found four Nazi organizations as criminal enterprises. *Id.*

humanity, consider Justice Jackson's recap of the resources required to prosecute the Nazi's crimes against humanity:

The magnitude of the task . . . may be suggested statistically: The trial . . . occupied 216 days of trial time. 33 witnesses were called and examined for the prosecution. 61 witnesses and 19 defendants testified for the defense; 143 additional witnesses gave testimony by interrogatories for the defense. The proceedings were conducted and recorded in four languages—English, German, French, and Russian—and daily transcripts in the language of his choice was provided for each prosecuting staff and all counsel for defendants. The English transcript of the proceedings covers over 17,000 pages. All proceedings were sound-reported in the original language used.

In preparation for the trial over 100,000 captured German documents were screened or examined and about 10,000 were selected for intensive examination as having probable evidentiary value. Of these, about 4,000 were translated into four languages and used, in whole or in part, in the trial as exhibits. Millions of feet of captured moving picture film were examined and over 100,000 feet brought to [Nuremberg]. Relevant sections were prepared and introduced as exhibits. Over 25,000 captured still photographs were brought to [Nuremberg], together with [the] photographer who took most of them. More than 1,800 were selected and prepared for use as exhibits. . . . The English translations of most of the documents are now being published by the Departments of State and War in eight volumes and will be a valuable and permanent source for the war history. As soon as funds are available, additional volumes will be published so that the entire documentary aspect of the trial—prosecution and defense—will be readily available.

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It is safe to say that no litigation approaching this in magnitude has ever been attempted. . . . [T]his gigantic trial was organized and ready to start the evidence . . . less than seven months after I was appointed and after the surrender of Germany. It was concluded in less time than many litigations in the regularly established [American] Courts . . . which proceed in one language instead of four.

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[We] install[ed] facilities for simultaneous interpretation of the proceedings into four languages. . . . It does work, and without it

the trial could not have been accomplished in this time, if at all. To have had three successive translations of each question, and then three of each answer, and to have had each speech redelivered three times in different languages after the first delivery finished, would have been an intolerable waste of time. The system we used makes one almost unaware of the language barrier so rapidly is every word made available in each language.<sup>227</sup>

Justice Jackson was steadfast in addressing the pressing question of whether the Nuremberg Trials were worth the time and expense—a resounding yes. He explained that any focus on “the personal fate of any of the defendants” missed the import of the Nuremberg Trials.<sup>228</sup> Rather, he explained that the significance of the Nuremberg Trials was a public demonstration that four world powers could commit to the London Agreement, jointly prosecute war criminals, and render judgment for those criminals.<sup>229</sup> Along these lines, Justice Jackson cataloged a long list of accomplishments from the Nuremberg Trials that included the first time that nations had explicitly and unambiguously declared that certain acts, even if conducted in war, constitute crimes against humanity.<sup>230</sup> Justice Jackson claimed that the London Agreement, International Military Tribunal, and the Nuremberg Trials undoubtedly strengthened “the bulwarks of peace and tolerance” and “enunciated standards of conduct which bring new hope to men of good will and from which future statesmen will not lightly depart.”<sup>231</sup>

If the international community heeds the lessons of the Nuremberg Trials, then we can once again come together to face what is alleged to be an even larger threat than Nazi war crimes. Climate change is cast as an issue of global

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227. *Id.* The scope of the effort at the Nuremberg Trials cannot be overstated:

While the Germans destroyed some of the historical record at the end of the war and some German records were destroyed during the Allied bombing of German cities, Allied armies captured millions of documents during the conquest of Germany in 1945. Allied prosecutors submitted some 3,000 tons of records at the Nuremberg trial. More than a decade later, beginning in 1958, the United States National Archives, in collaboration with the American Historical Association, published 62 volumes of finding aids to the records captured by the U.S. military at the end of the war. More than 30 further volumes were published before the end of the 20th century.

*Holocaust Encyclopedia, Combating Holocaust Denial: Evidence of the Holocaust Presented at Nuremberg, supra* note 109.

228. 1946 Report to the President, *supra* note 110.

229. *Id.*

230. *Id.*

231. *Id.*



significance that threatens humanity's survival. By adopting the Nuremberg judicial framework to try climate-change theories, we can follow Justice Jackson's guidance by enunciating standards of conduct that bring new hope to humankind. We can publicly demonstrate that the political process is deficient in confronting the convoluted and complicated issues of climate change. In its place, we can utilize a judicial process to seek the truth on climate-change claims while creating a historical record for the world to see.

I realize that many law review articles are scarcely read and rarely adopted. I get that. But I have grand hopes for this industrious proposal and its potential to address one of the defining issues of our time in the same way that the Nuremberg Trials addressed the defining issue of its time—the Nazi atrocities during World War II. If my proposal is executed in the way that I envision, I predict that the use of the Mock International Climate-Change Tribunal might result in one of the most famous trials in history. If the climate-change threat is even a fraction of that claimed by climate-change proponents, then the challenges we face are international and timeless in scope. Every person and every nation in the world has a stake in seeking the truth on these issues. We have a worldwide challenge with a worldwide audience.

In crafting my proposal to use the judicial process to seek truth on climate-change claims, I obviously have used the Nuremberg Trials as the model judicial framework. But please allow me to use another famous trial with the hope of drawing attention to the Climate-Change Trial—the famous Scopes Monkey Trial of 1925. Generally, the Scopes Trial pitted biblical creation against evolution in the prosecution of a public science teacher for teaching the theory of evolution.<sup>232</sup> When I was the Arthur Mag Fellow of Law at the University of Missouri—Kansas City School of Law, I took a class on Famous Trials taught by Professor Douglas O. Linder. The Scopes Trial was among the trials that we studied.<sup>233</sup> Even though Professor Linder has studied and

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232. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927) (“Scopes was convicted of a violation of [a statute for teaching] in the public schools [a] theory that denied the story of the divine creation of man, as taught in the Bible, and did teach instead thereof that man had descended from a lower order of animals.”).

233. In addition to offering an outstanding seminar on famous trials, Professor Linder has created a world-class website of famous trials. *Famous Trials*, <http://law2.umkc.edu/faculty/projects/ftrials/ftrials.htm> (last visited Feb. 9, 2016). Among the nearly eighty famous trials on the website, the Scopes Trial has its own page with a trove of information and documents about the trial. Douglas O. Linder, *Tennessee vs. John Scopes: The “Monkey Trial,”* FAMOUS TRIALS IN AMERICAN HISTORY, <http://law2.umkc.edu/faculty/projects/ftrials/scopes/scopes.htm> (last visited Feb. 9, 2016). The Nuremberg Trials are also featured on the website. *Famous World Trials: Nuremberg Trials, 1945-1949*, <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm>.

catalogued nearly eighty famous trials, he considers the Scopes Monkey Trial as “THE greatest trial of the twentieth century.”<sup>234</sup> If we follow the judicial lessons of both the Nuremberg Trials and the Scopes Trial, I contend, then we will conduct a full and fair examination of all climate-change theories and evidence while maximizing the public’s interest in the trial.

In determining that the Scopes Trial was the greatest trial of the last century, Professor Linder explained that it “brought together America’s greatest defense attorney, Clarence Darrow, its greatest political orator and a sort of Fundamentalist Pope, three-time presidential candidate William Jennings Bryan, and its greatest and most acerbic journalist, H. L. Mencken.”<sup>235</sup> I am not quite sure how to match that approach, but certainly there are hosts of great trial attorneys to serve as Chief Prosecutors and Chief Defense Counsel, fire-branding orators to serve as expert witnesses, and great and acerbic journalists to cover the case to arouse the interest of the general public. This cast of characters can be chosen at a later date.<sup>236</sup>

Citing another reason why he chose the Scopes Trial as the greatest twentieth-century trial, Professor Linder referred to “what the New York Times called ‘the most amazing courtroom scene in Anglo-American history,’ the calling of prosecutor William Jennings Bryan to the stand by Clarence Darrow for examination on the question of whether every story in the Bible was literally true.”<sup>237</sup> Can you envision a similar scene unfolding in the climate-change trial in which a sharp-tongued, well-prepared attorney mercilessly cross-examines a world-acclaimed scientist over his climate-change orthodoxy?

Finally, Professor Linder chose the Scopes Trial as the greatest trial of the twentieth century because the trial ultimately was about ideas:

The Scopes Trial . . . was about ideas. It was about whether Science and Religion could be reconciled. It was a symbolic struggle for America’s culture between the forces of Traditionalism and the forces of Modernism. It was about whether we look for guidance from, as Bryan said “the faith of our fathers,” or from our own

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234. Douglas O. Linder, *What is THE Trial of the Century?* (Jan. 28, 1999), <http://law2.umkc.edu/faculty/projects/ftrials/scopes/century.html>.

235. *Id.*

236. Are there any volunteers?

237. Linder, *supra* note 234. Professor Linder added, “If that weren’t strange enough, the examination took place in the courthouse lawn before a crowd of thousands after the judge expressed concern that the courtroom floor might cave in because of the weight of spectators.” *Id.*

intellects. The Scopes Trial was about what much of the twentieth century has been about.<sup>238</sup>

Similarly, climate-change proponents claim that there is no greater issue in the battle of international ideas than the issue of global climate change. As part of that battle, climate-change proponents openly belittle and bully anyone who doubts or challenges their orthodoxy, calling them “climate-change deniers.” Climate-change proponents should eagerly adopt this proposal to place their theories under the intense spotlight of the judicial process rather than within the dimly lit political process. The clash of ideas on climate-change deserves its day in court.

## VII. CONCLUSION

Given the overly politicized debate on climate change that bullies dissenters with the pejorative term “climate-change denier,” it is nearly impossible to clearly understand all of the issues that impact global temperatures over time and the proper response. Unfortunately, the public persona of the climate-change debate is belched upon us by mostly ignorant politicians. Even though this type of hyperbolic, human-made pollution finds its way to cameras, microphones, and news pads, trust does not follow. Instead, trust wanes. Even though the hot air of politicians propels the climate-change debate, there are legions of serious people and organizations devoted to the issue. And the climate-change debate is a serious one containing nearly infinitely complex variables. Even though there are a number of basic questions in the debate, it can be impossibly frustrating to get direct answers. But two simple questions need clear, precise answers. First, what are the precise claims of human-caused climate change? Second, what are the precise solutions to remedy the problem? When answering these questions, it is important to ascribe a level of certainty to them. Similarly, it is important to create a historical record on all climate-change claims.

This Article presents a workable solution that could galvanize and unify disparate forces to seek the unfiltered, depoliticized truth on climate change.

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238. *Id.* Another reason for choosing the Scopes Trial as the greatest trial of the twentieth century was based on its contribution to the movies: “The Scopes Trial inspired ‘Inherit the Wind,’ one of the greatest courtroom dramas ever starring Spencer Tracy as Darrow, Fredric March as Bryan, and Gene Kelly as Mencken.” *Id.* I am not predicting that a climate-change trial will be made into a movie like *Inherit the Wind*, but I would not bet against it. At a minimum, there will be a public record of the entire process. As discussed above, this Article proposes that the use of the Mock International Climate-Change Tribunal will create a historical record by making available to everyone in the world every filing, proceeding, and the entire trial.

Whether you are a climate-change proponent or climate-change skeptic, this proposal benefits your cause. Let's put all of the theories and claims made by climate-change proponents to the harsh, truth-seeking spotlight of a mock trial by using the Nuremberg Trials as the model judicial framework. Let's force human-caused climate-change proponents to plead and prove their best case with proposed remedies under the burden of proof of their choosing. Let's have the trial of the century on climate change.

