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THE RISKY BUSINESS OF BIG OIL: HAVE RECENT COURT DECISIONS AND LIABILITY CAPS ENCOURAGED IRRESPONSIBLE CORPORATE BEHAVIOR?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin, prepared statement	67
Franken, Hon. Al, a U.S. Senator from the State of Minnesota, prepared statement	68
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	1
prepared statement	103
Sessions, Hon. Jeff, a U.S. Senator from the State of Alabama	3
Whitehouse, Hon. Sheldon, a U.S. Senator from the State of Rhode Island	6
prepared statement	108

WITNESSES

Coleman, W. Jackson, Managing Partner, EnergyNorthAmerica, LLC, Washington, DC	10
Galligan, Tom, President and Professor of Humanities, Colby-Sawyer College, New London, New Hampshire	12
Jones, Christopher K., Baton Rouge, Louisiana	8

SUBMISSIONS FOR THE RECORD

Clemons, Eric K., Professor, Wharton School, University of Pennsylvania	37
Coleman, W. Jackson, Managing Partner, EnergyNorthAmerica, LLC, Washington, DC, statement	39
Congressional Research Service, report	55
Farady, Susan, Direct, Marine Affairs Institute, Roger Williams University School of Law, Bristol Rhode Island, statement	63
Galligan, Tom, President and Professor of Humanities, Colby-Sawyer College, New London, New Hampshire, statement	70
Greenstone, Michael, Politico, Arlington, Virginia, article	96
Jones, Christopher K., Baton Rouge, Louisiana, statement	98
Torgan, John, Narragansett Baykeeper, Providence, Rhode Island, letter	106

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

THE RISKY BUSINESS OF BIG OIL: HAVE RECENT COURT DECISIONS AND LIABILITY CAPS ENCOURAGED IRRESPONSIBLE CORPORATE BEHAVIOR?

TUESDAY, JUNE 8, 2010

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feingold, Durbin, Whitehouse, Klobuchar, Kaufman, Specter, Franken, Sessions, and Hatch.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. I appreciate everybody being here. I know this may be an emotional meeting. I would ask everybody to recognize the appropriate degree of decorum. I understand we have families who have gone through terrible tragedies and we should show the respect due for that.

It has now been 50 days since BP's Deepwater Horizon oil rig exploded and oil began gushing into the Gulf of Mexico. Deadly contamination has reached the shores and wetlands of the gulf coast. Our Nation faces an environmental catastrophe. Americans are angry.

In fact, the past week when I was home in Vermont, I cannot recall when so many people have come up to me on one issue as this, saying, "What is happening?"

The American people want to know how and why this happened. As Attorney General Holder and others investigate this disaster, I am confident that the facts will become known, and if criminal conduct occurred, it should be and it will be prosecuted to the fullest extent of the law.

Senators on both sides of the aisle believe that those responsible for this disaster should be held fully accountable. We cannot let big oil companies play roulette with our economic and environmental resources. A region that has already suffered so much from natural disasters has yet another tragedy on their hands, this time at the hands of one of the largest oil companies in the world.

Much attention is being given to the unfolding environmental disaster, but I would hope that Americans would never forget the 11 men who lost their lives—men who have left behind children

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and wives, parents, brothers and sisters. Christopher Jones, whose brother Gordon lost his life on the oil rig, is with us here today to represent all these men and these families. Mr. Jones, I am glad you are here. I know you are accompanied by your father, Keith Jones. And I understand from you, Mr. Jones Sr., that the President is having some of the families to the White House later this week. Mr. Jones, you and your family have our condolences. I know in the discussions I have had with the President, he feels very strongly about this. You should feel free to tell him exactly what you are thinking and any suggestions you have. He actually wants to hear what you have to say.

But you also have my commitment to work to achieve some fairness under the law for your brother's family and the families of all who lost their lives in this disaster. You deserve a measure of justice.

Today's hearing will examine how the applicable laws have shaped big oil's behavior. We have to find out whether our legal system itself gives some kind of incentive to big oil companies to cut corners.

We will ask whether the Supreme Court's decision in the *Exxon Valdez* case and the current liability caps in the Oil Pollution Act of 1990 and the Limitation of Liability Act encourage corporate risk and misconduct. We are going to ask whether current maritime statutes that compensate the survivors of those killed are fair and whether the current legal structure tempts corporations to devalue human life in their calculus of profitability. No one's life should become an asterisk in somebody's cost/benefit analysis. It is immoral.

The Death on the High Seas Act is the exclusive remedy for the families of those killed in international waters. But this law does not recognize all that is lost with the death of a loved one, such as loss of consortium, care, or companionship. These should not be any legal difference between loss at sea and what happens when a BP employee is killed while working at a facility on land. The disparity adds further insult to the 11 families who are victims of this tragedy.

Ten years ago, Congress amended the Death on the High Seas Act to achieve fairness for those who perish in airline crashes over international waters. It is time we modernized this law again. Later today, I will introduce the Survivors Equality Act to make sure these families are treated fairly.

Another law that Congress should consider updating is the Limitation of Liability Act, which limits a vessel owner's total liability to the post-incident value of the vessel. That law was passed in 1851, for a different time and before the Civil War. The company that owns the Deepwater Horizon, Transocean, wasted no time filing a motion in Federal court to limit its total liability under this arcane law to the value of the sunken drilling rig. They want their liability limited to the value of what is now a piece of junk sitting a mile below the surface. That is perverse, and I think Congress should act to avoid this absurd result.

Then, of course, there is the statutory liability cap of $75 million on consequential damages in addition to the costs of clean-up for an oil spill, and that needs reexamination.

Two years ago, an activist Supreme Court in the decision *Exxon* v. *Baker* created an arbitrary limit on punitive damages in maritime cases. When I chaired a hearing to examine the decision, I expressed my concern at that time that the Supreme Court's *Exxon Valdez* decision would encourage corporate misconduct. Why? Because it reduced the consequences of their misconduct to a discounted cost of doing business. That is almost like saying we are giving you a green light to do whatever you want to do. I cannot imagine why anybody would be surprised that after the Supreme Court effectively capped damages designed to punish corporate misconduct, oil companies cut corners and sacrificed safety.

The *Exxon Valdez* decision was another in a string of business-friendly Supreme Court decisions in which a narrow majority has essentially written new law and disregarded laws enacted by Congress. The impact on the lives and livelihoods of Americans is enormous. Two years ago, we heard from Alaskan fishermen. Now we are worried about the livelihoods of shrimpers and oystermen in the gulf, people who have spent decades, generations, obeying every single rule, building their businesses, having something they can leave to their children, and say they followed the rules. And because somebody else does not, they lose it all.

I have joined Senator Whitehouse's effort to overturn the Supreme Court's *Exxon Valdez* decision.

I am also looking into legislation to prevent corporations from deducting punitive damage awards from their taxes so that they bear the full cost of their extreme misconduct.

Our laws should encourage safety and accountability. Where they do not create the right incentives, we have to change them. Whether as the result of greed or incompetence or negligence, BP's conduct has devastated the lives and livelihoods of countless people and their communities and may threaten the gulf coast's very way of life.

It has been said by others that BP spends millions and millions of dollars writing ads saying how wonderful they are and how environmentally conscious they are. They could spend a lot more money helping the families that are suffering. The American people deserve better from all big oil companies who exploit our natural resources for enormous profit.

So in the months ahead, the people of the gulf coast will work to reclaim their coastline, their livelihoods, their wetlands, and their fisheries, and many of us here will help them. But, unfortunately, the families of those who lost their lives on that tragic day will not be able to reclaim their loved ones. The 11 men who were killed on the Deepwater Horizon rig deserved better, and we are going to try to make it better. I pledged that to their families. I renew that pledge today.

I thank Senator Whitehouse for co-chairing this hearing and all of our witnesses for being here. I am going to yield to Senator Sessions, who actually does represent a Gulf State, and then to Senator Whitehouse. Then we will begin the hearing.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. The Deepwater Horizon disaster is now and remains a very serious threat to our coastal environment, our coastal economy, and particularly, our thoughts and prayers remain with those who, like Christopher Jones, lost family members on that rig. Eleven wonderful Americans lost their lives.

I had a long meeting with Governor Riley and Congressman Bonner Friday in Mobile. We talked about the problems that the Nation faces, and we listened to the mayors of Gulf Shores and Orange Beach and Bayou La Batre and people who represented the Mobile Bay area and the threats that are being faced there. And there is quite a bit of concern, frankly, a lot of intensity of feeling that things have not gone as well as they could, and we do need to do better. We must do better. And I really want to thank Governor Riley for his personal leadership in leading the effort to coordinate the response with regard to the Alabama area.

Today marks the 50th day that oil has been pouring into the Gulf of Mexico, and it looks like it will be some time before we are fully able to comprehend the impact of this spill and the extent of the damage to our environment. Stopping this leak, of course, is the top priority because defensive measures trying to stop what has flowed out will never be able, as I have learned, to completely stop the flow into our estuaries and beaches, and even small amounts can cause serious damage.

The Coast Guard, BP, MMS, NOAA, and the EPA continue to evaluate and implement sub-sea and sub-surface efforts to stop the flow while closely monitoring its effect on the environment. I am somewhat encouraged by yesterday's announcement where Admiral Thad Allen confirmed that the capturing by BP of around 462,000 gallons of oil a day, which is a substantial increase from what was occurring Friday, that is a positive step. If this procedure continues to work, I am hopeful that the containment cap will begin to successfully collect as much oil as the surface tankers can handle.

That being said, this is only the first step in what could be a long process, and it is without question that the potential environmental and economic impact of the accident is unprecedented. BP is a multi-billion-dollar international company. As I said shortly after this event occurred, they are the responsible party. They are liable for the damages up to the extent of their very financial existence, and they are not too big to fail. I believed that then, and I believe that today. They have made great profits, and so be it. But they assume risk. They became and signed as the responsible party, and I believe that they are going to have to honor that commitment to be the responsible party.

In fact, in the first quarter of this year, BP's profits averaged $93 million per day. BP is the one that under the law and under the procedures of our drilling is the responsible party. So I have questioned those executives, those at Transocean and Halliburton, at the Energy Committee, of which I am a member, and administration officials seeking explanations for the cause of this accident and confidence and assurance that the responsible parties will accept the full responsibility for the damages.

Officials have repeatedly stated from BP that the company will pay all clean-up costs and that it will ignore the $75 million liability cap established by the Oil Pollution Act of 1990. And, indeed, there is no cap on the clean-up costs. Every dollar that is spent cleaning up any oil on the beaches and estuaries, that will be—there is no cap on that. In addition, there is no cap, as I understand it—and we will perhaps ask our witnesses—on the individual lawsuits that can be brought against them under State law.

Company spokesmen have said they will not seek reimbursement from the U.S. Government from the Oil Spill Liability Trust Fund. That remains to be seen how that will play out, but it is certainly available, if need be.

Those corporate entities responsible will be held liable for the actions. I think it is appropriate, Mr. Chairman, that we analyze precisely the legal causes of actions that are available and whether or not they appropriately fit the circumstances of this case.

We also need to examine did the Government play an adequate role in responding to the disasters. According to the Coast Guard logs released by Congressman Darrell Issa, the Ranking Member of the House Oversight and Government Reform Committee, the administration knew that this was going to be a spill of "national significance" within 24 hours of the event. Those logs also show discrepancies between the information they contain and the previously released White House timeline of the events.

While the title of this hearing obviously assumes a level of irresponsible corporate behavior on behalf of entities like BP, we need to examine also how well the administration responded to this event. Instead of allocating administrations, it appears we have had other actions that are less effective. I think an appropriate evaluation of possible criminal activity should be conducted, but it should be conducted in a fair and just way.

We must be careful in implementing new policies to address this incident. In late May, the President announced he is extending the moratorium on permits to drill new deepwater wells for 6 more months. I certainly think we need to be careful about that and examine very carefully whether or not and how we should go about further deepwater drilling. While this moratorium can be necessary to review safety and environmental regulations, it will clearly have a negative impact on production, jobs, and revenues to States and the Federal Government.

The offshore industry is responsible for nearly 200,000 jobs around the Gulf of Mexico and over $13 billion a year in non-tax revenues for the gulf coast producing States. Total revenue collected by the general treasury from all Federal offshore operations totaled $5.9 billion in 2009 alone. Drilling on the outer continental shelf is an important issue not just for the Gulf States but the entire country. There are several investigations into the cause of this rig explosion, and the administration recently established an independent commission to submit a plan to the President within 6 months providing solutions to prevent and mitigate future spills from offshore drilling.

I hope that we can complete that review and that it will be effective in identifying the dangers and risks involved. But I do hope that we will be able then to move forward with greater energy

independence and self-sufficiency by adopting the kind of plan that will allow us to be successful. The greater our dependence on foreign energy, the greater threat to America's national security.

Offshore drilling in the Gulf of Mexico supplies 30 percent of America's domestic energy production. Most people do not fully realize that. And 80 percent of the gulf's oil—and I did not realize this—comes from operation in more than 1,000 feet of water. Eighty percent. For this reason, we must continue the safe and secure offshore drilling. It is important to our economy, jobs, and national security.

Mr. Chairman, our communities are hurting. We have got a seafood industry that is basically shut down. Hundreds of low-wage workers have lost their jobs. Probably almost half of the rental capacity in our beachfront properties has been lost or is beginning to be lost, and so it is a national issue. But also we have thousands and thousands of good Americans who are working on those rigs every day whose lives are at risk and need to be assured that the production that is occurring is safely done.

Thank you for allowing me to have these remarks.

Chairman LEAHY. Senator Whitehouse.

STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Chairman Leahy, for holding this hearing, and thank you for inviting me to co-chair it. Like you, I believe that Congress must do whatever it can to prevent another family from having to hear that their loved one has perished on an oil rig. Congress must also take every available measure to avoid the environmental destruction that we are seeing unfold day after day as this spill continues. Gordon Jones and ten other men died. The gulf has been devastated. Something has to change.

How did it come to this? Well, we already know that BP, Transocean, and Halliburton failed to meet important safety standards. They undertook risky drilling without a proper degree of care—5,000 feet below the surface of the gulf, 18,000 feet to the oil reservoir, amid methane hydrate deposits that are highly dangerous when they get inside the drill column. They were irresponsible. The result was tragedy.

Sadly, key regulatory agencies also appear to have been asleep at the switch, shirking their responsibilities to protect our oceans and American workers at sea. I am convinced that something was fundamentally amiss at the Minerals Management Service at the Department of Interior. I strongly suspect that MMS had long since been captured by the oil industry and that it had ceased to serve the public interest.

But regulatory agencies, even when functioning properly, never have been America's sole line of defense against disasters. We also should make sure that it is in a corporation's clear economic interests to adhere scrupulously to the law. Meaningful civil and criminal fines and damages are one crucial tool for ensuring that a corporation takes proper precautions to avoid tragic errors. In contrast, a corporation that does not have to pay for its mistakes does not have to worry about making them.

Unfortunately many of our current laws—whether by statute or by court decision—cap the liability of big oil corporations, both for worker injuries and deaths, and for harms to the environment. Rather than making responsible parties pay for harm done, they foist this burden onto the families of the lost and onto the American taxpayers. As a result, corporations lack proper market incentives to act responsibly. That must not continue. Congress must act.

These restrictions on liability are, unfortunately, consistent with attacks upon the institution of the jury by powerful corporate interests. The Founders put the jury in the Constitution and Bill of Rights three times, and for a reason: to ensure that in at least one forum of government, the powerful and the powerless have equal standing. Not for nothing did de Tocqueville describe the jury as "a mode of the sovereignty of the people." That is as true today as it was at our Nation's founding.

The tide of corporate money that influences politics stops at the hard square corners of the jury box. That is why corporations fight so hard to attack the institution of the jury.

You know this as well as anyone, Mr. Chairman, and I am proud to cosponsor the legislation you are introducing today. It will eliminate the strange quirks in American law that, left unchanged, would result in the survivors of the 11 men killed on the Deepwater Horizon being treated unfairly. The Senate should pass that legislation promptly. I also urge my colleagues to support two bills that I have introduced. The first would raise penalties for worker safety and environmental violations under the Outer Continental Shelf Lands Act. The second would overturn the Supreme Court's regrettable *Exxon* v. *Baker* decision that capped maritime punitive damages at the level of compensatory damages. The *Exxon* Court believed that predictability for corporations was more important than deterring misconduct. I disagree.

The people of my home state Rhode Island—the Ocean State—would put our environment and our safety ahead of profits for irresponsible corporations. In fact, that is exactly what Rhode Islanders have done. John Torgan, the Narragansett Baykeeper in Rhode Island, has submitted a letter which I will introduce for the record, cataloguing the legislative and regulatory reforms put in place after the 1996 North Cape/Scandia oil spill off South Kingstown.

Rhode Islanders know what an oil spill can do to an ecosystem. We know just how important penalties and fines are to keeping seafarers safe and marine ecosystems healthy. Like my fellow Rhode Islanders, I insist that, in the future, oil companies do everything they can to prevent needless deaths and catastrophic environmental harm, whether in the gulf, off the coast of New England, or anywhere in our great country. Today's hearing is an important step toward that goal, and I applaud you for holding it, Mr. Chairman. Thank you very much.

Chairman LEAHY. Thank you very much, Senator Whitehouse.

Our first witness is Christopher Jones. Mr. Jones is currently a partner at the law firm of Keogh, Cox & Wilson in Baton Rouge, Louisiana. More important than his professional background, he is the brother of Gordon Jones, who was one of the 11 rig workers who lost their lives the day of the explosion.

Gordon Jones is survived by his wife, Michelle, two young sons, Stafford and Maxwell. One of the sons, I understand, was born very shortly after the accident. Is that correct?

Mr. Jones, please go ahead. The floor is yours.

STATEMENT OF CHRISTOPHER K. JONES, BATON ROUGE, LOUISIANA

Mr. JONES. Chairman Leahy, Ranking Member Sessions, and other members of the Committee, thank you for the opportunity to appear before you today.

My name is Chris Jones. Seated behind me is my father, Keith Jones. Gordon is my only brother. Gordon is survived by his wife, Michelle, and two sons, Stafford and Max. Stafford is 2 and Max was born 3 weeks ago. Gordon is also survived by a mother, sister, in-laws, and other family members and many friends who miss him very much. Words cannot describe what Gordon meant to this family.

I appear before you as a representative of only one family affected by this accident. Unfortunately, there are many more. I stood with those other family members at a recent memorial event, a service no one should ever have to experience. Although we never met before this disaster, I want those other family members to know that we grieve for them and are committed to telling our story so we can try and correct the inequities in the law and so no one else will find themselves in that situation in the future.

Of course, you are aware that Gordon died aboard the Transocean Deepwater Horizon oil drilling rig. He was employed by M-I Swaco, a contractor for BP hired to provide mud engineering services aboard the rig. He had worked aboard that rig for the past 2 years and was excelling in his profession. As many rig workers do, Gordon expected to gain experience on this rig and continue to advance with his company. He never got that opportunity.

This is a picture of the backyard fort Gordon built, with Stafford's help, for Stafford and Max. Although you may not be able to tell, it is not finished. Gordon planned to finish it when he returned home. He will never get that chance. Certainly, others will step in to make sure it is finished and try to fill the tremendous void left by Gordon's death. But this is yet another example of an incomplete life and what has been lost. I am at least comforted that it will be finished, and Stafford and Max will enjoy it for years to come and know their father built it for them.

The next picture is taken shortly after Max's birth. Notably absent is Gordon, whose presence in the delivery room was limited to a single family photograph.

Last, I show you possibly the last picture taken of Gordon before his death. It is taken just after Gordon gave Stafford his first golf lesson, an experience Gordon thoroughly enjoyed. You can see the joy in their faces. I am saddened that neither will experience this same joy again.

I want to take this opportunity to address recent remarks made by Tony Heyward, CEO of BP. In particular, he publicly stated he wants his life back. Well, Mr. Heyward, I want my brother's life back. And I know the families of the other ten men want their lives back. We will never get Gordon's life back, and his wife will live

a life without a husband and her two children a life without a father.

At the top of the United States Supreme Court building is the phrase "Equal Justice Under Law." As a United States citizen, and as a lawyer, I agree with that principle. Unfortunately, it does not exist in the cases of deaths occurring in Federal waters. This is not a phrase that applies to Michelle, Stafford, and Max in this instance. That is not right, and I make this request for change for my family, the families of the other ten men, and others who may find themselves in our same position, and who will quickly learn that our current laws do not protect those who need it most.

I want to be very specific. We are asking you to amend the Death on the High Seas Act to allow for the recovery of non-pecuniary damages. Currently, Michelle, Stafford, and Max can only recover pecuniary damages.

Stafford and Max will never play in the father/son golf tournament at the local golf course with their Dad, or experience the thrill of their first Saturday night in Tiger Stadium with their father at their side. Likewise, Michelle will never again experience a quiet dinner at home after a hard day with her true love. She will not celebrate another wedding anniversary. The last one would have occurred only 3 days after this accident. Most recently, Michelle did not have Gordon there to comfort her in the delivery room and tell her how much he loves her and the beautiful baby we now call Maxwell Gordon. These are all experiences, among many, many others, for which there is no compensation under the current law for maritime victims. The overwhelming impression I have gotten from the parties responsible for Gordon's death, besides that no one wants to take responsibility for it, is that they are immunized by the current law. Under the current law there is a finite, maximum amount that Michelle and her boys can recover, and nothing more.

Think of it as a liability cap. While some, but certainly not all, of these same parties express their sympathies and claim to want to do the "right thing," they can also hide behind the law and say they are protected from doing any more.

There is, of course, an exception for recovery of non-pecuniary damages under DOHSA. This is for victims of commercial airline accidents. In response to that event, this Congress passed a retroactive amendment to DOHSA to allow for the recovery of non-pecuniary damages. Currently, while victims of airline accidents are allowed recovery of non-pecuniary damages, victims of all other accidents occurring in Federal waters are not, including aboard cruise ships, ferry boats, and in this instance, oil rigs where hard-working men make their living to support their families.

During this past month and a half, I have gained tremendous perspective on things. Certain things that I thought were important before April 20th are just not important any more. This is important. This is important to Michelle, Stafford, and Max, and all the other families affected by this tragic event. You have an opportunity to make this right and create equal justice under law for these families.

Thank you. My father and I are more than happy to answer any questions you may have.

[The prepared statement of Mr. Jones appears as a submission for the record.]

Chairman LEAHY. Thank you, Mr. Jones.

Our next witness is—and I will go through all three witnesses, and then we will go to questions—Jack Coleman. Mr. Coleman is a managing partner for the energy consulting firm EnergyNorthAmerica. He has served as counsel for the House Committee on Natural Resources. He is a former senior attorney for royalty and offshore minerals for MMS, the Minerals Management Service, under Presidents George H.W. Bush and Bill Clinton.

Mr. Coleman, please go ahead, sir.

STATEMENT OF W. JACKSON COLEMAN, MANAGING PARTNER, ENERGYNORTHAMERICA, LLC, WASHINGTON, D.C.

Mr. COLEMAN. Thank you, Chairman Leahy, Ranking Member Sessions, and Members of the Committee. It is a pleasure to be here. I retired about a year ago after 27 years working for the Federal Government, the last 6 years in the House of Representatives. During that time, most of my work had been in the area of offshore oil and gas, but here on the Hill, it was also more in energy and minerals generally.

Prior to working as senior attorney for royalty and offshore minerals, I also served for 3½ years as a senior attorney for environmental protection for the Department of the Interior. And prior to that, I was special assistant to the Associate Administrator of NOAA for 3½ years. And I served 4 years on active duty in the Army, active duty as a Judge Advocate General Corps officer. I am a native of Mississippi. I went to Ole Miss, undergraduate and law school.

The focus of the hearing is, of course, on a variety of liability issues related to offshore oil and gas production. The ongoing, tragic oil spill in the Gulf of Mexico—tragic for the families of those killed and injured, including the Jones family represented here today, to all of whom I extend my deep condolences, but also tragic for the environment and the energy security aspirations of the American people—is unequaled in size in our Nation's history and has resulted in numerous legislative proposals to amend the Oil Pollution Act of 1990 and other applicable laws, and in actions by the administration related to offshore oil and gas operations. I will focus my testimony primarily on the breach of contract case law for Federal offshore oil and gas leases and the potential liability of the United States for breach of contract as a result of a few of these legislative proposals and executive branch actions. First, I would like to go over a few facts—Senator Sessions has mentioned some of them—about the importance of offshore energy to the Nation.

Currently, the United States consumes about 20 million barrels of oil a day—20 million. About 60 percent of that, or 12 million barrels of oil, come from foreign sources. Our largest source is Canada, but the majority of the rest comes from overseas. Our yearly amount of imported oil totals about 4.2 billion barrels.

Many times I have heard statements that the United States does not have much oil, does not have much natural resources. This really needs to be put in the context of our use and the context of what is available to us to produce. Certainly we do not have the

resources that Saudi Arabia has, but we do not need to have the resources that Saudi Arabia has to make a very important contribution to our energy security.

As of the time of the last Department of the Interior Offshore Oil and Gas National Assessment in 2006, just over 14 billion barrels of oil had been produced from the Federal offshore, but another 15 billion barrels as of that time had already been discovered and were reserves available for production. Further, there were another 86 billion barrels of oil that are believed to be economically and technically recoverable in the offshore that have not yet been drilled. And that is just for the oil. So a total of 101 billion barrels in the offshore, if these are made reasonably available to the American people for production.

One of the things I would like to emphasize is this oil belongs to the American people, and the bounty and the value of this oil cannot be made and accessed for the benefit of the American people if it is not made available, and that alone is sufficient, just in the offshore, sufficient to take care of all the imported oil needs at the current rates of the United States for about 25 years. So that is not an inconsequential amount of oil. It would take care of all of us, like I said, including displacing all the Canadian oil.

Similarly, we have similar numbers for natural gas, enough natural gas in the outer continental shelf, to at least—conventional natural gas to at least take care of all the natural gas needs for the Nation at the current rate for more than 20 years.

Now, one might ask, What is the value of these reserves and resources to the American people? And, frankly, if you use standard pricing based on just the reserves and resources that we have, without any other benefits, economic benefits, just the royalties and the corporate taxes would bring in about $4.5 trillion from production of that, more than enough to pay off about a third of the national debt without any tax increases. When you add in the ability to produce methane hydrates, which now international research has shown is likely, that would be another $7.5 trillion. All of those methane hydrates, by the way, 99 percent of them, are in the deep water, certainly deeper than 2,500 feet. And so if we do not allow deepwater drilling, that whole value of that will be unavailable for the American people, and that is $7.5 trillion in corporate income tax and royalties. So those two together, about $12 trillion.

Getting to the liability question, I had the honor of being the lead attorney for the Interior Department on a case which became *Mobil* v. *U.S.*, which was decided in the year 2000, and this involved a case where a rider, as part of the Oil Pollution Act, the Outer Banks Protection Act, was added in 1990, which prohibited the Secretary of the Interior from granting any permits to drill off North Carolina for more than 13 months. The Supreme Court, Justice Breyer writing the opinion, decided that that was a material breach of the leases, that the lessees had a right to rely on the law as it existed at the time that the leases were issued. And, therefore, the lessees recovered all of their expenses.

So this is an important matter, and I would encourage the Committee to consider that when making changes for the Oil Pollution Act liability damages.

[The prepared statement of Mr. Coleman appears as a submission for the record.]

Chairman LEAHY. And I should note to all witnesses, of course, your full statements will be made part of the record, and following the questions of the panel, if there are additional things you feel that should have been added, we will keep the record open for that.

Mr. COLEMAN. Thank you.

Chairman LEAHY. Professor Tom Galligan is the current president of Colby-Sawyer College and a professor of humanities in New London, New Hampshire—a neighbor of sorts. I have been many times to Colby-Sawyer, and New London, of course, is a beautiful community. Prior to joining Colby-Sawyer College, he served as dean of the law school at the University of Tennessee. As I recall, you taught admiralty law. Is that correct?

Mr. GALLIGAN. That is right.

Chairman LEAHY. Thank you. Professor Galligan, please go ahead, sir.

STATEMENT OF TOM GALLIGAN, PRESIDENT AND PROFESSOR OF HUMANITIES, COLBY-SAWYER COLLEGE, NEW LONDON, NEW HAMPSHIRE

Mr. GALLIGAN. Chairman Leahy, Ranking Member Sessions, Senator Whitehouse, and other members of the Committee, thank you for inviting me to appear before you today. My name is Tom Galligan, and I am the president of Colby-Sawyer College in New London, New Hampshire.

The staggering consequences of the oil spill in the Gulf of Mexico force us to ask whether our laws are fair, consistent, and up-to-date. Do they provide adequate compensation? Do they provide proper incentives to ensure efficient investments in safety? Sadly, an analysis of the relevant laws reveals a climate of limited liability, under-compensation, and the possibility of increased risk.

Let me begin with a discussion of wrongful death recovery for seamen under the Jones Act and for anyone killed on the high seas under the Death on the High Seas Act. Both of those statutes were passed in 1920, another era. As you said and as Chris Jones said, neither of them, as interpreted, allows recovery for loss of society damages to the survivors of those killed in maritime disasters. Loss of society are damages for companionship—for the loss of care, comfort, and companionship caused by the death of a loved one. The majority of American jurisdictions today do recognize some right to recover for loss of society damages in wrongful death, but not the Jones Act and not DOHSA. A spouse, child, parent, or a sibling who loses a loved one suffers a very real loss, and the law should recognize that loss.

As Chris Jones also noted, there is one exception to the rule barring recovery of loss of society damages under DOHSA. In 2000, after the Korean Air Line and TWA air disasters, you retroactively amended DOHSA to provide recovery of loss of society damages to the survivors of those killed in high seas commercial aviation disasters. But for anyone else killed on the high seas—on a cruise ship, on a ferry, on a semi-submersible floating rig, or on a helicopter—the survivors do not recover loss of society. The law should be the same for all, and you can make the law the same for all by amend-

ing the relevant statutes to provide recovery for loss of society. As I understand, Senator Leahy, your proposed Survivors Equality Act of 2010 would remedy that inequity.

Now, in fact, the climate of limitation fostered by the no loss of society recovery rules has been expanded because some courts have extended the Jones Act and DOHSA no recovery rules to other maritime contexts and to other types of damages. Those courts have done so based on your supposed intent in 1920 when you enacted the Jones Act and DOHSA. Those judicial decisions deprive injured persons and their relatives of compensation for very real losses, and they also adversely impact the deterrent effect of maritime tort law. Amending the Jones Act and DOHSA would reverse that trend.

Now, of course, tort law is concerned with corrective justice, with fairness, with consistency, and with compensation. But it is also concerned with deterring unsafe behavior that poses risks to people, property, and to the environment. Tort law can encourage efficient investments in safety so that society faces an optimal level of risk—no more, no less. But if tort law under-compensates, it under-deters, because when deciding what to do and how to do it, people will consider the real anticipated costs of their actions. If the law does not force a person to take account of the costs of accidents when deciding what to do and how to do it, he or she may well under-invest in safety and, therefore, increase risk to people, to property, to businesses, and to natural resources.

Under-compensation and under-deterrence in the maritime setting are exacerbated by the Shipowners' Limitation of Liability Act. Originally passed in 1851, the Act allows a vessel owner to potentially limit its liability to the post-voyage value of the vessel. The Act was passed before the modern development of the corporate form and before the evolution of bankruptcy law, and its operation today can lead to drastic under-compensation for the victims of maritime disasters.

Finally, these cumulative problems of limited liability in maritime law might be alleviated by the recovery of punitive damages, and the Supreme Court has twice in the past 2½ years recognized the right to recover punitive damages in maritime cases. However, the Court has limited the recovery of punitive damages in most maritime cases to a 1:1 ratio between the punitive damages awarded and the compensatory damages awarded. The ratio cap deprives a judge or a jury of the traditionally available ability to tailor a punitive award within constitutional due process limits to the particular facts of the case, including the level of blameworthiness, the harm suffered, the harm threatened, and the profitability of the activity.

Senator Whitehouse's proposed bill on maritime punitive damages would restore that traditional ability to tailor a punitive award to the facts of the case.

Thank you, and I am happy to answer any questions.

[The prepared statement of Mr. Galligan appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Professor.

Let me begin, Mr. Jones, with you. Obviously, I thank you for your testimony, and you said you are representing one family, but

it is obvious you are also standing up for all the families that were affected by the disaster.

We have talked a lot about the Death on the High Seas Act as one of the few exclusive Federal remedies for the families who lost their lives in the Deepwater Horizon. But the law arbitrarily restricts recovery for the very significant loss more than a dozen children in all, more than a dozen parents and many widows are experiencing as a result of what happened. If this had been an accident on land, if it had been at a refinery or something on land, there would be protection. If left unchanged, if we are unable to change the law, what is the practical effect for your sister-in-law and for the two young nephews that we just saw in the photographs?

Mr. JONES. Well, the way the current law is now, if it were allowed to remain in effect as it is, these companies, the parties responsible for Gordon's death, they want to go out and get an economist, calculate what his earnings would be, subtract out the income taxes he would have paid during his earning life, his work life expectancy, subtract out what he would have consumed himself, because that is what the law allows, and they want to write a check and walk away.

Aside from the fact that that may not be enough to support Michelle, Max, and Stafford, it does not allow for the recovery, like many other laws for United States citizens, to recover for life experiences, for the comfort and care that Gordon would have provided his sons, and the support he would have provided to his wife over the years.

Chairman LEAHY. That is something that they could have sought had it been an accident on land. You are a lawyer. I am a lawyer. Can you tell me any logical reason why it should be any different whether it was on the open sea or on land?

Mr. JONES. Absolutely not. As an example, I will refer to the BP explosion that occurred on land in Texas several years ago. I believe that BP paid $1.6 billion to the families of the victims from that explosion. I do not even want to speculate what could potentially be recovered by these families, but it is certainly not that amount. In Texas, punitive damages were allowed to be recovered, and they are not available here.

Chairman LEAHY. But the deaths are still the same.

Mr. JONES. Oh, absolutely. Absolutely.

Chairman LEAHY. In fact, to go back to something Professor Galligan said when he talked about how careful you are if you are running something like this, there is a direct corollary—my words, but basically what you said—to how much liability you might face. Would you agree with that? In other words, if you thought, Boy, you are really going to have to pay for any screw-up you cause, are you going to be a lot more careful?

Mr. JONES. Of course. And I know this: Having had discussions with some of the attorneys involved in this case, they want to pay what they are obligated to pay under the law. They want to pay it and move on. I will give you an example of another family, a family of another victim in this accident. He had no dependents, no children, no spouse, and under the Death on the High Seas Act, potentially the only thing that his family can recover is his funeral

expenses, and because no body was found, that could be $1,000. So potentially they could write a check for $1,000 and walk away.

Chairman LEAHY. Transocean, as we talked about before, wants to use the Limitation of Liability Act and say, "We are only limited to the value of our rig." It is down there somewhere about a mile below the surface, but that is the value of our liability. I mean, do you see any logic in that whatsoever?

Mr. JONES. Of course not, and I did file that action in Houston, Texas, and they represented to the court that the value of the rig was zero. They hired an appraiser, an official appraiser, who submitted a report to the court and said it was valued at zero. And so they want to limit their liability to the value of the rig and pending freight. That goes for not just the victims—the families of these victims, but also all the economic damages. And, realistically, the financial and economic impact on the coast and the businesses is going to dwarf any recovery potentially by the families. So think of it in a bankruptcy context. You know, the families of these victims could ultimately, at least from the rig owner, recover pennies on the dollar.

Chairman LEAHY. Nobody can call that fair.

Mr. JONES. Absolutely not.

Chairman LEAHY. And we hear the arguments about the increased liability, the increased regulation is going to make production more expensive. Let us be serious about this. Do you have any doubt in your mind that BP could have and should have done a lot more to ensure the safety of the people on that rig?

Mr. JONES. What I am shocked at is their profits. We are talking about billions of dollars here, billions of dollars in profit, and for something like this to happen and to cause such a dramatic impact on the lives of so many people, including the families of the victims and all the people that have been impacted along the gulf coast, it is mind-boggling how they can throw up their hands and say that they could not have anticipated this or not have had the resources in place to prevent it.

Chairman LEAHY. We will come back to this, but just speaking personally, we sometimes forget we let the profit motive outweigh the lives of people. And it is not just the 11 people on there. It is all those families that have played by the rules generation after generation who fish and otherwise use the resources. They played by the rules. We expected them to play by the rules. They did what they were supposed to do. Somebody did not do what they were supposed to do and ruined it for them.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

I agree with you, Mr. Jones, that the size and financial scope of this industry, the risk that drilling presents, indicates to me that the companies—this company particularly; I do not know about the others, but I am worried about it—failed to invest sufficiently in ensuring the safety of their employees, and I believe that that is something that must change out of this whole experience.

Mr. COLEMAN., or maybe you, Professor Galligan, the question of punitive damages, Mr. Jones says that you are limited only to compensatory damages. The Supreme Court case did hold that punitive

damages are recoverable but limited that to the economic loss 1:1 ratio?

Mr. GALLIGAN. Not just the economic loss, but the compensatory damages. Whatever compensatory damages were awarded, the 1:1 cap is the punitives could not in most cases exceed the award of those compensatory damages.

I think that traditionally—let me expound on this a little bit. Traditionally, punitive damages have not been available under the Death on the High Seas Act or for a Jones Act seamen. A case called *Atlantic Sounding*, which was decided last summer, may open that question up again. But in DOHSA cases, punitive damages may not be available at all, so the 1:1 cap may not even apply there. But in other cases, yes, sir, 1:1.

Senator SESSIONS. Mr. Coleman, I have offered legislation I think similar to Senator Whitehouse's that would raise the $75 million cap retroactively. The Congressional Research Service says that is constitutional. The Deputy Attorney General, Mr. Perrelli, testified recently at the Energy Committee hearing, when I asked him about it, that he thought it was constitutional, although the Department of Justice had not recommended a retroactive legal policy. But I have to say some of my staff doubt that. As a matter of fact, some of my staff think it is unconstitutional to retroactively do that.

So I am a little concerned about it. That is why I asked the Deputy Attorney General about that. What is your view about the ability of Congress to alter the liability, the $75 million limit, although I would note that BP has repeatedly and insistently said they will not be bound by it and will pay whatever the liability is.

Mr. COLEMAN. Yes, Senator, with regard to the constitutional questions, they are, I think, more difficult than the contractual issues. As I remember, the Associate Attorney General said that there was more liability potential for the Government in the contractual base than on the constitutional issues.

I would say I would agree with your staff that there is more risk on the constitutional issues than the testimony that you have had before the Congress today. However, I am very confirmed that on the contractual—on the breach of contract issues, which would come into play in the case of a Court of Federal Claims case, that any kind of change, material change to the OPA 90 damages $75 million limitation would be a material breach of the lease and would open up the United States to enormous damages.

Senator SESSIONS. Well, it is just something I think we need to wrestle with. I have always believed we should not offer legislation that we reasonably believe is not constitutional, even though it may sound good at the time and is something we would like to accomplish. So I will continue to review that.

Professor Galligan, it is generally easier, is it not, on the question of initial liability under the Jones Act for a plaintiff to get into court; whereas, if you have an action on the shore that you have proof of negligence is very real and can be a complete bar to the plaintiff going forward. Traditionally, having been on the gulf coast like I have in Mobile for most of my legal career, I have been aware that it is easier to make out a case and to avoid dismissal of a case or avoid summary judgment under the Jones Act, and that that may be—is that a compensating reason for our sudden lack of

equality in actual damages recovery if you have an easier basis to go forward with the lawsuit?

Mr. GALLIGAN. I have never seen in the legislative history any indication at all that Congress thought, when passing the Jones Act, that by possibly easing the burden of the plaintiff there was some quid pro quo with other recoverable damages. However, I would also say this: First you have to establish that you are a seamen, and that is not an easy hurdle to clear. So, first, to have the availability of a Jones Act claim, you have to establish that you are a seamen.

What you are talking about is that in an FELA case, Federal Employer's Liability Act case, called *Rogers* many years ago, the court—and the Jones Act incorporates the FELA so they go hand in hand. The Supreme Court said you could recover if you could prove cause in any way, caused in whole or in part. And that has been interpreted to slightly reduce the burden of proof on causation for the Jones Act seamen, but first he or she has to establish status, then they have to establish a breach of the duty of reasonable care. That same rule does not apply in a general maritime law case if the claim is unseaworthiness for a seamen or if it is a general maritime tort law claim filed by anyone other than a seamen, nor does it apply when the seamen seeks to recover from a third party. So it is limited to the Jones Act claim, seamen against employer.

Senator SESSIONS. Mr. Coleman, do you want to briefly comment on that? My time is up, but——

Mr. COLEMAN. Senator, I do not have any comment that would disagree with what Professor Galligan said.

Senator SESSIONS. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Senator Whitehouse.

Senator WHITEHOUSE. [Presiding.] Thank you, Mr. Chairman, and thank you again for holding this hearing.

Mr. JONES., could you tell me a little bit more about the circumstances that exist right now between BP and your brother's family? You indicated that he worked for a contractor, a contractor to BP presumably.

Mr. JONES. Correct. Correct.

Senator WHITEHOUSE. And if you could answer that in the context of the limit on economic damages, that BP has been so noisy about saying that it would not be bound by, that it would go beyond the $75 million in economic damages and make sure that everyone affected by this was made whole. I think that has been their corporate statement. In terms of its measure against your family's experience, what do they see?

Mr. JONES. Well, every time I wake up in Baton Rouge and open up the Advocate, I see a full-page ad from BP that says that they are going to make things right and they are going to pay all legitimate claims, and we sat through a hearing a week and a half ago where they continued repeating that saying that they are going to pay all legitimate claims. Well, I do not think that they are referring to our family's claim. I do not think—and they have made no overtures to us. We have actually—I have never spoken to somebody from BP. They have made no phone call, no nothing, to make any effort to reach out and at least extend their sympathies.

Senator WHITEHOUSE. Well, wait a minute. Say that again?

Mr. JONES. Nobody from BP has contacted anybody within our family to extend their sympathies. I am not asking them to take responsibility, but—they made it to the memorial event a couple of weeks ago. I heard that they were there, but we have not heard from them.

Senator WHITEHOUSE. You have not. OK.

How does the contractual relationship intervening between Gordon and BP affect this, in your view?

Mr. JONES. First things first, is that I am not a maritime attorney. I have learned about maritime law in the last month and a half, of course. It is my understanding that there is an agreement between the contractor, M–I Swaco, and BP whereby there is potentially some type of indemnity. But Gordon's family——

Senator WHITEHOUSE. Meaning BP has agreed to indemnify——

Mr. JONES. M–I Swaco agrees to indemnify BP, but I am not—I cannot really speak on that because I have never seen any documents to that effect. That is just what I have heard.

As far as Gordon's family, they have potentially a recovery against his employer, M–I Swaco, under the Jones Act, and——

Senator WHITEHOUSE. And that is a limited recovery only to the formula that you have described based on future earnings.

Mr. JONES. Of course. And then a claim under the Death on the High Seas Act against all parties responsible. However, regardless of what claims he has, there is a cap, and he cannot recover anything more than that. And so regardless of who is at fault and what percentage does the fault lay, or we ultimately determine down the road—and there may be some subrogation claims from one party to the next. But there is a cap, and they can pay that and go home.

Senator WHITEHOUSE. And somebody killed in an air travel accident would not face that cap. Somebody killed in a traffic accident in Louisiana would not face that cap. Somebody killed—this is a cap that narrowly falls on this group of victims.

Mr. JONES. And it is unfortunate that a catastrophic event is what precipitates this legislation, and that is why that specific exception to DOHSA was made and introduced in the past, in 2000, after a tragic event much like this one. And that is why we are here today, is to ask for that same amendment so that everybody who perishes in Federal waters is protected equally under the law and is allowed to recover non-pecuniary damages, in which case there is no cap. That cap is determined by the jury.

Senator WHITEHOUSE. Do you have any reaction to Mr. Coleman's suggestion that efforts to make things right for Gordon's family would amount to a substantial impairment of the contract that BP has with the U.S. Government and we should not address it for that reason?

Mr. JONES. Well, like I said, I anticipate that all the companies involved and responsible for Gordon's death are more than happy—I mean, I heard that they made a grant of $500 million to LSU to fund conservation research and mitigation efforts. I am sure they are more than willing to pay what they are obligated to pay under the law to the families. As far as, you know, everything else, I do not really have much of a comment. I have personal thoughts, but,

you know, that is generally how I look at it, is that they want to pay what they are obligated to pay under the law. It is almost like they are restrained from doing any more and they are hiding behind that.

Senator WHITEHOUSE. Well, I appreciate that.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman, for holding this hearing. I want to thank all the witnesses for joining us. And, Mr. Jones, I want to express my most sincere condolences to you and your family for the tragic loss of your brother.

This tragedy, which resulted in the loss of 11 lives and now the biggest environmental disaster in United States history, highlights the need for improved regulation and updated laws. For starters, as the witnesses have indicated, we need to ensure that the oil companies can be legally liable for their actions.

One way to deter wrongdoing and encourage the kind of responsible, careful drilling we need is to increase the unrealistically low liability caps for damages caused by oil spills, and in that vein, I am a cosponsor of Senator Menendez's legislation to do just that, and I appreciate the witnesses' additional valuable suggestions.

But it is not enough to hold big oil accountable. We also have to end the cozy relationship between the Federal Government and the oil companies it is supposed to regulate and oversee. That means getting rid of unjustified taxpayer-funded giveaways for the oil and gas industry, and it means making sure the regulators are not simply acting as a rubber stamp. Unfortunately, too often the Federal Government ends up listening more to the powerful industry it is supposed to be regulating than to the consumers it is supposed to be protecting. So whether it is Wall Street or big oil who are calling the shots, the result is rarely good for my constituents in Wisconsin.

There are many other actions we need to take, such as passing my "use it or lose it" legislation to ensure that oil companies are diligently exploring the Federal leases they currently have and restoring the Clean Water Act, which is the main statute used to prosecute polluters who dump oil into the waters of the United States.

Mr. Galligan, in your testimony you discuss the need for these strong laws to deter risky actions. Attorney General Holder recently announced that the Department of Justice is undertaking a criminal investigation of the gulf oil spill, and the Clean Water Act is the main law for imposing criminal penalties for oil spills and other pollution violations.

Given the oil company's sizable annual profits, does a maximum $25,000 per day fine, as the Act provides, appear to you to be an effective deterrent?

Mr. GALLIGAN. I think when you analyze deterrence, Senator, you have to look at the whole package of deterrent measures that are in place. So you have to look at criminal laws, you have to look at regulations and regulatory fines, and you have to look at civil liability.

I am not an expert in administrative law; however, $25,000 a day does not sound like an awful lot of money in light of the terrible

things that we have seen in this and other environmental disasters.

Senator FEINGOLD. Mr. Galligan, on another topic, I wanted to ask you about Mr. Coleman's testimony that there are breach of contract concerns with retroactively increasing liability caps. Senator Sessions also inquired about this issue. The Oil Pollution Act contains a provision that seems to give the Federal Government the authority to retroactively modify the $75 million damages cap without raising breach of contract or constitutional concerns. Section 1018(c) of the Oil Pollution Act states that, "Nothing in this Act shall in any way affect or be construed to affect the authority of the United States to impose additional liability or additional requirements relating to the discharge of oil."

Mr. Galligan, do you agree that this is a significant provision? And what is your response to Mr. Coleman's argument?

Mr. GALLIGAN. I do agree that it is a significant provision. I am not an expert on energy law contracts, so I cannot express an opinion on the contractual issues. On the constitutional issues, it is my understanding that as long as a piece of legislation that is being retroactively imposed does not otherwise violate a fundamental right, it will be reviewed by courts under a rational basis test. And you ask yourself then, would any retroactive enactment be rational? And where do you look? You look at the policy reasons that underlie the decision to apply retroactively.

Here, just let us take the Death on the High Seas Act amendment. Here, to make the law modern, to make it fully compensatory, and to make it consistent would seem to me to be rational bases for a retroactive amendment.

Senator FEINGOLD. I agree with that and I thank you for that.

Let me ask that a May 12th memorandum from CRS on this question be entered into the record, Mr. Chairman.

Senator WHITEHOUSE. It will be.

Chairman LEAHY. [Presiding.] Without objection.

Senator FEINGOLD. I got a double approval there.

[The letter appears as a submission for the record.]

Senator FEINGOLD. Mr. Jones provided some very personal moving testimony on the need to update our maritime laws, and, Mr. Galligan, you have made several suggestions for how Congress can update the laws. So you think changes should apply broadly to all vessels or narrowly target drilling rigs?

Mr. GALLIGAN. I personally think that they should apply to all vessels on the high seas because that would encourage consistency. But God forbid there should be some disaster involving a cruise ship, but it would seem to me it would be tragic if in 5 years that happened, another group of people were before you explaining why cruise ship victims were treated less fairly than commercial aviation disaster victims or victims of maritime environmental disasters.

Senator FEINGOLD. I thank you, Professor.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Durbin.

Senator DURBIN. Thanks, Mr. Chairman.

Mr. Jones, I have been on this Committee for 12 years, and we have considered this issue, capping the damages, issues of medical malpractice, issues relating to mesothelioma and lung cancer from asbestos, and there has been strong sentiment on this Committee for a long period of time that we should limit the amount that a jury could award in those cases. I have never accepted it and have fought it for 12 years. I want to tell you that the appearance of your father and yourself and your testimony in 5 minutes did more to make the case than I have ever made in 12 years. Showing those photos of your brother's family and your brother, photos that would be shown to a jury, I hope will start to convince some in Congress who believe that we should cap the amount of money that could be awarded to a family like that for the loss of your brother's life. So if for no other reason, I thank you for coming today. I think you have had a profound impact on all of us. I sincerely regret your loss under these circumstances, and I do believe that your brother's family is entitled to full recovery for their loss in this, although money just will not buy your brother back. You know that as well as I do, in your testimony.

Mr. Coleman, I am troubled. You have got a tough responsibility here arguing a position which is not that popular, so I respect you for coming here and giving it your best professional effort. But I would say that there is one sentence in your testimony that troubles me, particularly troubles me. You say on page 15, "I hope that our political leaders will not implement what I believe to be reckless policies that would imperil such an enormous source of jobs and revenue."

I want to tell you what I have heard. The leaders of major oil companies other than BP are telling Members of Congress and this administration privately that what BP did in this circumstance was to materially misrepresent their capacity to stop this type of blowout in the permits filed with the Federal Government; and, further, to engage in what I consider to be reckless misconduct in establishing a blowout preventer that was not redundant, clearly failed, and now has contaminated one of the most magnificent bodies of water in the world today.

So I would like you to balance for a moment that reckless misconduct, as I see it, on the part of BP with what you characterize as the possibility that we will enact reckless policies—reckless policies like offering to Ms. Jones' family the loss of companionship, as this father and husband is gone for the rest of their lives; reckless policies like suggesting that the current cap on liability does not even come close to measure the loss that is going to be part of this disaster in the Gulf of Mexico.

Can you really put these in the same level, the conduct of BP and their reckless misconduct and what we are suggesting as changes in the law?

Mr. COLEMAN. Senator, thank you for asking the question. I am also a native of the gulf coast, the State of Mississippi, and have enjoyed the gulf coast my entire life. Certainly my comments in my testimony were not directed toward the Jones Act issues. They were dealing with the Oil Pollution Act question of lifting the $75 million damages limitation. In my testimony, I did not come out against an increase in that for future leases. I was dealing with it

from a contract law point of view and the great damage to the industry that would come about from a $10 billion cap or unlimited cap on damages in addition the full restitution—full response cost.

Senator DURBIN. Well, let me ask you this question: If we followed your logic here and did not increase the cap on liability, and what you characterize as a small or medium-size drilling operation engaged in the same type of activity as BP, resulting in the same level of damages, who do you think should pick up the cost of that?

Mr. COLEMAN. Senator, as you know—and, actually, I was involved in reviewing the various drafts of the Oil Pollution Act at the time and helping the Department of the Interior determine what its position should be. I was part of the team evaluating the impact of the Exxon Valdez and looking at the liability opportunities for the Government to go after Exxon. So this is not a matter that is new to me. But I do have to say that—and I do believe that the caps potentially that were set in 1990, which the Government—which the Congress gave the executive branch the ability to increase over time by regulation, which they failed to do, they probably should be raised some. But the question——

Senator DURBIN. Who is going to make up the difference? Who makes up the difference if a small or medium-size company does the same type of drilling operation, incurring the same type of damages as BP, who then—are you saying taxpayers have to pay for it?

Mr. COLEMAN. Under the Oil Pollution Act, above the damages limitation the excess claims go to the Oil Spill Liability Trust Fund.

Senator DURBIN. What is the current balance in that fund?

Mr. COLEMAN. The current balance I understand is $1.6 billion.

Senator DURBIN. And once we have exhausted that, who pays for the difference?

Mr. COLEMAN. Under the law, that is the end of it.

Senator DURBIN. That is not the end of it, no. It is the taxpayers that step in.

Mr. COLEMAN. But I will add, though, as we have had discussion today earlier, this is just dealing with the Federal claims, under Federal law. The State law claims are unlimited, and those particularly in this case are probably likely to be larger than even the Federal claims.

Senator DURBIN. Mr. Chairman, thank you for giving me an additional minute here. I happen to believe that if you are engaged in drilling and can create this level of damage, it carries with it a responsibility that you accept liability for the damage. If you cannot accept that liability, stay the hell out of the business.

Thank you, Mr. Chairman.

Chairman LEAHY. Especially a business where you may end up with billions of dollars of profits.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

Mr. Coleman, I wanted to follow up with Senator Durbin's points, which I thought were very well taken, and he was talking about going forward and how the liability caps would work. But you actually argue that retroactively you do not believe that we can change this $75 million cap. Is that right?

Mr. COLEMAN. You can do it. Congress can do it. It is just that you cannot do it without paying for it. There will be a contractual price to doing it. This is similar to what the Supreme Court said in the Mobil case. Congress changed the law after the fact, which they had the perfect right to do, but there were contractual repercussions, contractual damages that the Government incurred by that Congressional action.

Senator KLOBUCHAR. Mr. Galligan and others disagree with that, but I just again wanted to clarify along the lines of Mr. Durbin's points that if, in fact, we do not change this, if we are unable to be doing this retroactively, who do you think is going to pay for this $8, $10 billion that BP caused damages?

Mr. COLEMAN. Well, once again, the OPA 90 damages limitation retroactively against the lessees, it is my firm belief would be a breach of contact. However, there are other options. One of them has been suggested by Senator Vitter to consider the BP written offer, basically an offer to change their liability limits on this contract, so Congress could enact a law which accepts that offer.

Another one is, of course, the Oil Spill Liability Trust Fund. That does not raise contractual——

Senator KLOBUCHAR. But isn't this the one that you just told Senator Durbin has the $1.6 billion in it, and we are looking at over almost $10 billion for this right now.

Mr. COLEMAN. You could adjust that and make it retroactive, and claims from this accident could be paid out of that, and you could provide additional fees or taxes to support that fund.

Senator KLOBUCHAR. Well, let me just give you some other facts that make us concerned about just, you know, having BP tell us they are going to do something. I am looking back at the Exxon Valdez spill. I am familiar with this case because actually the law firm that represented the fishermen was in Minnesota. And BP said it is going to pay all legitimate economic claims, but Exxon made the same statement after the oil spill in Alaska. It then proceeded to litigate the claims brought against it for nearly two decades.

What do you think we can do to ensure that families like the Joneses will have a swift resolution of legitimate claims against BP, Transocean, and other subcontractors? Because Exxon was saying the exact same thing.

Mr. COLEMAN. I am certainly not involved in the claims process, Senator. I did happen to see the testimony at the House Judiciary Committee from the BP representative. Basically, what is understand is that these claims are filed with BP. If they pay them, then they pay them. If they do not, they are rejected and sent to the Coast Guard for payment under the Oil Spill Liability Trust Fund. I am not sure what else you might be asking.

Senator KLOBUCHAR. It is just that people make claims, companies make claims, and they take big ads out and say things, and then unless we have a way to hold them to it, we cannot ensure that the Joneses and other families are going to be compensated. That is what we are trying to do here.

Mr. Galligan, I wonder if you would respond to some of the statements that Mr. Coleman made, and then also I am troubled by the fact that Transocean has already filed a motion in Federal court in

Houston seeking to limit its liability under the Limitation of Liability Act, that 1851 law, that would limit Transocean's liability to $26 million, as has been discussed. Is there any good reason to keep this law on the books? Should we repeal it? And how do you respond to some of the things that Mr. Coleman has said?

Mr. GALLIGAN. Let me start by saying what I said before, which is that I really cannot respond to what he said about the breach of contract claims. When I was speaking about retroactivity, I was speaking more from the constitutional sense.

Let me also add, when you talk about claims—and I do not think anybody has said this yet, and it is really important—OPA 90 does not apply to personal injury and wrongful death claims. OPA 90 does not apply to personal injury and wrongful death claims. That would be maritime law and maritime tort law solely.

As to the Limitation of Liability Act, I mentioned in my statement it was passed in a very, very different historical context. It was passed in 1851 to encourage investment in maritime shipping and commerce. The corporate form had not developed. Bankruptcy law had not developed. So you ask yourself today, Is that law still salient from a policy perspective? And what happens is the shipowner starts a concursus proceeding in a Federal court somewhere, and it means everybody who has a claim has to then file that claim in that Federal court. What then happens is they say we want to go back to State court for some issues, and they enter into stipulations and they go back to State court. Then they come back to Federal court. It is an expensive, time-consuming, slow process.

Senator KLOBUCHAR. OK. Mr. Jones, I am sure that is not good to hear, and I just want to assure you that we will do everything we can to help your family.

I was just struck by Senator Whitehouse's questions about BP. So they were at the memorial service, but they never contacted you. Did you get anything in writing from them? How long had your brother worked for them?

Mr. JONES. Well, he had worked for his particular employer, M–I Swaco, for about 5 years. He had worked on that particular rig, which was operated by BP, for about 2 years. And for that time he had helped BP make a lot of money.

The only reason I had heard that the BP executives were at the memorial event—I did not see them until after when they were running out the back door into dark-tinted-window SUVs to avoid the media.

Senator KLOBUCHAR. So you never got anything in writing or a phone call.

Mr. JONES. No.

Senator KLOBUCHAR. Did any of the other people killed on that day get any—have you heard if they have gotten any communication?

Mr. JONES. Really since—well, I came face to face with several of the families. It was a very awkward, uncomfortable situation. I have had some discussions with some of the family members, not all, and so I cannot really speak for them.

Senator KLOBUCHAR. All right. I am so sorry for your loss. Thank you for being here today. It made a difference.

Chairman LEAHY. Thank you very much.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Jones, and all of us appreciate your being here, and we express our condolences to you and your Dad and your entire family.

Mr. Coleman, as I understand from your written testimony, you are saying that if we change our liability laws, it is going to place an unacceptable, prohibitive cost on oil companies, but someone needs to bear these costs. So basically you are saying that the costs should be borne by Mr. Jones and his family, by the fishermen, by the oystermen, by the homeowners along the coast.

Don't you think that the oil companies who make such huge profits should be the ones bearing these costs?

Mr. COLEMAN. Senator, I appreciate the question. As Professor Galligan mentioned, the question of the loss and the claims of the family of Gordon are not involved in the issue that I was addressing, which is the damages liability cap under the Oil Pollution Act. However, of course, lost income from fishermen and other economic activities is involved in that. Certainly I am very concerned about—extremely concerned about the loss of income not only for the individual——

Senator FRANKEN. Well, you write of non-pecuniary and pecuniary damages and say that if those were allowed, the loss of comfort and those kind of things, it would impose a burden on the oil companies, on mom-and-pop companies. That is what I get from your testimony.

Mr. COLEMAN. I did not address that issue at all in my testimony, Senator.

Senator FRANKEN. Well, in your written testimony you question whether offshore drilling really poses "an unacceptable threat" under "current conditions" that would justify a moratorium. Are you saying that the BP rig was operating in such an irresponsible and reckless fashion, that it was run in such an egregiously negligent manner that it would be irrational to put on a 6-month moratorium on new deep-sea drilling?

Mr. COLEMAN. Once again, thank you for the question. My statement with regard to that had nothing to do with the facts of the BP case, because I do not know the facts. I am not the investigator of it, and——

Senator FRANKEN. And you write that——

Mr. COLEMAN. Those will be determined.

Senator FRANKEN. Here you write, "Further, a blanket 6-month additional drilling moratorium because 'under current conditions deepwater drilling poses an unacceptable threat of serious and irreparable harm or damage to wildlife and the environment' is highly questionable." What current conditions are referenced here that causes deepwater drilling to pose an unacceptable threat? What is an unacceptable threat? Is the fact that many thousands of deepwater wells have been drilled before—you are speaking exactly to that. And what I am asking you is the BP—is what we have just seen here such an outlier that we should not have a 6-month moratorium?

Mr. COLEMAN. That is exactly what I was discussing, Senator. You are exactly right.

Senator FRANKEN. Well, you just said you were not discussing that.

Mr. COLEMAN. Well, I did not discuss exactly what happened with BP, but it is an aberration, and that is the point——

Senator FRANKEN. It is an aberration. Let me ask you this: If 8 weeks ago someone had said we should put a moratorium on deepwater drilling, would you have said yes?

Mr. COLEMAN. I would absolutely say no, and I still say no because——

Senator FRANKEN. Have you been looking at what is happening in your beloved coast?

Mr. COLEMAN. I absolutely have. But what we have——

Senator FRANKEN. So, in retrospect, you would not have stopped that drilling. I am asking you if 8 weeks ago you would have stopped that drilling, and you say no.

Mr. COLEMAN. I would not because we have to be bound, Senator, and the administration has to be bound by the regulations in place and the contractual rights of the lessees, and——

Senator FRANKEN. Look, we are responsible——

Chairman LEAHY. Just a minute. I want to hear the end—I want to hear the rest of Mr. Coleman's answer.

Mr. COLEMAN. What matters from a contractual point of view—and this was an issue. What did the notice to lessees say in the *Mobil* case? That was extremely important before the Supreme Court. If you take away a contractual right based on a regulation that you cite and says it means one thing and it does not mean that, then you have not followed the law. So what I have been addressing in those questions that I included there are—they cited that there is an unreasonable threat and risk of damages. If that is what the statute—if that is what the outer continental shelf statute mean, the provision that they are citing to in that regulation, then we could never have any wells drilled at all, because there is always a risk of a blowout.

So that is the point that I was trying to make. There have been 3,000 or 4,000 wells in this water depth, or similar to it, without ever having a blowout. So is that an unreasonable risk? And I would say from my legal judgment it is not an unreasonable risk to allow more drilling.

Chairman LEAHY. Senator Franken, I interrupted there. Please go ahead.

Senator FRANKEN. I am sorry, it is just that we have so little time in these questions.

Chairman LEAHY. I have just given you more time.

Senator FRANKEN. Yes, I understand.

Mr. Jones, if 8 weeks ago you were asked should we put a moratorium on drilling, in retrospect what would you say now?

Mr. JONES. Eight weeks ago, before the explosion, of course. Then Gordon would still be here.

Senator FRANKEN. Right. So there is a very different perspective, isn't there? I mean, I do not understand your reaction. You know, there are other BP deep wells, and what I am asking you is: Is the conduct of the way this rig was run so different from all the others that it does not warrant a look at and a moratorium on this kind

of drilling so that we learn our lessons from this and prevent it from happening again? Or are you willing to let this happen again?

Mr. COLEMAN. Senator, what I was saying is that we have had thousands of these, similar types of wells drilled. There obviously is something very unusual that happened on this one case. Obviously, it needs to be fully investigated, and whatever adjustments need to be, they need to be made. But we have through our experience shown that this type of drilling is, in the scope of, you know, comparable things, a very safe way of producing energy.

Senator FRANKEN. Thank you. I have used my time.

Chairman LEAHY. Senator Kaufman.

Senator KAUFMAN. Thank you, Mr. Chairman, for holding this hearing.

Just to follow up on that thought, I think if you had 3,000 wells out there and a well went down, you would say it is 1 in 3,000. But, you know, your testimony is quite eloquent in talking about incentives, that we have to have the proper incentives for offshore drilling. It seems to me that the one thing that I have noticed about the way things could happen in our present society is we just do not have disincentives for bad behavior. And I think what Senator Durbin said earlier is—one of the things many of us are concerned about is how do we get the disincentive for the bad behavior. And could you just give me your thoughts about how you think that there should be a disincentive—if we sent a message after this example that BP can really get away with this thing for relatively minor, are you concerned that a corporate boardroom somewhere in the future—and I am not talking about bad people. I teach a course at Duke Law School with MBAs and law students, and the MBAs are always very concerned about the fact that, you know, you have got to look out for the shareholders' money, you have an obligation.

So if you are sitting there and you are BP and you are looking at what is going to happen if, in fact, you do not do the proper safety and you do not put in the proper things, you do not have the people out there, you do not take the chance—which BP has been accused of in a number of cases of just saying go ahead, we need this well, we need it fast, we need it producing, do not worry about the concrete, do not worry about the—do not worry about what we are going to do if something goes wrong, do not worry about doing a relief well, let us just go ahead and do it. Does that concern you at all in terms of our present liability structure?

Mr. COLEMAN. Senator, I am a strong believer in regulation, inspections, aggressive inspections. I do have questions as to whether the inspections were handled properly in this situation. Certainly one of the things that could be done is to send out the inspectors to be there when they test the blowout preventers and make sure that that works before you start drilling. I think that would be a commonsense—just one thing, and there are many others that could be done.

Certainly civil penalties are available under numerous statutes for failure to perform in accordance with the regulations as direct.

Senator KAUFMAN. What about kind of a private sector—I mean, you are a private sector guy. I am a private sector guy. What about a private sector approach which says, well, the Government is going to do all that, but why don't we have some trial attorneys out

there trying to make sure that this happens, and that in order to get them involved, you have to have hard damages? What is your feeling about that?

Mr. COLEMAN. I must say I have found that the private sector bar is very adept at doing—you know, taking on that role. They do it aggressively, and I do not have a criticism of lawyers taking the opportunity to see that the Government and others in the private sector implement the laws, and——

Senator KAUFMAN. So you would not be opposed—I mean, you think the idea—there is an idea out there that maybe there is liability that the private sector could operate against, punitive damages and things like that, that may have a value, whether we are talking about the economic value or not, just the idea that there is a disincentive to a corporation sitting around deciding what they are going to do, if, in fact, they know the payoff is going to be greater. And isn't that important in terms of this BP case? Isn't it important that we send a clear message that—taking your approach, which is these are all wells, probably 3,000, no problem, but we have this one, it really went bad. So if you are in the oil business and you are out drilling in the gulf and you drill a well and you do not do the proper things, you do not do the things that have been raised here, and others, that you are going to have to pay a major price for that—just that alone, not counting the really most important thing which has been raised here, Mr. Jones' brother and the families and all the rest of that, the fishermen, the things that Senator Franken raised. Isn't there an economic, straight up economic reason that BP should pay a major price for this problem?

Mr. COLEMAN. Well, I agree from a public policy point of view there needs to be a major price to be paid for this kind of accident. And I would submit to you that there is—I think everyone is seeing that there is a major price. Not only has their share value gone down tremendously, they are projecting—I have seen projections of up to 30-some-odd billion dollars that may have to be paid under current law by BP for what has happened here.

So I do think the idea that there is not enough—or that there is not a significant price to pay is not accurate.

Senator KAUFMAN. But you do say it should be a significant price to pay when you make a mistake like this, and that there should be disincentives, because incentives are an important part—there are incentives for drilling in the gulf, and there are disincentives if you make a mistake.

Mr. COLEMAN. I agree, and our current law sets up those very significant prices to pay.

Senator KAUFMAN. Thank you.

Mr. Jones, as with others, I am sorry about your loss, and I think it does bring home much of what we are talking about here. It comes down to people, and I think that this is—your testimony is incredibly important. Just from talking to the survivors' families, do you have any anecdotes you can say of how they thought safety was handled on that rig?

Mr. JONES. Well, I have not had really much of an occasion to speak to a lot of them, and those that would have known about that are no longer here. We have had some discussions with some

of the survivors, some of the folks who were rescued that came through the visitation line, which was not really an appropriate time for us to discuss that. And to be quite honest with you, we have not had a whole lot of time in the last month and a half to really have a lot of those discussions. I have a lot of anecdotal evidence, e-mails, comments that have been made by a lot of different sources as to what happened, and, you know, mentioned the BOPs, but the BOPs did not cause this. The BOPs failed to prevent it.

So there is a lot of stuff that went wrong well before that ever happened. So, you know, there is a lot that is going to play out in the months and, unfortunately, years before there is ultimately a result here, and that, you know, Michelle and her boys and the other families can move on.

Senator KAUFMAN. You know, we heard a lot of testimony—Senator Feingold raised it—about how much this is like Wall Street, and there is one kind of common theme that weaves its way through this thing. You know, it was Washington's fault. We did not have the proper rules, we did not have the proper regulators, we did not do the rest of that. We heard it from Washington Mutual when we had the hearings on that. It is almost like—and I agree that we do not have regulators. I agree. One of the big problems is we do not have regulators. You hit it right on the nail.

But, you know, sometimes it is like cops on the beat. You know, because there is not a cop on the street corner does not mean you can break a window and go in a jeweler's and steal the stuff right out of the thing. And the idea there were not regulators, you know, I just always kind of—I am big on the fact that we have not regulated and we have to regulate, it is important, just like we need cops on the beat, just like we need referees on the football field. And we went through a period where we had—where we just did not need to do that. And so—but it does bother me when—and I know—Mr. Coleman, I am not accusing you of making this argument, but the argument that is constantly made is, well, you have got to understand it was Washington's fault. And because there was not a cop on the beat, we could go in there and do whatever we wanted. We could not worry about safety. We could not do these other things.

So I think it is important to keep the fact we have a responsibility of doing this, but I think corporate America did not have the ability to go in and do what they did because there were not regulators on the beat, and there clearly were not regulators on the beat.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Whitehouse, do you have further questions?

Senator WHITEHOUSE. A few.

Professor Galligan, is it reasonable to assume that corporations act in a way to maximize their own economic self-interest?

Mr. GALLIGAN. I think that is what they exist for. Obviously, they are concerned with societal interests, but the definition is to make a profit, and there is a duty to the shareholders to do so.

Senator WHITEHOUSE. Specifically, they are under a duty to their shareholders to act in a way to maximize their own economic self-interest as a matter of law. Correct?

Mr. GALLIGAN. Correct.

Senator WHITEHOUSE. If we switch to the question of criminal restitution, I view this as a lay-down hand, really, from a criminal point of view under the Rivers and Harbors Act. It is a misdemeanor, but it triggers penalties and restitution and other criminal consequences.

Is there anything that prevents, under the various doctrines that govern criminal restitution, the restitution in the criminal case from supplementing areas in which there is an untoward or unnecessary, inappropriate cap or restraint on liability that is revealed by these facts, for instance, to the Gordon Jones family?

Mr. GALLIGAN. Well, I am not a criminal lawyer, but I am not aware of any limits. But at the same time, I am not aware of any creative cases in which that kind of restitution has been liberally extended, because there are constitutional issues about a criminal defendant.

Senator WHITEHOUSE. Mr. Coleman, the *Exxon* decision cut very favorably toward the oil industry by limiting what had heretofore been unlimited punitive damages. Did that affect any existing agreements? And should the Government have renegotiated at that point existing agreements because of a material change in its contractual relationships?

Mr. COLEMAN. I do not see that that affected the contracts that the Government has with any——

Senator WHITEHOUSE. All right. Let us hypothesize that we were here putting a restriction on liability, that we were reducing—saying $75 million applied not just to economic damages but to other damages as well. If that were the argument that was being made here, if we were considering a piece of legislation to reduce liability, would you be here arguing that that was a material impairment of the contractual relationship between the Government and the corporations and that, therefore, the Government was in a position now to renegotiate with all the corporations affected by that change?

Mr. COLEMAN. Senator, if the Congress were to have reduced this $75 million down to $35 million or something like that, then the $75 million remains the contractual deal, but from a legal perspective, they would not have to pay more than $35 million. And so it would not be any——

Senator WHITEHOUSE. So what you are suggesting is, in fact, a one-way ratchet that works in favor of the corporations and against the Government in every circumstance in which the Government acts with respect to a corporate—the Congress acts with respect to a contract with the Government?

Mr. COLEMAN. Well, there would be some exceptions, and this would require lengthy briefs.

Senator WHITEHOUSE. But generally——

Mr. COLEMAN. But generally——

Senator WHITEHOUSE [continuing.] That is true, you would create with your policy a one-way ratchet that worked only in favor of the corporations and not in favor of the Government when Congress changed the terms of a contract.

Mr. COLEMAN. It is a question of two parties to a contract, Senator, and if one makes a unilateral change—the same would be if

the private sector party to the contract said they were going to make a change, and they could repudiate the contract just as the Government does. The Government would be entitled to damages. So it is not a one-way street. It works both ways.

Senator WHITEHOUSE. Well, it works only one way from Congress' perspective, and that is in favor of the corporations under your theory.

The final question I will ask is for Mr. Jones. You mentioned the blowout preventer. We are told that in Norway and in Brazil and in places where there is considerable drilling, there is a device called an acoustic switch that is required, that is a safety device that encourages the operation of blowout preventers—it might actually have been helpful in this particular case—and that the industry argued vociferously against it because it costs $500,000 for that piece of equipment. I just want to put that in the context of BP's first quarter earnings this year. You also mentioned those. They earned $5.6 billion in the first quarter of 2010. For that, they could have bought 11,000 of these devices that are required in other States. Instead, they argued against being required to buy one.

How do you feel that the incentives and the economics work in terms of how this affected the safety out on the Deepwater Horizon?

Mr. JONES. Well, from a purely economic perspective, I personally feel that if you are going to play and you are going to make billions and billions and billions of dollars, then you need to pay to avoid the threat that Mr. Coleman mentioned. You know, even though this is an aberration, it is not an aberration in my life. It is not an aberration in Michelle and the boys' lives. You know, any threat is too much from my perspective. I know that other people think differently about that. I do not. Sitting here today, for the reason that I am here, I do not think that way. And I think half a million dollars is nothing compared to the loss that we have experienced and all the other families have experienced.

Senator WHITEHOUSE. Thank you, Mr. Jones.

Thank you, Mr. Chairman, again.

Chairman LEAHY. Senator Klobuchar, do you have any further questions?

Senator KLOBUCHAR. Yes, I do. Thank you, Mr. Chairman.

Chairman LEAHY. Go ahead, and then Senator Franken.

Senator KLOBUCHAR. Thank you again. I was going back to—my last questions were more on specifics of how the law works, but I was thinking about this $75 million cap, and obviously we are going to try very hard to lift it retroactively to find other ways to do this. But the question I keep going back to is whether or not BP would have acted so recklessly if it knew that there was not a $75 million limit, if they could have foreseen the damages, and that maybe they were in a comfort zone because they knew that things—their maximum liability would only be for so much. And, you know, would they have put in a back-up blowout preventer, considered other safety measures that would have prevented this disaster?

And so I am looking at this as how do we best incentivize in a free market these companies to do the right thing. Obviously, we

want them to do their work, but we want them to do the right thing and be incentivized not to cause damages to the taxpayers. And, to me, if you really have a free market, then they pay for those damages.

Mr. Galligan, Professor, do you want to start with that?

Mr. GALLIGAN. I will, yes. The whole law and economics theory of tort law is based on what you just said, which is that for there to be an effective, optimal deterrence scheme in tort law, you have to face the full costs of your activities, because when you decide what to do and how to do it, if you do not have to pay a cost, if you see a cap, if you see a liability limitation, it is rational as an economic factor to not consider that cap. That is the basis of Judge Calabrese's work on law and economics; it is the basis of Judge Posner's work on law and economics. And law and economics, as you know, has become one of the prevalent theories, along with corrective justice, for modern tort law.

Senator KLOBUCHAR. I know that. I attended the University of Chicago Law School, Professor.

Mr. GALLIGAN. You do indeed know that, then.

Senator KLOBUCHAR. I took a class from Professor Easterbrook, so that is what I am——

Chairman LEAHY. I wondered if you were going to point that out.

Senator KLOBUCHAR. So I just keep going back to that, and this seems the antithesis of it. I am also thinking, being from the Midwest with our ethanol industry, they have to get insurance so they buy insurance, but—I mean, I will check it out, but I am not aware that they have some major law put in place that if an ethanol plant blew up in the middle of the cornfield that they would suddenly have the Federal Government coming in and protecting them with a liability limit. You know, I want to look at it. But it does not—I know they have to get insurance, but I have not heard that they have the protection of these liability caps. So it almost seems like we are picking one industry over another.

Are there other energy industries that have these liability caps, Professor Galligan?

Mr. GALLIGAN. I cannot—none that I am aware of to this extent. Of course, I am really an expert in maritime law and maritime tort law. But I think one thing you see here is the accident of time. A statute passed in 1851, statutes passed in 1920 that have not really been reexamined and reconsidered, except in limited contexts. And now is a chance to look at them comprehensively.

Senator KLOBUCHAR. OK. And then this issue of smaller oil and gas producers, you know, we do not want to everyone be big. We want to have smaller ones as well. Mr. Coleman said that they could not meet the liability. But I cannot help but think sometimes if you have a smaller company, then they have a different role to play in exploration. Maybe they are doing things that are less risky so that they can afford the insurance, because in the end it seems inconsistent with free market principles to allow companies to externalize the risk of an oil spill and pass it on to society.

Do you want to comment on the size issue, Mr. Galligan?

Mr. GALLIGAN. I think you are right on the size issue because I think the key issue is not size but safety, and if—whether large or small—the entity is unable to adequately and efficiently invest in

safety, then I think we want to deter those operations, because we want to have a sufficiently safe world. We have expectations about risk, and we want those expectations to be consistent with fairness. So I think the size issue goes hand in hand with the safety issue.

Senator KLOBUCHAR. Mr. Coleman, do you want to respond to any of this?

Mr. COLEMAN. Yes, I would, Senator. Thank you.

You know, with all due respect, all these things—the world is filled with risk, and so, you know, if we stop doing things that have risk to them, then we will not do much. There are many industries and many activities in the commercial world that have limitations on liability. Certainly the nuclear industry has limitations on liability, shipping industries. It is all a matter of balancing. I understand the difficult role that people in Congress——

Senator KLOBUCHAR. Ethanol, solar, wind, do they have limits?

Mr. COLEMAN. Well, I am not sure whether the ethanol. I do not think that the solar and wind folks do. But they are not in a particularly highly risky endeavor.

Senator KLOBUCHAR. Interesting. That is probably true.

Mr. COLEMAN. But even what the wind people—the impacts of wind are extremely serious to many people considering the amount of birds that are killed every year by windmills.

So everything has its own—if you do not have this offshore oil and gas production in the United States, 1.7 or 1.8 million barrels a year, you are going to have a lot more tankers bringing that oil into this country. That is just a flat out matter of the way it is going to be for decades. And so the fact is the National Academy of Sciences says that is a more dangerous way for the environment to have this oil brought to this country.

Senator KLOBUCHAR. And, you know, Mr. Coleman, two things. One is that I do not think we should stop doing things that are new and taking risks. I just think we have to protect the taxpayers from taking those risks, because it was not their decision to go down 5,000 feet and take this risk. And I think we need to protect Mr. Jones' family from that. And so it is a free market decision of how to make money.

So I am not saying that you should ban oil drilling. I am not saying that we should take risks. I am just saying that we have to assess what the potential damages are and make sure that the people who are taking those risks pay them. And there may be other places to drill—in North Dakota, I mean, you know—that would come with it, with less risk that these smaller businesses can do.

Finally, I am just sorry, but comparing the birds and the windmills to the damage that we are seeing to not just the wildlife but to Mr. Jones' family, I just do not think it is an equal comparison.

Thank you.

Chairman LEAHY. We are supposed to wrap this up by 12, but, Senator Franken, please go ahead.

Senator FRANKEN. Thank you for indulging me.

Chairman LEAHY. You will have the last questions. Go ahead.

Senator FRANKEN. OK. I will take up Amy's point. I have never seen a solar panel or a wind turbine kill 11 people. I have never seen a 50-day ethanol spill. And I think that we have to rethink

our entire energy portfolio and what we are doing to drive the demand for oil. And I think that this is a wake-up call.

You say that the American people, in your testimony—this is from your written testimony—that the American people continue to strongly support offshore oil and gas drilling. There is a CBS poll that says 51 percent oppose it. You cite a Rasmussen poll or statistic that 58 percent of the American public supported offshore drilling as of June 1st. Did the survey ask people whether they supported deep offshore drilling?

Mr. COLEMAN. I am not certain, Senator.

Senator FRANKEN. The one you cited.

Mr. COLEMAN. I think the question was: Do you support continued offshore oil and gas drilling?

Senator FRANKEN. And do you hear the President saying we should suspend all offshore drilling?

Mr. COLEMAN. The President has suspended everything except in 500 feet of water, and 92 percent of the oil that we have yet to get is beyond that. So, in essence, he has basically said he is putting 92 percent off limits as of the current time.

Senator FRANKEN. But the survey that you cited, you do not even know—you cited a survey, but you do not know what the questions on the survey were?

Mr. COLEMAN. I have read—I read the previous survey that they asked, and this is a follow-on. I assume it was the same question. It was just generally offshore drilling. Offshore oil and gas, do you support that?

Senator FRANKEN. The question was: Do you think offshore drilling should be allowed?

Mr. COLEMAN. Well, that is——

Senator FRANKEN. And, obviously, the President thinks offshore drilling should be allowed. So the President would be part of that 58 percent, right?

Mr. COLEMAN. Senator, I think the implication is that the American people—they are talking about—they are seeing in context this accident in 5,000 feet of water. That I think is the most reasonable interpretation that they are thinking about that kind of drilling.

Senator FRANKEN. I do not necessarily buy that at all. OK. There are some people who say that—you say that most of the oil is in deep water. Right?

Mr. COLEMAN. Yes, sir.

Senator FRANKEN. Ninety-two percent.

Mr. COLEMAN. According to the Government.

Senator FRANKEN. OK. We have been hearing from certain quarters that the environmentalists caused the deep-sea drilling. But isn't it true that the deep-sea drilling is done because that is where the oil is?

Mr. COLEMAN. Senator, as I said in my testimony, you need to be allowed to be able to go where the oil is, and 92 percent——

Senator FRANKEN. Right. I just want to speak to this. We have heard in certain quarters, from William Kristol, from Sarah Palin, that the environmentalists caused this spill because they forced the oil companies to drill in deep water. You seem to be an expert on deepwater drilling. Would those statements be true?

Mr. COLEMAN. I can just say I do not know where they got their talking points from, Senator. They did not get them from me. In my view, the reason we are in deep water is because the United States offshore oil and gas industry has driven the development of technology to produce oil and gas. And as we have driven the technology, we have been able to go further and further in the offshore——

Senator FRANKEN. OK. So we are in agreement here. We are in agreement here. I want to end on that.

Mr. COLEMAN. That would be great.

Senator FRANKEN. OK.

[Laughter.]

Senator FRANKEN. So we are in agreement here that those people who say that environmentalists caused this spill because they forced the oil and gas industry to drill as far away from shore as possible is maybe, oh, poppycock? Would you agree with that?

Mr. COLEMAN. I would not agree with that completely, Senator. I would say——

Senator FRANKEN. Really?

Mr. COLEMAN. But I——

Senator FRANKEN. So you think environmentalists caused this spill?

Mr. COLEMAN. I do not believe that—I just did not agree with your "poppycock" comment.

Senator FRANKEN. But you do not think that is poppycock?

Mr. COLEMAN. No, sir.

Senator FRANKEN. OK. That is interesting. OK, so environmentalists—maybe we do not end up agreeing with each other. Thank you.

Chairman LEAHY. Can I just interject? If it is not poppycock, what is it?

Mr. COLEMAN. I think the environmentalists have had impacts on offshore oil and gas drilling. I do not say that it is—to say that they have not had any impact on how far from shore that you drill would not be accurate. They have absolutely pushed to a degree getting further away from shore. There are many—I can tell you many——

Senator FRANKEN. But you say that 92 percent of the oil is in deep water, and then you say that you have to drill where the oil is, but then you say it is the environmentalists' fault?

Mr. COLEMAN. I never said that.

Senator FRANKEN. But then you would say that it is not poppycock to say it is the environmentalists' fault. This does not make sense to me.

Mr. COLEMAN. If I could, the——

Senator FRANKEN. I am sorry, Mr. Chairman. I know you need to go, and I apologize for—I think I should wrap up right here. Please.

Chairman LEAHY. I am reminded of the question, and I whispered to Senator Whitehouse, when Willie Sutton was finally arrested from his bank robbery spree, they said, "Why do you rob banks?" He said, "That is where the money is."

Why do you drill deep? That is where the oil is.

Thank you. We will stand in recess——

Senator WHITEHOUSE. Mr. Chairman, may I ask that two documents—one, a letter to me from John Torgan, the Narragansett Baykeeper in Rhode Island, and the other a letter from Professor Susan Faraday at the Roger Williams University School of Law Marine Affairs Institute—be made a part of the record of this proceeding.

Chairman LEAHY. Without objection.

[The letters appears as a submission for the record.]

Chairman LEAHY. As I said before, if Senators have further follow-up questions based on an answer given or if any of the three testifying wish to add to their answers, they will be given that opportunity.

We stand in recess. I thank you all very, very much.

[Whereupon, at 12:08 p.m., the Committee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Testimony for the Record
Submitted by Professor Eric K. Clemons
Wharton School, University of Pennsylvania
June 8, 2010
Hearing Title: The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?

The BP Deepwater Horizon disaster may have been the result of rational financial analysis by BP managers trading off speed of maintenance operations and risk of failure. If the chance of losing the blowout preventers, and thus the chance losing of the well itself, seemed low enough, the managers may have decided to accept the chance of catastrophic failure. It is the point of punitive damages to ensure that this decision never appears rational again.

Modern portfolio theory and modern business schools' corporate finance offerings teach executives to be risk neutral. Quite simply, that means that an executive should be completely indifferent if asked to choose between losing $100 one percent of the time or losing $1 with certainty. The executive should be equally indifferent if both monetary amounts are multiplied by one thousand or one million.

Likewise, if the executive has to choose between a one percent chance of losing $100 or losing $2 with certainty, a risk-neutral executive should choose the small chance of losing $100.

This would be not only rationally, but socially and societally acceptable, if not for two significant problems:

1. Decision makers do a terrible job dealing with low probability high significance events. There are decades' worth of data to demonstrate that we all consistently place too low an expected value on low probability losses. That means that a rational BP executive would probably consistently risk a 1% chance of losing $5 billion or even $10 billion, to avoid losing $40 million with certainty.
2. Much of the risk that BP was taking will ultimately be absorbed by individuals, or by society at large, or by wildlife, rather than by BP. For decades these have been called economic externalities; the risk to brown pelicans and to manatees, the risks to Louisiana wetlands and the Florida Everglades, the risk to tourists and resort operators, and the risks to shrimpers and those of us who just like to eat shrimp, cannot be fully captured in the compensatory damages or in the direct costs to BP.

The first says that executives will under-estimate ***their own*** expected exposure — the value that they place on a 1% chance of losing $5 billion is, paradoxically, less than $50 million. The second says that because of intangibles (what is a brown pelican worth?) and externalities (what do I lose if I pay more for shrimp, or if I eat tuna salad instead?) they will underestimate ***everyone's*** expected exposure. If you put the two together you have a recipe for disaster. You can virtually ensure that risk neutral executives acting rationally will accept risks that society, equally rationally but fully mindful of all risks, would strongly prefer that they avoid.

Punitive damages can appear arbitrary, capricious, even spiteful, and the Supreme Court voted after the Exxon Valdez disaster to limit punitive damages to no more than direct or compensatory damages.

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Clearly, a preliminary reading of the available information on the BP Deepwater Horizon disaster suggests that the fear of punitive damages was not sufficient to avoid the greatest environmental disaster in US history. The chance of blowout associated with expedited operations was low enough that the BP decision makers appear to have felt that it was acceptable. They believed that the expected total loss to BP and its shareholders was low enough to bear.

I think we agree that we do not want rational executives making the same decisions again. If enough of the intangibles and externalities are loaded back into punitive damages, and if the expected cost of a serious mistake is made high enough, rational decision makers will act in ways that governments, voters, and indeed society as a whole will consider rational as well.

I am not suggesting that damages be imposed arbitrarily, capriciously, or spitefully. Society does want oil, and it does want responsible drilling.

I am suggesting that punitive damages be imposed when dangers have been intentionally discounted. More importantly, I am suggesting that these punitive damages should be large enough to change executives' analyses, and to ensure that executives following risk neutral practices make the decisions that we would all want them to make.

Statement of W. Jackson Coleman

before the

United States Senate Committee on the Judiciary

Concerning

"The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?"

June 8, 2010

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Statement of W. Jackson Coleman

before the

United States Senate Committee on the Judiciary

Concerning

"The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?"

June 8, 2010

I. Introduction

Chairman Leahy, Ranking Member Sessions and Members of the Committee, my name is Jack Coleman and I am Managing Partner of EnergyNorthAmerica, LLC, an energy consulting firm with offices in Washington, DC, Houston, TX, and Oklahoma. I appreciate the Committee's invitation to present my views at this hearing. Early in 2009 I retired after a career of almost 27 years in the federal government – the last six of which were spent working in the House of Representatives. From February 2007 until March 2009, I was the Republican General Counsel of the House Committee on Natural Resources, and prior to that I served from May 2003 until late 2006 as the Energy and Minerals Counsel for the House Committee on Resources.

My work in the House followed my previous fourteen years as a senior attorney at the Department of the Interior. From September 1992 until May 2003, I served as Senior Attorney for Royalties and Offshore Minerals in the Office of the Solicitor with the Minerals Management Service (MMS) as my primary client, and prior to that, from January 1989 until September 1992, I served as Senior Attorney for Environmental Protection and legal advisor to the Department's Office of Environmental Affairs. My first work on offshore oil and gas issues began during the

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period from March 1982 until August 1985 when I was Special Assistant to the Associate Administrator of the National Oceanic and Atmospheric Administration.

Prior to my service at NOAA, I served on active military duty as an Army Judge Advocate General's Corps Captain from June 1978 until March 1982. My post-secondary education was completely at the University of Mississippi, except for graduate work in legislative affairs at the George Washington University. I received a Juris Doctor degree from the University of Mississippi School of Law in 1978 and a Bachelor of Business Administration in Accountancy degree from the University of Mississippi in 1975.

The focus of this hearing is on a variety of liability issues related to offshore oil and gas production. The ongoing, tragic oil spill in the Gulf of Mexico – tragic for the families of those killed and injured, including the Jones family represented here today, to all of whom I extend my deep condolences, but also tragic for the environment and the energy security aspirations of the American people – is unequaled in size in our nation's history and has resulted in numerous legislative proposals to amend the Oil Pollution Act of 1990 (OPA 90) and other applicable laws, and in actions by the Administration related to offshore oil and gas operations. I will focus my testimony primarily on the breach of contract case law for federal offshore oil and gas leases and the potential liability of the United States for breach of contract as a result of a few of these legislative proposals and executive branch actions. First, however, I will present a few facts about offshore oil and gas and our national debt.

II. Offshore Oil and Gas and our National Debt

The approximate daily oil consumption in the United States is 20 million barrels, with about 60%, or 12 million barrels per day, imported. Our largest source of foreign oil is Canada, but the

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majority of our imported oil comes from other nations. Our yearly amount of imported oil totals more than 4.2 billion barrels. As of the time of the last Department of the Interior Offshore Oil and Gas National Assessment of offshore oil and gas resources in 2006, just over 14 billion barrels of oil had been produced from the federal offshore and more than 15 billion barrels of already discovered oil reserves were available to be produced. Further, the National Assessment estimated that exploration and production activities in the federal offshore would, in the mean case, eventually produce an additional 86 billion barrels of currently undiscovered oil – assuming the offshore lands containing this oil are reasonably made available for leasing and production. These two amounts combine to an expected future production from the federal offshore of 101 billion barrels – sufficient to eliminate all oil imports by the United States, at current levels, for almost 25 years.

Similarly, the National Assessment estimated that just over 153 trillion cubic feet of natural gas have been produced from the federal offshore and that more than 60 trillion cubic feet of already discovered natural gas were available to be produced. Further, the National Assessment estimated that exploration and production activities in the federal offshore would, in the mean case, eventually produce an additional 420 trillion cubic feet of currently undiscovered natural gas – assuming the offshore lands containing the natural gas are reasonably made available for leasing and production. These two amounts combine to an expected future production from the federal offshore of 480 trillion cubic feet of conventional natural gas – sufficient to totally provide for the United States' current annual consumption of natural gas for more than 20 years.

One might ask, "What is the value of these reserves and resources to the American people?" This can be measured in many ways. The direct value of receipts to the Treasury from producing these reserves and resources, at $75/barrel of oil and $5 per thousand cubic feet of natural gas, is

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approximately $1.8 trillion dollars in royalties (assuming an 18% royalty) and $2.7 trillion in corporate income tax receipts from producers, for a total of $4.5 trillion. This sum does not include any up-front sums paid to obtain the leases, nor the tax revenues derived from the jobs that will be created to directly produce these resources, nor the indirect and induced economic impacts of producing these American energy resources owned by the American people. Even without those additional benefits and others, the direct corporate taxes and oil and gas royalties will pay off more than one-third of our current national debt without raising taxes on the American people. However, these vast offshore resources will never pay off any of the national debt if they are not made available for leasing, drilling and production.

Additionally, it is important to note that these offshore resource numbers do not include natural gas hydrates which international public and private research has now proven will be able to be commercially produced in the near future. More than 99% of America's 320,000 trillion cubic feet of natural gas hydrates are located in the deepwater federal offshore. If the deepwater offshore is closed to production, virtually this entire resource will be wasted and the American people will achieve neither the financial bounty nor the environmental benefit from this vast, clean energy resource that they own. If even only 1% of this resource is eventually producible, it would add 3,200 trillion cubic feet of natural gas. In the Gulf of Mexico alone, the Department of the Interior projects that more than 7,000 trillion cubic feet of natural gas hydrates are located in sediments likely to be producible reservoirs. Production of this 1%, or 3,200 trillion cubic feet, of our natural gas hydrate resources would generate approximately $3 trillion in royalties and about $4.5 trillion in corporate income tax on this production from the lessees, for a total of approximately $7.5 trillion. When combined with the prior $4.5 trillion, a total of $12 trillion will result from production of offshore oil and natural gas, including natural gas hydrates. This

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sum almost completely pays off the current national debt without raising taxes. Further, this amount could easily be 50 to 100 percent higher because it is based on decades old seismic surveys in moratoria areas which are expected to significantly underestimate recoverable resources. As the Department of the Interior stated in its February 2006 OCS Inventory Report to Congress mandated by Section 357 of the Energy Policy Act of 2005, "**True knowledge of the extent of oil and natural gas resources can only come through the actual drilling of wells**. Estimating undiscovered resources, no matter how sophisticated the models and statistical techniques employed, is an inherently uncertain exercise that is based on hypotheses and assumptions, with **the results limited by the quality of the underlying geologic data**." (**emphasis** added). The Department also stated, "**Frontier areas such as parts of the Eastern Gulf of Mexico and other offshore areas under congressional or executive withdrawal offer the potential of larger field-size discoveries** . . . the risk-based **estimates in frontier areas ordinarily will have been seen as far too conservative** if later exploration demonstrates that the area is hydrocarbon-prone."

Some have said that the oil and gas industry is trying to produce oil in water that is just too deep. First, the offshore drilling industry is capable of drilling in 12,000 feet of water and deeper, and that more than 80% of the oil production in the Gulf is from leases in more than 1,000 feet of water. Second, oil must be produced where it is found. According to the 2006 National Assessment, of the 45 billion barrels of oil left to be discovered in the Gulf of Mexico, all except 3.5 billion barrels, or 92% is located in water deeper than 650 feet. The current 500 foot drilling moratoria in the Gulf of Mexico makes those 41.5 billion barrels unavailable for exploration and future production. Finally, we can all agree that the nation needs to continue to push the development of even better and safer technology and implement procedures that will

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help ensure that an accident of this type never happens again, and in the outside chance that it does that we have in place more aggressive and effective oil spill response mechanisms that shut down the well and clean it up much quicker.

I also want to mention that the American people, even after more than six weeks of this record spill, continue to strongly support offshore oil and gas drilling. In late March before the accident, a Rasmussen poll reported that 72% of the American people supported producing oil and gas from the offshore. On May 6th, after more than two weeks of spectacular television coverage of the explosion and spill, a Rasmussen poll reported that 58% of the American public still supported offshore oil and gas drilling, and only 23% opposed. Almost a month later, on June 1st, another Rasmussen poll reported that support for offshore oil and gas drilling remained at 58%, and only 20% opposed. The rest were undecided. So, it is clear to me that the American people have maintained strong support for offshore oil and gas production and they understand why it is so important for our nation.

III. *Mobil v. U.S.* and its Progeny

Since 1992, my career has predominantly focused on offshore oil and gas law and it has frequently included significant responsibilities related to breach of contract liability issues. Beginning in 1992, I was the lead Department of the Interior attorney for *Conoco v. U.S.*, 35 Fed. Cl. 306, later *Marathon v. U.S.*, 177 F. 3d 1331, and finally *Mobil Exploration and Producing Southeast, Inc., v. U.S.*, 530 U.S. 604, 120 S.Ct. 2423 (2000). *Mobil* is a landmark case establishing the law applicable to federal offshore oil and gas lease contracts. The *Mobil* opinion, delivered by Mr. Justice Breyer, resulted from a breach of contract action by seventeen oil and gas lessees involving claims exceeding $700 million resulting from Acts of Congress that

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restricted the rights of lessees to explore for and develop oil and gas resources on existing leases off Alaska, Florida, and North Carolina. Discovery exceeded several hundred thousand pages. I personally conducted depositions totaling more than 2,500 pages in length. All except two of the plaintiffs settled with the government prior to the case reaching the Supreme Court

At issue in that Court was the passage of the Outer Banks Protection Act (OBPA) as a part of OPA 90 and whether the leases incorporated the OBPA into their terms and were "subject to" the OBPA. The OBPA established an Environmental Sciences Review Panel (ESRP) and prohibited the Secretary of the Interior from issuing any permit to drill on existing leases offshore North Carolina for at least thirteen months, but for a longer period if the ESRP had not completed its work of determining whether the Secretary possessed sufficient environmental information with which to make decisions on drilling permit requests for the affected leases. Among other things, the Department of the Interior had taken the position that the provisions of the leases incorporated the later-enacted OBPA into them and made them "subject to" it. This position was based on the terms of the leases which provided in relevant part that the leases are "subject to all other applicable laws and regulations." The Court addressed this issue by stating that "the lease contracts say that they are subject to then-existing regulations and to certain future regulations . . . This explicit reference to future regulations makes it clear that the catchall provision that references "all other applicable . . . regulations," . . . must include only statutes and regulations already existing at the time of the contract, see 35 Fed. Cl., at 322-323, a conclusion not questioned here by the Government. Hence, these provisions mean that the contracts are not subject to future regulations under other statutes, such as new statutes like OBPA. Without some such contractual provision limiting the Government's power to impose new and different requirements, the companies would have spent $158 million to buy next to nothing." The Court

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found that when Congress enacted the OBPA and the Department of the Interior announced that it would apply its provisions to the leases offshore North Carolina, the government had repudiated the contracts and committed a material breach. In the Court's words,

> "As applied to this case, these principles amount to the following: If the Government said it would break, or did break, an important contractual promise, thereby "substantially impair[ing] the value of the contract[s]" to the companies, *ibid.*, then (unless the companies waived their rights to restitution) the Government must give the companies their money back. And it must do so whether the contracts would, or would not, ultimately have proved financially beneficial to the companies."

The Court noted that the leases stated that they would be subject to "all regulations issued pursuant to" the Outer Continental Shelf Lands Act (OCSLA) "in the future which provide for the prevention of waste and the conservation" of outer Continental Shelf resources. Further, the Court found that federal mineral leases are governed by the commercial law of contracts. The Court further noted that "the Court of Claims concluded . . . that timely and fair consideration of a submitted Exploration Plan was a 'necessary reciprocal obligation,' indeed, that any 'contrary interpretation would render the bargain illusory.' We agree." Of note, but not decisive, is that the OCSLA required in 43 USC 1340(c)(1) that the government act within 30 calendar days to approve exploration requests. The government argued that the OBPA-required delays of at least thirteen months were not substantial and therefore did amount to a material breach of the leases. The Court rejected that argument by noting, "if the companies did not at least buy a promise that the Government would not deviate significantly from those procedures and standards, then what

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did they buy? . . . The Government's modification of the contract-incorporated processes was not technical or insubstantial. It did not announce an (OBPA-required) approval delay of a few days or weeks, but of 13 months minimum, and likely much longer. And lengthy delays matter, particularly where several successive agency approvals are at stake." Finally, the Court wrote, "Contract law expresses no view about the wisdom of OBPA. We have examined only that statute's consistency with the promises that the earlier contracts contained. We find that the oil companies gave the United States $158 million in return for a contractual promise to follow the terms of pre-existing statutes and regulations. The new statute prevented the Government from keeping that promise. The breach "substantially impair[ed] the value of the contract[s]." And therefore the Government must give the companies their money back."

Shortly after the *Mobil* decision, I became the lead Department of the Interior attorney in a breach of contract action filed by Chevron and its two co-lessees for 9 leases in the eastern Gulf of Mexico, *Chevron et al. v. United States*, 00-431 C (Fed. Cl. 2000), challenging actions, or lack thereof, by NOAA and the EPA related to the giant Destin Dome 56 dry natural gas development project located 25 miles south of Pensacola, Florida. The action stemmed from the failure of EPA to act to issue a required air permit for this proposed development to produce the estimated 1-2 trillion cubic feet of dry natural gas in 200 feet of water. Further, because the State of Florida had objected that the proposed project was not consistent with the enforceable policies of its state coastal zone management program, Chevron had filed an appeal requesting the Secretary of Commerce to overturn Florida's objection and allow the Department of the Interior to issue the required permits. The Secretary of Commerce failed to close the administrative record and make a decision on the appeal after a period of more than two years, and Chevron *et al* filed the subject breach of contract action alleging that both Commerce (NOAA) and EPA, citing *Mobil*,

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had failed to provide the contractually-required timely and fair consideration of their permit requests, thereby materially breaching their leases and entitling them to restitution. After almost two years of discovery, briefs, and motions, I negotiated and signed on behalf of the United States, with the approval of the Department of Justice, an agreement in principle with the plaintiffs settling the litigation just after Memorial Day in 2002.

Prior to the resolution of *Chevron v. US*, I became the lead Interior attorney for another major offshore oil and gas breach of contract action, *Amber Resources Co. et al v. United States*, 538 F. 3d 1538 (Fed. Cir. 2008). This case was factually very similar to *Mobil* in that it involved a statute enacted after the issuance of the leases, the Coastal Zone Management Act Amendments Act of 1990, which was determined in other litigation for which I was the lead Interior attorney, *California et al. v. Norton*, 150 F. Supp. 2d 1046 (N.D. Cal. 2001), to apply to the operation of the leases. The lessees filed *Amber* citing *Mobil's* holding that the application of a later-enacted statute to the leases in such a way that materially changed the process through which the lessee must pass in order to explore and develop the oil and gas resources on the leased tracts amounted to a material breach of the leases entitling the lessees to compensation. The Court of Federal Claims granted judgment for the lessees and the Court of Appeals for the Federal Circuit affirmed the judgment but decreased the measure of compensation to restitution of the $1.1 billion paid to the federal government on the leases.

IV. Application of the *Mobil* and *Amber* Decisions to Current Issues

I will address the following in turn – legislative proposals to substantially increase, or eliminate, the OPA 90 $75 million damages limitation and apply this increase to existing leases; proposals to change the OCSLA statutory deadline to approve exploration plans from 30 to 90

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days and apply this change to existing leases; and President Obama's current minimum seven month drilling moratoria on wells in more than 500 feet of water.

Proposals to substantially increase, or eliminate, the $75 million damages limitation (for natural resource damages, lost income, property damage/loss, lost tax revenues) in OPA90 and apply it to existing leases abound, even though the responsible party already has unlimited, strict liability for the entire response cost. One of the most widely cited solutions is the "Big Oil Bailout Prevention Act," introduced by Sen. Robert Menendez (D-NJ), that would raise the liability cap for damages under the Oil Pollution Act of 1990 ("OPA '90")from $75 million to $10 billion. The cap was put in place to limit the liability exposure of individual companies by sharing the risk so that companies would be able to continue to produce oil and gas offshore and tankers would be able to continue to bring oil into the United States. To raise the cap to $10 billion, or even some much lesser amount, would, at minimum, prevent U.S. small and mid-size oil and gas companies from participating in domestic offshore oil and gas development, and at worst, completely shut down almost one-third of our nation's domestic oil and gas supply. Either of these would destroy tens of thousands of high-paying American jobs.

While such an outcome would be harmful enough on its own, the consequences of such a policy could extend even further. The Menendez legislation would apply the liability cap retroactively to cover existing leases. Such a substantial change to the conditions under which companies have acquired their leases would likely be a material breach of contract, based on *Mobil*. As stated earlier, the Supreme Court held that companies that acquire leases do so in return for a contractual promise that the Government will follow the terms of pre-existing statutes and regulations. To apply substantial changes to those pre-existing statutes and regulations, except within narrow limits, in this case by materially changing the liability cap

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under OPA '90 for existing leases, would likely be a repudiation of the contracts and entitle leaseholders to compensation for ALL existing federal offshore leases, including those already in production. In the Gulf of Mexico alone, there are currently over 6,600 oil and gas leases covering 35 million acres that were bought for an average of about $300 per acre in recent years. By committing a breach of contract on its Gulf of Mexico leases, the federal government would expose the American public to far more than $10 billion in claims from current leaseholders, not counting likely claims for lost profits. An additional $3 billion would be at risk for leases bought offshore Alaska.

The Administration has recently proposed to make other legislative changes, such as amending the Outer Continental Shelf Lands Act to substantially extend the statutory time allowed for the Department of the Interior to act on exploration plans (extending it from 30 days for existing leases to 90 days), that would materially impact existing leases and likely constitute a breach of contract of all non-producing offshore leases and thousands of onshore oil and gas leases, potentially costing taxpayers billions more. This exact provision was one of the issues in the *Mobil*. Regarding this, the Supreme Court stated, "The Government's modification of the contract-incorporated processes was not technical or insubstantial. It did not announce an (OBPA-required) approval delay of a few days or weeks. . . . The upshot is that, under the contracts, the incorporated procedures and standards amounted to a gateway in the companies' enjoyment of all other rights. To significantly narrow that gateway violated material conditions in the contracts. The breach was "substantial," depriving the companies of the benefit of their bargain."

Finally, in my opinion, President Obama's current minimum seven month drilling moratoria on wells in more than 500 feet of water is not well-supported by the law and is likely

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to constitute a repudiation of all of the leases located in 500 feet of water and deeper. The OCSLA provides that the government must approve "submitted" exploration plans within 30 calendar days, as recounted in *Mobil*. By regulation, the government has 15 business days to review an exploration proposal to determine if it contains all of the required information and forms. Upon deeming an exploration plan "submitted" the government has a further 30 calendar days in which to review it and approve it or send it back for changes. In order to get around this statutory requirement which *Mobil* decided is part of the essence of the lease contracts, on May 30, 2010, the Minerals Management Service issued a Notice to Lessees (NTL) directing a suspension of operations, citing 30 CFR 250.172 (b) and 250.172 (c) as authority. The NTL states that it -

> "is based on a May 28, 2010, Memorandum from the Secretary of the Interior to the Director of the MMS finding that, under current conditions, deepwater drilling poses an unacceptable threat of serious and irreparable harm or damage to wildlife and the marine, coastal and human environment, as set forth in 30 C.F.R. 172(b). The Secretary also determined that the installation of additional safety or environmental protection equipment is necessary to prevent injury or loss of life and damage to property and the environment, as set forth in 30 C.F.R. 250.172(c)."

These are regulatory provisions taken from the OCSLA verbatim, so regulatory interpretation includes statutory interpretation. To my knowledge, never in the history of the OCS oil and gas program have either of these provisions been applied to hundreds or thousands of leases, and especially not for a significant period of time. There is really no justification given in the NTL

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for taking these actions, but the NTL does state that "the causes [of the explosion] are still under investigation." So, if that is the case, what "additional safety or environmental protection equipment is *necessary*"? "Necessary" is a legal term that states within the context of the regulation that without the equipment to prevent it, the injury will take place. Where is the list of such "necessary" equipment? Why is it necessary to require drilling to stop for 6 months to wait on a report from a non-technical commission that is not expert in safety and environmental equipment? Wouldn't it be more reasonable to take immediate actions that are already recommended in the 30-day review safety report? Further, a blanket 6 month additional drilling moratorium because "under current conditions deepwater drilling poses an unacceptable threat of serious and irreparable harm or damage to wildlife and … the environment" is highly questionable. What "current conditions" are reference here that causes deepwater drilling to pose an unacceptable threat? What is an unacceptable threat? Is the fact that many thousands of deepwater wells have been drilled before having a sea-floor blowout an "unacceptable" threat? Can a 1 in 3,000 or 1 in 4,000 or 1 in 5,000 drilling history constitute an "unacceptable threat"? I do not believe that a court of competent jurisdiction would agree with the Administration's judgment on those questions.

V. Closing

It is clear that our nation benefits from developing oil and gas resources here at home. Domestic energy development reduces our reliance on imported oil, directly supports over 9 million jobs, creates billions in new wealth every year, and generates over $13 billion for the federal Treasury on an annual basis. I hope that our political leaders will not implement what I believe to be reckless policies that would imperil such an enormous source of jobs and revenue.

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Finally, it is critical that cooler heads prevail so that rational policy changes can be developed. We clearly will need to closely examine the findings associated with the oil spill investigation and develop policies that address areas including: (1) the appropriate level of funding for oil spill prevention, response, and mitigation; (2) inspections and enforcement of offshore facilities; (3) emergency response protocols; and (4) the training and pre-positioning of equipment and personnel to facilitate faster incident response times. In sum, we need a carefully considered solution that will appropriately address pertinent issues without jeopardizing our economic, energy and national security.

Thank you for the opportunity to testify and I would be pleased to answer any questions.

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MEMORANDUM May 12, 2010

Subject Constitutional Issues Raised by Pending Bills to Increase Retroactively a Liability Limit in the Oil Pollution Act

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This memorandum was prepared to enable distribution to more than one congressional office.

This memorandum looks at the constitutional issues implicated by two recently introduced bills -- S. 3305, titled the "Big Oil Bailout Prevention Liability Act of 2010," and H.R. 5214, titled the "Big Oil Bailout Prevention Act of 2010." The constitutional issues are raised by the retroactive increase each of these bills would effect in the oil spill liability limit now in section 1004(a)(3) of the Oil Pollution Act (OPA).[1] That limit applies to each responsible party, per oil spill incident, at an offshore facility and covers damages (not including "removal costs") resulting from the incident. Section 1004(a)(3) currently sets this limit at $75 million,[2] though the limit is lifted (liability is unlimited) if any of several exceptions apply.[3] The bills, in identical language, would simply strike the $75 million figure and replace it with $10 billion, thus preserving the exceptions.

S. 3305 and H.R. 5214, introduced May 4 and May 5, 2010 respectively, state that they take effect on April 15, 2010. Thus, they are plainly retroactive: even if, under the bills, a responsible party's payments over the current $75 million cap all go toward damages incurred after the bill is enacted, those damages stem from a pre-enactment incident and thus satisfy a common definition of retroactivity. The intent of making the increased liability limit retroactive to April 15, 2010 is presumably to displace the existing $75 million liability limit on damages that would otherwise apply to any responsible party in connection with the Deepwater Horizon blowout in the Gulf of Mexico on April 20, 2010. Even in the absence of this pre-enactment effective date, however, the bills could be said to be retroactive if they apply to oil and gas leases entered into pre-enactment, notwithstanding that an oil spill at one of those lease locations occurs after enactment.

This memorandum surveys the **constitutional issues** raised by this proposed retroactive increase in the $75 million liability cap, where no exceptions operate to eliminate the cap, and does not speak to the breach of contract arguments related to British Petroleum's offshore lease. The retroactive nature of the

[1] 33 U.S.C. §§ 2704(a)(3).

[2] OPA § 1004(a)(3); 33 U.S.C. § 2704(a)(3).

[3] For relevant exceptions, see OPA § 1004(c)(1)-(2), 33 U.S.C. § 2704(c)(1)-(2). OPA also states three narrow defenses to liability, OPA § 1003(a), 33 U.S.C. § 2703(a), which could eliminate all of a responsible party's liability under the Act.

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cap increase invites examination of five constitutional provisions. The memorandum concludes that claims based on three of these – the Takings Clause, Substantive Due Process, and Bill of Attainder Clause – appear to have at best a modest chance of success, while claims under two others – the Impairment of Contracts Clause and Ex Post Facto Clause -- seem to have almost no chance of success. It must be immediately stressed, however, that how the legislative history of an enacted law characterizes the predecessor bill – especially whether a broad and legitimate public purpose for the bill is convincingly set forth – may affect the analysis, especially with regard to the Bill of Attainder Clause (see discussion below). That legislative history, of course, does not yet exist. The reader is further cautioned that prediction of how courts will rule when applying the broadly worded tests of constitutional law is always attended by some uncertainty, particularly where, as here, the analysis must proceed without full knowledge of the relevant facts.

Introduction

The Constitution disfavors retroactivity. At least five constitutional provisions, noted above, embody the notion that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted."[4] A legislature's responsiveness to political pressures, the Supreme Court has said, "poses the risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[5]

Nonetheless, each of these five constitutional provisions has its special concerns and is of "limited scope,"[6] recognizing that within reasonable bounds, the retroactive application of statutes can be an acceptable and unavoidable means of achieving a legitimate public purpose. As the Court has said --

> Retroactivity provisions often serve entirely benign and legitimate purposes, whether *to respond to emergencies*, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply *to give comprehensive effect to a new law Congress considers salutary*.[7]

Accordingly, several Supreme Court decisions in the past half-century to address retroactive federal statutes have found them constitutionally inoffensive.

Before turning to the five retroactivity-concerned constitutional provisions, the meaning of OPA section 1018(c) must be addressed.[8] That subsection, enacted in 1990 as part of the original OPA, declares that "[n]othing in this Act …shall in any way affect, or be construed to affect, the authority of the United States … to impose additional liability or additional requirements … relating to the discharge … of oil." By its literal terms, this provision seems to say that parties entering into Outer Continental Shelf leases since 1990 (such as British Petroleum in connection with the lease here) are on notice that the United States may change the liability caps in OPA, even retroactively. Read in this manner, several of the constitutional issues discussed in this memorandum (and the breach of contract issue) disappear. A responsible party likely would not be heard by a court to complain of a liability cap increase the

[4] Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). *See also* General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) ("Retroactive legislation … can deprive citizens of legitimate expectations and upset settled transactions.")

[5] *Landgraf*, 511 U.S. at 266.

[6] *Id.* at 267.

[7] *Id.* at 267-268 (emphases added).

[8] 33 U.S.C. § 2718(c).

possibility of which was expressly authorized at the time that party's involvement at the affected offshore site began.

It is entirely possible, however, that OPA section 1018(c) has a narrower meaning that does not apply to the retroactive amendment of OPA proposed by S. 3305 and H.R. 5214. CRS declines to speculate here what those narrower meanings might be. The following analysis is written as if section 1018(c) would not apply if one of the bills were enacted.

Takings Clause

The Takings Clause safeguards "private property" against government interference by promising "just compensation" in the event that the interference amounts to a "taking."[9] The success of a taking claim depends critically, therefore, on whether the interest alleged by plaintiff to be taken is one recognized as "property" by the Takings Clause. Moreover, how the analysis proceeds may depend on the type of property involved. Based on a limited understanding of the Deepwater Horizon situation, CRS supposes that at least three interests may be implicated: (1) a claimed right to having the relevant law (the current liability cap) remain unchanged; (2) the money disbursed by a responsible party over and above the current liability cap, up to the new cap in the bills; and (3) an alleged contract right under British Petroleum's lease of the affected area to bar application to the lease of laws enacted after it was entered into.

The interest in the law remaining unchanged. In the substantive due process context, the interest in the law remaining unchanged has long been held not to constitute a vested property interest: "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."[10] More recently, takings decisions have adopted the same proposition.[11] Thus, the bare fact that the bills would change the law existing when an offshore lease was entered into is not, of itself, a basis for a taking claim.

Responsible-party disbursements in excess of the current liability cap. Money is held to be property under the Takings Clause,[12] so this preliminary hurdle is surmounted here. Thus, an OPA responsible party would be able to argue, under the canonical *Penn Central* test for regulatory takings,[13] that the bills effect a taking of its disbursements to cover damages beyond the existing liability cap. Under the *Penn Central* test, used by the Supreme Court for takings challenges to retroactive monetary liability,[14] the court must examine (1) the economic impact of the government action, (2) the degree to which it interferes with reasonable, distinct investment-backed expectations, and (3) the "character" of the government action.[15]

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[9] U.S. Const. amend. V.

[10] New York Central RR Co. v. White, 243 U.S. 188 (1917).

[11] *See, e.g.*, Branch v. United States, 69 F.3d 1577-1578 (Fed. Cir. 1995) ("no one is considered to have a property interest in a rule of law"); Johnson v. American Leather Specialties Corp., 578 F. Supp. 2d 1154, 1173-1174 (N.D. Iowa 2008).

[12] Philips v. Washington Legal Found., 524 U.S. 156 (1998).

[13] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[14] *See, e.g.*, Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (plurality opinion); Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993). *Concrete Pipe* rejected plaintiff's contention that the appropriate analytical framework in the case of retroactively added monetary liability should be either the Court's per se test for government interferences that totally eliminate the value of property or the Court's per se test for permanent physical occupations of property. *Id.* at 643-644.

[15] *Penn Central*, 438 U.S. at 124.

Each of the *Penn Central* factors may pose a daunting obstacle for a taking claim based on the retroactively increased monetary liability in the bills. As for the economic impact factor, the *Penn Central* test requires that the impact be very substantial, if not severe, before this factor weighs in favor of a taking. In one case, the Supreme Court held that a retroactively imposed monetary liability amounting to 46% of shareholder equity, combined with the "proportionality" of that impact with plaintiff's conduct, was insufficient to count the economic impact factor as favoring a taking.[16] Thus, based on reports as to the net worth or market capitalization of British Petroleum, the potential additional liability under the bills -- between $75 million and $10 billion -- may fall short of the *Penn Central* threshold, though it might not fall short as to other, smaller responsible parties (in this or future oil spills from offshore facilities).

The second *Penn Central* factor is the degree of government interference with the reasonable and distinct investment-backed expectations of the property owner. This factor often involves courts in a review of the legal landscape at the time the property interest alleged to be taken was acquired, with a view toward gauging the reasonableness of the property owner's expectations of economically exploiting that property interest. Oil and gas operations on the Outer Continental Shelf have been heavily regulated since the 1950s, under the Outer Continental Shelf Lands Act.[17] Moreover, by 2008 when British Petroleum entered into the lease at issue here, federal oil spill liability limits had been increased, some twice and some by multiples approaching the 133-fold increase the bills would effect.[18] As the Supreme Court has said in addressing a takings claim to retroactive monetary liability, "Those who do business in [a] regulated field cannot object if the regulatory scheme is buttressed by subsequent amendments to achieve the legislative end."[19] The Court noted further in the case:

> Because legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations ... even though the effect of the legislation is to impose a new duty or liability based on past acts, [petitioner's] reliance on [the statute in question's] original limitation of contingent liability to 30% of net worth is misplaced, *there being no reasonable basis to expect that the legislative ceiling would never be lifted.*[20]

Thus, a company entering into an Outer Continental Shelf lease in recent decades faces an uphill climb in arguing that the bills' increase in the liability cap interferes with its reasonable expectations.

As much a barrier as each of the first two *Penn Central* factors may be to a takings challenge to the bills, it is the third factor, the character of the government action, that most likely will prove fatal -- independently of the size or other circumstances of the responsible party. Initially, there is the oft-repeated phrase that government programs adjusting the benefits and burdens of economic life (as with the bills) are less likely to be takings than government-caused physical invasions of property. More cogently, there is the "generalized monetary liability" principle. The principle stems from the fact that the character of the government action factor demands that the government conduct target *specific* property, according to

[16] *Concrete Pipe*, 508 U.S. at 645.

[17] 43 U.S.C. §§ 1331-1356a.

[18] *See* Rachel M. Hopp and Benjamin H. White, *Oil Spill Liability and Compensation*, Proceedings of the Marine Safety and Security Council 41 (Spring, 2010) (table at page 46 titled "Oil Pollution Limits of Liability Over Time"), available at www.uscg.mil/proceedings. The reference in the text to the bills' "133-fold increase" in the current liability cap for offshore facilities was derived by dividing the existing cap, $75 million, into the bills' cap, $10 billion. According to the table in the Hopp and White article, the minimum liability for tank vessels under the Federal Water Pollution Control Act of 1972 was $250,000, but by the time British Petroleum entered into its lease had risen to $22 million for single-hull tank vessels of 3,000 gross tons or greater -- an 88-fold increase.

[19] Id.

[20] *Id* (emphasis added; footnotes and quotation marks deleted).

the concurring justice and four dissenters in a 1998 Supreme Court decision (that is, a majority of the Court).[21] Thus, a taking claim may arise when government appropriates money from a specifically identified fund of money.[22] But a statute imposing a generalized monetary liability - e.g., that A pay B out of unspecified funds -- is not a taking. Lower courts most importantly the Federal Circuit, to which any takings claims based on the bills likely would be appealed -- have endorsed this principle.[23] In light of the principle, it is very unlikely that the bills' increase in the OPA liability cap for offshore facilities -- an increase in generalized monetary liability -- would be regarded as a taking.

Eastern Enterprises v. Apfel should be distinguished.[24] There, a four-justice plurality opinion of the Supreme Court did indeed hold a federal statute's retroactivity to effect a taking, explaining that the statute imposed severe retroactive liability (attaching new liabilities to events that occurred decades earlier) on a limited class of parties that could not have anticipated the liability, and that the extent of liability was substantially disproportionate to the company's experience in the affected field. These elements found by the plurality to be constitutionally offensive, at least in the aggregate, seem a far cry from the modest retroactivity of S. 3305 and H.R. 5214. As applied to the Deepwater Horizon spill, those bills reach back only a short time (to April 20, 2010). Moreover, an increase in liability could have been anticipated given Congress' already noted history of liability increases in the oil spill area. Finally, the extent of liability imposed by the bills is "proportionate to the company's experience," since the added liability would be only for damages stemming from a company's own oil spills. Of course, the precedent value of *Eastern Enterprises* is further undercut by the fact that only four justices supported the takings analysis of the statute's retroactivity; the other five justices, a majority, concluded that retroactivity is best analyzed under substantive due process, not takings.[25]

Note that both before and after *Eastern Enterprises*, every court to address the matter rejected takings (and substantive due process) challenges to the Superfund Act, whose retroactivity liability scheme offers some parallel to that of the bills.[26]

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[21] Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

[22] *See, e.g.*, Brown v. Washington Legal Found., 538 U.S. 216 (2003) (interest on lawyers' trust accounts); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (interest on interpleader fund).

[23] Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); Swisher International, Inc. v. Schafer, 550 F.3d 1046 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 71 (2009); Empress Casino Joliet Corp. v. Giannoulias, 896 N.E.2d 277 (Ill. 2008), *cert. denied*, 129 S. Ct. 2764 (2009). CRS is aware of no lower court decision to have expressly rejected the generalized monetary liability principle.

The text statement that the taking suit likely would be appealed to the Federal Circuit (after a ruling by the U.S. Court of Federal Claims) warrants elaboration. The possibility exists that a responsible party under OPA might challenge the increased liability limit as a taking and seek injunctive rather than the customary monetary relief. Injunctive relief is justified when, as here, the challenged statute "requires a direct transfer of funds mandated by the government." Eastern Enterprises v. Apfel, 524 U.S. 498, 521 (1998). In that event, "a claim for compensation would entail an otherwise pointless set of activities" -- in the present instance, the United States paying the responsible party a dollar of compensation for each dollar above $75 million that the responsible party pays out for damages. Thus, the presumption of Tucker Act jurisdiction in the U.S. Court of Federal Claims (authorizing the payment of monetary compensation only) must be reversed. *Id.* *See* 28 U.S.C. § 1491(a) (Tucker Act). Absent Tucker Act jurisdiction in the Court of Federal Claims, jurisdiction presumably would lie in a U.S. district court.

[24] 524 U.S. 498 (1998).

[25] *See, e.g.*, Franklin County Convention Facilities Authority v. American Premier Underwriters, 240 F.3d 534, 552 (6th Cir. 2001) ("We conclude that *Eastern Enterprises* has no precedential effect on this case because no single rationale was agreed upon by the Court.")

[26] *See, e.g.*, United States v. Alcan Aluminum Corp., 315 F.3d 179, 189-190 (2d Cir. 2003) (collecting cases). The Superfund Act, 42 U.S.C. §§ 9601-9675, is more formally known as the Comprehensive Environmental Response, Compensation, and Liability Act.

Alleged contract right under British Petroleum's lease to exclude application to the lease of laws enacted after it was entered into. Leases are in the nature of contracts, and contract rights generally are held to be property for purposes of the Takings Clause.[27] That being so, a taking argument might be made by British Petroleum that the bills are essentially an abrogation -- a taking -- by Congress of a contract/lease term to which the United States had agreed. Presumably, such an argument would focus on the clause in the company's lease stating that "The lease is issued subject to [the Outer Continental Shelf Lands Act, existing regulations thereunder, and certain future regulations thereunder] and all other applicable statutes and regulations." The company might argue that "all other applicable statutes" refers solely to statutes existing when the company entered into its lease -- not those, such as S. 3305 and H.R. 5214, enacted by Congress later on. Indeed, there is solid Supreme Court support for this interpretation. In 2000, the Court interpreted the same "catchall" language in another Outer Continental Shelf lease to "include only statutes and regulations already existing at the time of the contract ...."[28] The argument concludes that "all other applicable statutes" must incorporate into the contract the current $75 million cap, which the bills abrogate.

More important, however, is the longstanding and consistent preference of the U.S. Court of Federal Claims and its appellate court, the Federal Circuit, to address disputes revolving around written contracts with the United States under a breach of contract, rather than a takings, theory.[29] Again, it is in these courts that any taking claim against the United States based on the bills likely would be litigated.[30] As noted at the outset, this memorandum does not reach any breach of contract issues raised by the bills.

Substantive Due Process

The Due Process Clause of the Fifth Amendment declares that no person shall be "deprived of life, liberty, or property, without due process." The clause has long been read to demand not only procedural due process, but *substantive* due process as well. Substantive due process in the realm of economic legislation - the realm of S. 3305 and H.R. 5214 -- imposes only a very lax, highly deferential standard: that there exists a plausible rational basis that the legislative body could have had in mind linking the means chosen and the legitimate public purpose sought to be achieved.

In a leading retroactivity/substantive due process decision, the Court explained –

> To be sure, insofar as the [Act being challenged] requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect. .... But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. .... *This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.*[31]

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[27] *See, e.g.*, Lynch v. United States, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States.")

[28] Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 616 (2000).

[29] The Federal Circuit has offered a variety of explanations for the breach of contract preference. *See, e.g.*, Hughes Communications Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001) ("[t]akings claims rarely arise under government contracts, because the government acts in its commercial or proprietary capacity .... "); Castle v. United States, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (nothing is taken in the constitutional sense when the plaintiff, as is typical, retains the full range of breach of contract remedies).

[30] *But see* note 23, *supra*.

[31] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976) (emphasis added).

The Court did add a caution to this expansive view: "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." But that burden, said the Court in a later decision, "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."[32] It would seem that the retroactive application of the increased liability limits in S. 3305 and H.R. 5214 back to the April 20 spill easily satisfies this test. Congress could reasonably suppose that for the foreseeable future, most of the exceedance of the current OPA liability cap would derive from this one huge spill. To exclude that spill from the bill's cap increase would compromise substantially the (assumed) public purpose of the bills to lay a greater portion of economic damages per oil spill at the feet of the responsible party. Similarly, not applying the bills to other existing leases (that is, confining the bills to leases entered into post-enactment) would greatly undercut the effectuation of that public purpose.

As noted in the takings discussion above, all substantive due process challenges to the retroactive liability scheme in the Superfund Act have been unsuccessful.[33]

In sum, the sounder argument is that the retroactive application of the $10 billion liability cap in the bills does not offend substantive due process.

Bill of Attainder Clause

The Constitution's Bill of Attainder Clause bars legislative enactments that effectively declare the guilt of, and impose punishment on, an identifiable individual or entity, without a judicial trial.[34] Such enactments are seen to usurp the judicial function, thereby offending the separation of powers principle so fundamental to the U.S. Constitution. An example of a law held to be void as a bill of attainder is a statute making it a crime for a Communist Party member to serve as an officer or employee of a labor union.[35] As pertinent here, the argument might be that S. 3305 and H.R. 5214, by reaching back to April 15, 2010, depart from the usual prospective-only application of enactments solely to bring in one particular oil spill, the Deepwater Horizon incident. This retroactive feature of the bills, the argument concludes, betrays an underlying intent to punish parties responsible for that incident. Then, too, the punishments that may be found constitutionally offensive are "not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct."[36] Thus, one can imagine an argument that the bills punish existing offshore facilities generally.

In the Court's most comprehensive statement of its test for bills of attainder, *Nixon v. Administrator of General Services*, the Court indicated that to offend the Bill of Attainder Clause, the law must (1) single out a specific person or class and (2) be punitive.[37] The Court then listed several indicators that a federal law is punitive. First, the law may impose punishment traditionally judged to be prohibited by the Clause. Second, even in the absence of such a traditional punishment, the law may not be rationally describable as

[32] Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984).

[33] *See supra* note 26 and accompanying text. *Accord*, Franklin County Convention Facilities v. American Premier Underwriters, 240 F.3d 534 (6th Cir. 2001) (rejecting substantive due process challenge to Superfund's retroactive liability scheme, in part because "Congress acted rationally by spreading the cost of cleaning hazardous waste sites to those who were responsible for creating the sites. Cleaning abandoned and inactive hazardous waste disposal sites is a legitimate legislative purpose which is furthered by imposing liability for response costs upon those parties who created and profited from those sites.").

[34] U.S. Const. art. I, § 9. *See* Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977).

[35] United States v. Brown, 381 U.S. 437 (1965).

[36] Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 851-852 (1984).

[37] 433 U.S. 425 (1977).

furthering a nonpunitive legislative purpose. And third, the legislative history may evince a congressional intent to punish. The Court may also consider whether less burdensome alternatives would have achieved the same non-punitive purpose. A statute need not satisfy all these factors; rather, a court weighs them together.

Arguably, the bills meet the first, specificity requirement. One indication: the identity of the individual entity (British Petroleum) or class (responsible parties for offshore facilities generally) was "easily ascertainable" when the legislation was passed.[38] We need not dwell on the specificity requirement, however, because it is likely – assuming Congress does not "evince a congressional intent to punish" in passing S. 3305 or H.R. 5214 -- that a court would find the bills not to satisfy the second, punitive requirement and thus not to be a bill of attainder. First, monetary liability for the injuries one causes is not a type of punishment historically prohibited by the Bill of Attainder Clause. Second, the bills can reasonably be said to further a nonpunitive legislative purpose: the attaching of liability to the entity that caused the oil spill injury in lieu of the taxpayer. In language plainly relevant to the Deepwater Horizon spill, a court has noted: "[E]ven if the [law in question] singles out an individual on the basis of irreversible past conduct, if it furthers a nonpunitive legislative purpose, it is not a bill of attainder."[39] Thus, as long as the committee reports and floor debates during deliberations on the bill that is enacted do not suggest punitive motive, the bill is unlikely to be deemed a bill of attainder. It would seem, as suggested above, that there are obvious candidates for nonpunitive purposes that Congress might put forward in the legislative history of the bills.

Impairment of Contracts Clause

The Supreme Court has held that the impairment of contracts clause in the Constitution,[40] by its terms applicable only to the states, does not apply to the Federal Government indirectly through the Fifth Amendment Due Process Clause.[41] Therefore, this clause is no impediment to S. 3305 and H.R. 5214.

Ex Post Facto Clause

This clause prohibits Congress from passing an ex post facto law[42] – that is, a law attaching new negative legal consequences to pre-enactment conduct. Since the early years of the nation, however, the Supreme Court has construed the clause to apply only to penal legislation.[43] By contrast, the OPA liability to which the $75 million cap and S. 2205/H.R. 5214 apply is civil, not criminal, liability. Thus, the Ex Post Facto Clause poses no obstacle to the bills.

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[38] *Brown*, 381 U.S. at 448–449.

[39] Seariver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662, 674 (9th Cir. 2002).

[40] U.S. Const. art. I, § 10.

[41] PBGC v. R.A. Gray & Co., 467 U.S. 717, 733 (1984).

[42] U.S. Const. art. I, sec. 9, cl. 3.

[43] Landgraf v. USI Film Products, 511 US 244, 266 n.19 (1994), *citing* Calder v. Bull, 3 Dall. 386, 390-391 (1798).

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June 7, 2010

U.S. Senate Judiciary Committee

"The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?"

To Chairman Leahy, honorable members of the Judiciary Committee:

My name is Susan Farady. I am an attorney, and the Director of the Marine Affairs Institute at the Roger Williams University School of Law located in Bristol, Rhode Island. We are one of five law schools in the country specializing in marine and maritime law. We are dedicated to preparing the next generation of marine law professionals and serving as a national marine law and policy clearinghouse for the marine law and policy profession.

I have been asked by Senator Whitehouse to provide you some thoughts about liability and oil spills in light of the ongoing Gulf of Mexico disaster. Rhode Island has direct experience with the devastating impacts and costs of oil spills. In 1989 and again in 1996, the state experienced two oil spills off the coast. Over a million gallons of oil total were spilled in these two incidents, killing thousands of fish, lobsters, and birds, and devastating the state's fishing industry. The government held the companies liable for the effects of these spills, resulting in millions of dollars in compensation.[1] The state passed its own oil spill law in 1997, establishing a spill prevention and response trust fund.[2] Rhode Island is dependant on its' coastal resources, has been devastated by these spills in the past and needs to be protected from future spills.

In summary, I believe liability remains an important deterrent to risky behavior, that liability limits are clearly inadequate for catastrophic events, and that preventing future oil spills requires a broader examination of marine law and policy beyond liability.

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[1] On June 23, 1989, the oil tanker *M/V World Prodigy* ran aground off Newport, Rhode Island, spilling 290,000 gallons of home heating oil. This oil hit during a key spawning period and spread over 123 square miles. Eggs and larvae of fish, lobsters and clams were exposed to oil, marine life was killed, and Narragansett Bay beaches and fishing grounds were closed. NOAA negotiated a $567,000 settlement for damages caused by this spill. In January of 1996, a tugboat and the barge *North Cape* ran aground off a National Wildlife Refuge in southern Rhode Island, producing the state's largest oil spill. Nearly a million gallons of home heating were spilled, killing approximately nine million lobsters, 150 million surf clams, 4.2 million fish, over a half a million kilograms of other creatures such as crabs, mussels and worms, thousand of marine birds, and millions of animals in nearby salt ponds. The state's lobster industry was particularly hard hit and shut down completely for five months. The government reached a settlement agreement with the responsible parties for a total of over $11 million dollars for response and restoration costs. See http://www.darrp.noaa.gov/northeast/index.html.

[2] See Robert E. Falvey, *A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act*, 2 Roger Williams U.L. Rev. 363 (1997).

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Liability as a deterrent in preventing environmental catastrophes

The role of liability in preventing and accounting for pollution is a central principle of environmental law. Essentially, pollution should be prevented, contaminated resources cleaned up and overall environmental quality preserved.[3] Pollution injures common public trust natural resources. The public relies on the government and appropriate law to prevent pollution and when pollution occurs, to collect damages from the responsible parties. The "polluter pays" principle is well established and understood, as a way to put private companies on notice that they will be held accountable for pollution and to collect damages from the responsible parties should pollution occur.[4]

The passage of the Oil Pollution Act in 1990 enacted important changes to liability for oil spills. Responsible parties are held liable for cleanup costs borne by government as well as private parties, and are also held liable for a broad range of economic and environmental damages.[5] Prior to the Deepwater Horizon catastrophe, a $75 million cap on liability under the law for offshore spills seemed sufficient. It is clear now that this cap as well as the limitations on punitive damages imposed by the Supreme Court in the Exxon Valdez case are insufficient to meet the challenges of the catastrophe in the Gulf of Mexico.[6]

Evaluating the effectiveness of liability under OPA to deter risky behavior is not a straightforward examination. According to industry experts, liability under OPA encouraged prudent corporate behavior by making it expensive to spill.[7] It makes sense that a potential high price tag can encourage companies to take precautions against spills, yet that clearly did not act as enough of a deterrent when the Deepwater Horizon operation was permitted. Yet other commentators have noted that liability for spills as a part of command-control environmental regulation is inherently flawed because it does not

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[3] Jan G. Laitos, Natural Resources Law 57 (West Group 2002).

[4] "... the polluter receives the right price signals with respect to that pollution. Moreover, the notion that the polluter should pay for the harm it creates resonates even with non-economists." Johnston, Funk and Flatt, Legal Protection of the Environment 3rd Ed. 25 (West/ Thomson Reuters, 2010).

[5] Jonathan L. Ramseur, *Oil Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress*, Congressional Research Service, April 30, 2010 at 11-12.

[6] Nixon, Daly and Farady, Marine and Coastal Law: Cases and Materials, 2nd ed. 487-95(ABC-CLIO LLC, 2010).

[7] "OPA '90 essentially made it very expensive to spill oil, so it became justified for a company to spend money not to spill. The law's regulations didn't cause this shift but reinforced it." Dennis Bryan, maritime consultant and retired Coast Guard captain who supervised implementation of OPA '90 regulations, quoted by Pamela Glass, *'Spillover effect: twenty years after the Exxon Valdez, most agree that oil spill prevention and response have improved significantly.'* July 1, 2009, Vol. 66, Issue 7, at 2.

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address the industry's economic considerations and is insufficient to address the consequences of oil spills; this suggests that regulation using pollution trading systems could provide greater market-based incentives to companies to prevent spills.[8]

It is my opinion that a strong 'polluter pays' principle as embodied by liability provisions in environmental protection laws is important. Current liability under OPA for oil spills should be retained and the issue of appropriate damage compensation for catastrophic events should be re-examined. However, a single minded focus on liability alone to prevent future disasters does not provide a complete solution, and could in fact create more problems for the public and the marine environment.

Reforming ocean management to preventing future devastating events

We cannot consider changes to offshore oil and gas regulation in a vacuum. This disaster clearly illustrates the risky tradeoffs made in perpetuating our dependence on petroleum, furthering societal desires to develop domestic resources, offshore, out of sight, and the disjointed, fractured nature of ocean and energy governance. To make better informed decisions that will fully account for resource development, energy security and sustainable ocean management, I believe the following need to be considered:

a. We need a comprehensive ocean policy and accompanying legislative and agency changes to implement it. We will continue to desire access to ocean resources, whether it's oil, wind energy, fish either wild or farmed, and numerous recreational and commercial opportunities. The Gulf disaster clearly demonstrates the need to consider all resources, all potential risks and benefits of resource access when permitting activities. We do not have the necessary legal mechanisms to make fully informed decisions about the level of activity and the risk of accidents to maintain a sustainable ocean environment. Bills such as the National Ocean Protection Act and Oceans 21 lay out a structure to do this, as do the preliminary findings of the President's Interagency Ocean Task Force. Emergencies present opportunities for expeditious, sweeping reform that otherwise take decades and appear impossible. Now is the time to change our regulatory relationship with ocean resources.

[8] "Freely tradable permits, issued by the government based on its determination of acceptable pollution levels, would allow oil transporting firms the freedom and incentive to: 1. create better pollution control technology and pollution preventive measures; 2. police their own behavior via market mechanisms; and 3. avoid the rent seeking behavior that inevitably accompanies command and control regimes." Michael de Gennaro, *Oil Pollution Liability and Control under International Maritime Law: Market Incentives as an Alternative to Government Regulation*, 37 Vand. J. Transnat'l L. 297 (2004).

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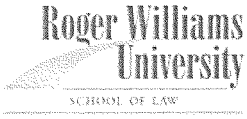

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b. We need a comprehensive energy policy that considers the risks, benefits, appropriate incentives and appropriate penalties to all energy forms. All energy production comes with risk. It would be short-sighted to overly penalize the oil and gas industry while too permissively encouraging other energy sources such that other disasters, say from a nuclear release, or a catastrophic failure of an offshore wind turbine, take place. We need to fully consider our energy needs, the risks and benefits of different forms of energy production, and develop a governance mechanism that fully acknowledges and incorporates the tradeoffs that are made. The costs of climate change to the environment and to our society need to be overtly included in this calculation. The types of incentives provided to energy industries need to reflect societal goals and governmental policies that direct us to a more sustainable energy future.

Thank you for this opportunity to provide you this information. I am happy to provide the Committee with further information as is helpful to your deliberations.

Susan Farady is the Director of the Marine Affairs Institute and the Rhode Island Sea Grant Legal Program, and adjunct faculty. She directs the education, outreach and research programs of the Institute, including the joint degree program with the University of Rhode Island Department of Marine Affairs, activities with Rhode Island Sea Grant, and marine affairs curriculum and outreach activities at the School of Law. Professor Farady has published and presented on marine protected areas, the National Marine Sanctuary Act and marine governance reform, and teaches marine policy topics. Prior to joining RWU, she directed the Ocean Conservancy's New England Regional Office and practiced both civil and criminal law. She received her Bachelor's Degree from the University of Colorado and her J.D. from Vermont Law School, and serves as an advisor to various government and academic bodies engaged in marine and environmental activities.

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News From:

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For Immediate Release – June 8, 2010
Contact: Zach Lowe & Katie Rowley - (202) 224-8657

Statement of U.S. Senator Russ Feingold

Hearing on "The Risky Business of Big Oil"
Senate Judiciary Committee

As Prepared For Delivery

"This tragedy, which resulted in the loss of 11 lives and now the biggest environmental disaster in United States history, highlights the need for improved regulation and updated laws. For starters, as the witnesses have indicated, we need to ensure that oil companies can be held legally liable for their actions. One way to deter wrongdoing, and encourage the kind of responsible, careful drilling we need, is to increase the unrealistically low liability cap for damages caused by oil spills, and I am a cosponsor of Senator Menendez's legislation to do just that. I appreciate the witnesses' additional valuable suggestions.

"But it's not enough to hold Big Oil accountable – we also need to end the cozy relationship between the federal government and the oil companies it is supposed to regulate and oversee. That means getting rid of unjustified taxpayer-funded giveaways for the oil and gas industry, and it means making sure that regulators aren't simply acting as rubber stamps. Unfortunately, too often the federal government ends up listening more to the powerful industries it is supposed to be regulating than to the consumers it is supposed to be protecting. Whether it's Wall Street or Big Oil who is calling the shots, the result is rarely good for my constituents in Wisconsin.

"There are many other actions we need to take such as passing my 'Use It or Lose It' legislation to ensure oil companies are diligently exploring the federal leases they currently have, and restoring the Clean Water Act, which is the main statute used to prosecute polluters who dump oil into waters of the United States."

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Opening Statement for "The Risky Business of Big Oil"
Senator Al Franken

Mr. Jones, I'm deeply sorry for your loss. Thank you for being with us here today.

This oil spill is a tragedy. But this was no freak accident. British Petroleum had one of the worst—if not the worst—safety records in its industry. According to one report, ninety-seven percent of the flagrant safety violations in the entire oil industry in the past 3 years came from two BP refineries. That is amazing.

In fact, just 5 years before the Deepwater Horizon disaster, 15 BP employees died in a separate incident at a refinery in Texas. News reports now tell us that BP's own internal investigations had revealed that, to quote the Washington Post, "the oil company repeatedly disregarded safety and environmental rules and risked a serious accident if it did not change its ways."

This tragedy shows us that our laws aren't doing enough. We need to improve our laws so that bad actors like BP can't just make a business decision to ignore them. We need laws that better incentivize safety. And we need laws that strictly penalize violations, and help the people harmed by those violations. That is why I am a co-sponsor of Senator Menendez's bill, the Big Oil Bailout Prevention Act, and that's why I look forward to learning more about the legislation to be discussed today.

Ultimately, this tragedy is a wake-up call. It's a reminder that we should never have allowed a company with such an egregious safety record to drill in mile-deep water with no plan for responding to a disaster of this magnitude. And moreover, it's a wake-up call that we can't drill

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ourselves out of our dependence on oil. We need to pass comprehensive energy and climate legislation that transitions our country to clean, renewable energy - and we need it now. You've never seen a wind turbine explode and kill 11 people. You've never seen a 45-day ethanol spill. We need to all think about the broader energy crisis that is driving the demand for oil.

Thank you, Mr. Chairman, I look forward to hearing from the witnesses today.

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Statement of Thomas C. Galligan, Jr.

President and Professor of Humanities, Colby-Sawyer College and Scholar on Torts and Maritime Personal Injury Law

on

The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?

before the

U.S. Senate Judiciary Committee

June 8, 2010

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I. Introduction

Chairman Leahy, Ranking Member Sessions and members of the Committee, thank you for inviting me to appear before you today. My name is Tom Galligan and since 2006 it has been my good fortune to serve as the President of Colby-Sawyer College in New London, New Hampshire where I am also a Professor in the Humanities Department. From 1998-2006, I was the dean of the University of Tennessee College of Law where I also held a distinguished professorship. From 1986-1998, I was a professor at the LSU Paul M. Hebert Law Center in Baton Rouge, where I also held an endowed professorship. From 1996-1998, I also served as the Executive Director of the Louisiana Judicial College. At both Tennessee and LSU, I taught and wrote about torts and maritime law. I am the author or co-author of several books and many articles on tort law and punitive damages. Along with Frank Maraist, I am the author of three books on maritime law, one of which is and another of which will soon be co-authored by Catherine Maraist. I have also written law review articles on various aspects of maritime law and given countless speeches on torts and maritime law; and I continue to speak and write on those subjects. It is an honor to appear before you today.

The disaster in the Gulf of Mexico has already resulted in death, injury, environmental devastation, and economic loss to individuals, businesses, and governmental entities. Additional damage is occurring every day; no end is yet in sight. The staggering consequences of the spill

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force us to ask whether applicable laws are fair, consistent, and up-to-date. Do they provide adequate compensation to the victims of maritime and environmental disasters? And, do our laws provide economic actors with proper incentives to ensure efficient investments in accident avoiding activities? Sadly, an analysis of the relevant laws reveals a climate of limited liability and under compensation.

The law under compensates, in part, because, the Jones Act and the Death on the High Seas Act (DOHSA), as interpreted, do not provide damages to the survivors of Jones Act seamen and those killed in high seas maritime disasters for the loss of care, comfort, and companionship suffered as a result of their loved one's deaths. Aggravating the situation, some courts have inappropriately relied on those recovery denying rules to further limit recovery of nonpecuniary damages in other maritime cases. These failures to fully compensate raise basic issues of fairness and corrective justice. Is it right, consistent with modern law and values, and just to deny recovery for very real damages such as the loss of care, comfort, and companionship one suffers when a loved on is killed? In addition, the failure to compensate raises important issues concerning tort law and deterrence.

If the law under compensates, economic actors, when deciding what to do and how to do it, face less than the total costs of their activities. This economic reality may, in turn, lead to under deterrence and increased risk. In the maritime setting, the climate of limitation is exacerbated by the existence of the 1851 Ship Owner's Limitation of Liability Act, which allows a ship owner to limit its liability to the post-disaster value of a vessel, providing the events occurred without the privity or knowledge of the ship owner. While punitive damages might make up for the lack of deterrence in some areas, the deterrent role of punitive damages in

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admiralty is less significant because of the rule that limits the recovery of punitive damages to compensatory damages in maritime cases at a 1:1 ratio.

I will begin my analysis with a discussion of the legal fact that loss of society damages are not recoverable by the survivors of many who are killed in maritime disasters. In failing to allow recovery of loss of society damages —damages for loss of care, comfort, or companionship—maritime law is contrary to the rule prevailing in the majority of the states. Katherine J. Stanton, *The Worth of Human Life*, 85 N.D. L. Rev. 123, 130-31 (2009). Consequently, maritime law under compensates the surviving families of seamen and those killed in high seas maritime tort disasters. Congress has the chance and ability to change this state of affairs by amending the relevant statutes. Second, I will discuss the extension of the seamen and high seas no loss of society recovery rules to other maritime cases, thereby further limiting potential overall liability. Third, I will describe the anomalous high seas death rule that pre-death pain and suffering damages are not recoverable in a maritime survival actions where death occurs on the high seas. Fourth, I will briefly explain how under compensation can lead to under deterrence and increased risk. Next, I will address the maritime doctrine of limitation of liability and, finally, I will review the impact of maritime punitive damages rules on risk and deterrence.

II. Loss of Society in Maritime Wrongful Death Cases—Seaman and the High Seas

Loss of society damages are not recoverable in Jones Act wrongful death cases and/or in any case where death occurs on the high seas. This harsh legal reality is inconsistent with modern American law and under compensates for loss arising from maritime wrongful death.

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The no recovery rule is also inconsistent with the more progressive recovery available in high seas commercial aviation disasters.

A. Seamen

The analytical starting point in any industrial maritime tort case is to determine whether an injured or deceased person was a seaman because that status determines the legal rights of the claimant. A seaman is a person who does the work of a vessel, *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), and who has an employment-related connection to a vessel which is substantial in duration (more than 30% of one's work time is spent on a vessel or fleet of commonly owned or controlled vessels), *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and nature (the worker is exposed to the perils of the sea). *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997). Maritime law treats a semi-submersible drilling rig as a vessel. *Marathon Pipe Line Co. v. Drilling Rig/Odessa*, 761 F.2d 229,233 (5th Cir. 1985). The moveable drilling rig is a vessel because it is "capable of being used as a means of transportation on water." 3 U.S.C.A. § 3; *Stewart v. Dutra Construction Company*, 543 U.S. 481 (2005). The Deepwater Horizon was a moveable drilling rig and, therefore, under maritime law, it is a vessel. Interestingly, a permanently attached drilling platform, as opposed to a semi-submersible drilling rig, is not a vessel.

Assuming that the Deepwater Horizon was a vessel, workers with a substantial employment-related connection to the Deepwater Horizon would be seamen. A seaman has several possible claims against his or her employer: 1.) the right to recover maintenance and cure; 2.) the right to recover injury caused by the unseaworthiness of the vessel on which he or she served (a vessel is unseaworthy if it presents an unreasonably unsafe condition to the seamen

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on board); and 3.) a Jones Act, 46 U.S.C.A. § 30104, right to recover in negligence against his or her employer. Frank L. Maraist & Thomas C. Galligan, Jr., *Admiralty in Nutshell*, 194-99 (5th ed. 2005)

1. Jones Act Negligence

The Jones Act incorporates the provisions of the Federal Employers Liability Act (FELA). 45 U.S.C.A. § 51. The Jones Act (through the FELA) provides certain survivors of seaman killed as a result of their employer's negligence with wrongful death and survival action claims against the employer. Basically, a wrongful death action is an action that compensates certain beneficiaries for the loss they suffer as a result of the death of the victim. The survival action provides recovery for the damages that the decedent suffered before his or her death.

Critically, what do the recoverable damages include and what do they not include in a Jones Act negligence wrongful death action? The survivors can recover any loss of economic support, any lost services, and other traditional types of pecuniary damages. The survivors *cannot* recover loss of society damages. That is, they cannot recover for the loss of care, comfort, or companionship caused by the death. Loss of society damages are, in essence, those damages survivors suffer as a result of the fact that the deceased is no longer there to share the joys of life with the them. The inability of the Jones Act seaman's survivors to recover loss of society damages in the negligence action does not result from the language of the Jones Act or the FELA. Rather, it is the combination of a 1913 decision of the United States Supreme Court, *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913), which refused to recognize the right to recover loss of society damages under the FELA (and which actually predated the passage of

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the Jones Act by seven years) and the result of the Court's reliance on that decision in *Miles v. Apex Marine*, 498 U.S. 19 (1990).

One might arguably understand and appreciate the *Vreeland* holding in an era when the law of wrongful death was still in its relative infancy; human life spans were shorter, and given the state of technology, industry, and law, accidental death was a more common part of the American landscape than it is today. However, to deny recovery of loss of society damages in a wrongful death case today is out of the legal mainstream and is a throwback to a past era. A spouse, child, parent, or sibling of a seaman killed in a maritime disaster suffers a very real loss of society and the law should recognize it.

Congress could easily remedy this state of affairs by amending 45 U.S.C.A. § 51, the FELA wrongful death statute, to state that recovery by a named beneficiary in a wrongful death action shall "include nonpecuniary damages for loss of care, comfort, and companionship." That amendment would bring the Jones Act and FELA much more into line with modern tort law regarding the recovery of damages in wrongful death cases, as well as the economic, social, and familial realities of today.

2. Unseaworthiness

Moving from the negligence claim for wrongful death to the unseaworthiness claim for wrongful death, the general maritime law provides certain survivors with wrongful death and survival actions against a vessel owner (or operator under many circumstances) if the seaman is killed as a result of the vessel's unseaworthiness. If the death occurs on the high seas, then DOHSA, 46 U.S.C.A. § 30302, governs the recoverable wrongful death damages arising from the vessel's unseaworthiness. DOHSA limits recovery to "pecuniary loss." 46 U.S.C.A. §

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30303. Thus, the survivors of seamen killed as a result of a vessel's unseaworthy condition on the high seas may not recover loss of society damages. Consequently, the spouse, parent, or child who has no claim for pecuniary damages recovers nothing for the losses caused by the death of a loved one and all of the issues raised concerning the inequity, incongruity, and antiquated nature of that limitation on recovery discussed above in conjunction with the Jones Act apply to DOHSA. One case worthy of note is *Rux v. Republic of Sudan*, 495 F.Supp.2d 541 (E.D. Va. 2007), which chillingly presents the operation of DOHSA. There, 56 surviving family members of the 17 sailors killed in the terrorist bombing of the U.S.S. Cole sued the Republic of Sudan under the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605(a)(7) alleging that Sudan was at fault for providing material assistance and support to Al Qaeda, the group responsible for the attack. The court held that DOHSA applied and because nonpecuniary damages were not recoverable, 22 family members, including parents and siblings recovered nothing as a result of the deaths even though the court noted:

> The court sympathizes greatly with plaintiffs, who continue to suffer terribly years after their loved ones died. But the court is bound to follow the legal precedent before it. Congress makes the laws; courts merely interpret them. Whether to amend DOHSA to allow more liberal recovery in cases of death caused by terrorism on the high seas, as Congress did in 2000 for cases of commercial aviation accidents on the high seas, is a question for Congress alone. Accordingly, plaintiffs' IIED [intentional infliction of emotional distress] and maritime wrongful death claims are dismissed for failure to state a claim upon which relief can be granted.

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495 F.Supp.2d at 565. *See also*, *Rux*, 461 F.3d 461 (4th Cir. 2006), cert. denied, 127 S.Ct. 1325 (2007); *Rux*, 672 F.Supp.3d 726 (E.D.Va. 2009). *See generally*, Ross M. Diamond, *Damage – Unequal Recovery for Death on the High Seas*, 45 Sept. Trial 34 (2009).

Here, as in *Rux*, in addition to the general and very substantial reasons to allow recovery of loss of society damages in DOHSA cases, there is an additional analytical prong involving a 2000 amendment to DOHSA (referred to in the quote from *Rux* above) that points to the need to amend DOHSA. In response to several highly publicized commercial airline disasters, (KAL 007 and TWA 800) Congress amended DOHSA to provide for recovery of nonpecuniary damages (loss of care, comfort, and companionship), 46 U.S.C.A. § 30307(a), for death resulting from "a commercial aviation disaster occurring on the high seas beyond 12 nautical miles from the shore of the United States…but punitive damages are not recoverable." 46 U.S.C.A. § 30307(b). *See generally*, Stephen R. Ginger and Will S. Skinner, *DOHSA's Commercial Aviation Exception: How Mass Commercial Aviation Disasters Influenced Congress on Compensation for Deaths on the High Seas*, 75 J. of Air Law & Comm. 137 (2010) (discussing the legislation and the jurisprudence). This amendment, which was made retroactive to the day before one of the relevant air disasters, brought DOHSA into the legal mainstream as far as the survivors of victims of commercial aviation disasters. But, while the survivors of the victims of a commercial aviation disaster on the high seas may now recover nonpecuniary damages the survivors of anyone else killed on the high seas (including for instance someone killed on a cruise ship or on a semi-submersible floating rig or even a helicopter) may not. It strains reason to come up with a meaningful, rational principle to justify the differential treatment, other than the very real social and political turmoil that followed the high profile tragic air disasters. The

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disaster of the Deepwater Horizon is, of course, a similarly tragic event, which presents an opportunity to bring the law into some logical, sensible, compassionate symmetry.

To add another relevant point to the analysis, OPA 90, 33 U.S.C.A. § 2701 et seq., allows victims of oil spills to recover various damages, including removal costs, § 2702(b)(1); damage to real or personal property, § 2702(b)(2)(B); damage to natural resources used for subsistence, § 2702(b)(2)(C); and economic damages because of damage to property or natural resources even if the claimant does not own the property. § 2702(b)(2)(E). These rights to recover damages assure compensation to persons injured in various ways by an oil spill.

But, critically, OPA 90 does not apply to personal injury or wrongful death claims. *See generally, Gabrick v. Lauren Maritime (America), Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009)(OPA does not cover bodily injury claims damage). Consequently, the survivors of the seaman (or others) killed on the high seas as a result of negligence or unseaworthiness do not recover for loss of society while the persons whose property was damaged or who lost profits do recover. This is not to say that recovery for damaged property or lost profits is not appropriate, it is merely to point out that currently recovery of economic loss is more readily available than recovery for loss of a loved one.

I have noted above how a possible amendment to the FELA would deal with the seaman's negligence claim: DOHSA could also be amended to delete the word "pecuniary" before "loss" in 46 U.S.C.A. § 30303 and to add the language, "including nonpecuniary damages for loss of care, comfort, and companionship" after "loss." This is basically the language that was originally included but taken out of the proposed Cruise Vessel Security and

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00083 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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Safety Act of 2008, S. 3204, 110th Cong. (2008); Cruise Vessel Security and Safety Act of 2008, H.R. 6408, 110th Cong. (2008).

III. Seaman's Survivors Wrongful Death Claims Against Third-Parties and Non-Seaman Wrongful Death Claims

The beneficiaries of a seaman killed on the high seas may have claims not only against the vessel but may also have general maritime tort claims against other parties such as manufacturers, contractors, or others. Likewise, the survivors of non-seamen tortiously killed on the high seas may have maritime wrongful death claims. But by definition, if death results then DOHSA applies and nonpecuniary damages would not be recoverable.

As noted, if workers, who are not seaman, are killed as a result of a maritime disaster on the high seas, DOHSA would also govern their survivors' recovery which would be limited to pecuniary damages, as currently defined. The amendments to DOHSA, proposed above, making nonpecuniary damages and pre-death pain and suffering damages recoverable, would apply to those claimants as well. Concomitantly, if the death occurs in territorial waters, nonpecuniary damages would seem to more likely be recoverable. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974)(allowing the survivors of an LHWCA worker killed in territorial waters to recover loss of society). *See also, Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1995)(allowing the survivors of a non-seafarer killed in territorial waters to rely on state law to seek recovery of loss of society damages). Thus where one dies may be more relevant to recovery than other critical circumstances, such as the injury to the relevant survivors.

If a worker is killed on a *stationary drilling platform* located over the high seas, as opposed to being killed on a semisubmersible mobile rig, state law would govern his or her tort

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00084 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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recovery rights against third persons and state law very probably would mean survivors could recover loss of society and pre-death pain and suffering damages from third persons. This is because the Outer Continental Shelf Lands Act, 43 U.S.C.A. § (a)(2)(A), adopts the laws of each adjacent state as the governing law on OCS platforms, which are treated as islands in an upland state (recall that platforms, unlike rigs, are not vessels). *See generally*, Frank L. Maraist & Thomas C. Galligan, Jr., *Admiralty in a Nutshell*, 323-27 (5th ed. 2005); *Alleman v. Omni Energy Services Corp*, 580 F.3d 280 (5th Cir. 2009). Thus the measure of recovery in a fatal injury action on an off-shore oil or gas production facility (a rig or platform) would depend upon whether the relevant vehicle was a platform or a rig, even though the job that the killed worker was doing and the cause of the death was exactly the same. The point is that the potential recovery would illogically and unfairly depend upon happenstance not substance.

IV. Expanded Under Compensation

As noted above, the fact that the survivors of seamen and anyone killed on the high seas cannot recover for loss of society damages under compensates and is inconsistent with the current majority rule in America; however, some courts have actually extended the scope of the Jones Act and DOHSA no recovery rules beyond their express reach and have applied them to limit or deny recovery in other maritime contexts. In *Moragne v. States Marine Lines, Inc.*, 389 U.S. 375 (1970), the United States Supreme Court created a general maritime law action for wrongful death that filled some of the gaps in maritime wrongful death law and to provide recovery beyond the factual situations which DOHSA and the Jones Act did not cover. Then in, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) the Court held that the *Moragne* claim allowed the survivors of an LHWCA worker killed in territorial waters to recover loss of society damages. In so holding, the Court's decision was consistent with the modern American majority

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00085 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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rule allowing recovery of loss of society in wrongful death cases. Thereafter, the Court, in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), held that the spouse of an injured long shore worker could recover loss of society/loss of consortium in a case where the worker was injured but not killed.

However, two years before *Alvez*, the Court began a trend of liability limiting decisions ostensibly based on Congressional intent. In *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978), the Court refused to allow the survivors of someone killed on the high seas to rely upon the *Moragne* claim to recover loss of society damages because those damages were not recoverable under DOHSA. The Court decided that because Congress had spoken to the subject in DOHSA (limiting recovery to punitive damages), the Court was not free to supplement the recovery through the general maritime law. The trend to extend liability limitation was on. Thereafter, in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), the Court refused to allow the plaintiffs in a high seas death case to "borrow" state law to supplement DOHSA recovery. The limitation trend continued.

Then, in *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), the Court considered a case involving a seaman killed in *territorial* waters. There, a seaman was brutally murdered by a bellicose fellow crew member, who repeatedly stabbed the decedent. The decedent's mother sued the employer alleging, among other things, a Jones Act negligence wrongful death claim and a *Moragne* general maritime law wrongful action claim arising out of an unseaworthy condition of the vessel (the presence of the bellicose seaman). In a somewhat surprising decision, the Court refused to allow the mother to recover her loss of society damages on the unseaworthiness general maritime law wrongful death claim. The Court reasoned that when Congress enacted the Jones Act in 1920 and incorporated the FELA, it must have been aware of

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the *Vreeland* decision holding that the FELA did not authorize wrongful death recovery for loss of society damages and so Congress must have incorporated that holding in the Jones Act as judicial "gloss." *Id.* at 32. The *Miles* Court then reasoned that since Congress supposedly did not intend to allow recovery for loss of society damages in a Jones Act based wrongful death claim for negligence, such damages were not available in a general maritime law (*Moragne/Gaudet*) wrongful death action based on unseaworthiness. This was because, the Court said: "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault [unseaworthiness] than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33. *See generally*, David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463 (2010). The *Miles* decision was, of course, arguably inconsistent with the spirit, if not the holding, of *Gaudet* and *Moragne*, and scholars have criticized it. *See* Hon. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. Mar. L. & Com. 249 (1993); Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 La. L. Rev. 745 (1995). Moreover the Supreme Court has twice refused to extend the holding of *Miles*. *Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009)(recognizing right to recover punitive damages in case alleging willful failure to pay maintenance and cure); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1995)(allowing the survivors of a non-seafarer killed in territorial waters to rely on state law to seek recovery of loss of society damages).

However, despite the scholarly criticism and the Court's failure to extend the holding of *Miles*, some lower courts have relied upon *Miles*, *Tallentire*, and *Higginbotham* to limit recovery

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00087 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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of nonpecuniary damages in maritime cases that do not fall under their holdings. For instance, in *Scarborough v. Clemco Industries*, 391 F.3d 660 (5th Cir. 2004), the fifth circuit said that loss of society damages were not recoverable in any wrongful death action involving a seaman, even when the claim was against a third party, who was *not* the decedent seaman's employer or the owner of the vessel on which he or she was killed. In *Doyle v. Graske*, 579 F.3d 898 (8th Cir. 2009)(boat passenger and spouse brought action in admiralty for personal injuries and loss of consortium damages sustained in boating accident off the coast of Grand Cayman Island when steering linkage disengaged), the court held that general maritime law did not allow loss of consortium recovery for the spouse of a non-seafarer (non-seaman/non-longshore worker) injured, as opposed to killed, on the high seas. *See also, Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994). And, in *Tucker v. Fearn*, 333 F.3d 1216 (11th Cir. 2003), the court, again relying upon *Miles* held that the father of a minor killed in a sailboat accident in Alabama territorial waters could not recover loss of society damages under the general maritime law. In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), the court relied on *Miles* to deny recovery of punitive damages in a case involving the alleged arbitrary failure to pay maintenance and cure. Of course the Supreme Court abrogated the holding of *Guevera* in *Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009)(allowing punitive damages).

Of course all courts have not extended *Miles* beyond its holding. *See, Kahumoku v. Titan Maritime, LLC*, 486 F.Supp.2d 1144 (D.Hawai'i 2007)(law entitles LHWCA worker to recover punitive damages in maritime tort case); *Clark v. W & M Kraft, Inc.*, 2007 WL 120136 (S.D. Ohio 2007)(loss of consortium recovery claim available for seaman's spouse and son against third party); *In re Consolidated Coal Co.*, 228 F.Supp.2d 764 (N.D.W.Va. 2001))(loss of consortium recovery claim available for seaman's spouse against third party); *Rebardi v.*

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00088 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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Crewboats, Inc., 906 So.2d 455 (La. App. 1st Cir. 2005)(punitive damages available). The fact that some courts have not extended *Miles* beyond its holding and some have done so results in inconsistency. But more importantly, the fact that courts have extended *Miles* increases the number of cases in which the law fails to recognize the reality of injury and loss and in so doing either fails to compensate for that loss at all or, at best, under compensates. The extension of limited liability and under compensation expands the general climate of limited liability in maritime tort cases and hence maritime disasters. The extensions increase the possibility of under deterrence and the potential for increased inefficient risk. Amending the Jones Act (actually the FELA) and DOHSA, as suggested about to allow recovery for loss of care, comfort, and companionship would solve the problem because the amendments would do away with the language upon which courts have relied to limit recovery and increase risk.

V. Survival Action Pre-Death Pain and Pain and Suffering

Additionally, shifting from the wrongful death claim to the survival action claim, the Supreme Court in a case that did not involve a seaman has refused to allow recovery of pre-death pain and suffering as part of a survival action claim if death occurs on the high seas. *Dooley v. Korean Air Lines Co.*, Ltd., 524 U.S. 116 (1998). The law does allow the Jones Act seaman's survivors to recover for pre-death pain and suffering. *See*, David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 32 Tul. Mar. L.J. 493 (2008). Thus *Dooley* does not apply to those seaman claims but in any case covered by *Dooley*, involving a death caused by events on the high seas, no matter how much the decedent may have suffered before his or her death, those damages are not recoverable.

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To remedy this situation, Congress could amend the law to not only make loss of society damages recoverable, as suggested above, but also to make pre-death pain and suffering available in maritime survival actions. Congress could accomplish that by adding the following language at the end of 46 U.S.C.A. § 30303: "The individuals for whose benefit the action is brought may also recover damages for pre-death pain and suffering." This is precisely the language that was originally included but taken out of the proposed Cruise Vessel Security and Safety Act of 2008, S. 3204, 110th Cong. (2008); Cruise Vessel Security and Safety Act of 2008, H.R. 6408, 110th Cong. (2008).

VI. Under Compensation Leads to Under Deterrence and Increased Risk

Critically, in terms of the subject of this hearing, risk and corporate responsibility, if the law under compensates, it will, by definition, under deter which will lead to lower than optimal investments in safety. Lower investments in safety and accident avoidance can lead to increased risk. This is true because when deciding what to do and how to do it, the rational economic actor will consider the costs of its activities. To the extent that a person does not have to pay a cost, it is much less likely to take that unpaid cost into account when deciding what to do and how to do it. As Judge Guido Calabresi so ably noted many years ago in *The Costs of Accidents: A Legal and Economic Analysis* (1970), one of the costs economic actors must consider is the costs of accidents. The costs of accidents are just as real and important as the costs of goods, the costs of raw materials, and the costs of labor. The critical importance of encouraging actors to take account of accident costs is also at the heart of Judge Richard Posner's important law and economics scholarship and jurisprudence on negligence. *See, e.g.*, Richard A. Posner, *A Theory of Negligence*, 1 J. of Legal Stud. 29 (1972). This truism about taking account of accident costs is also the crux of Judge Learned Hand's famous negligence formula that provides that one is

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00090 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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negligent if the burden or cost of avoiding a loss is less than the probability of the loss occurring times the anticipated magnitude (or value) of the loss if the loss arises *and* the actor fails to incur the burden, i.e., the costs of accident avoidance. Put algebraically as Judge Hand himself did, one is negligent if B < P x L and the actor does not avoid the loss by making the investment in safety. Interestingly Judge Hand originally articulated his famous and influential negligence formula in a maritime tort case. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

If a person does not take account of the costs of accidents when deciding what to do and how to do it, he or she will under invest in safety. Of course, compensatory damages are based in corrective justice and are designed to make the plaintiff whole—to put him or her in the position he or she would have been in if the wrong had never occurred. Professor Douglas Laycock has called it the "plaintiff's rightful position." Douglas Laycock, *Modern American Remedies* 14 (1985). However, compensatory damages also play another role in the regulation of American tort law because tort law not only compensates, it also deters unsafe conduct. And compensatory damages play a critical role in deterrence. Damages in tort cases force people to consider the costs of accidents when making decisions about engaging in risk. Moreover, as I have written:

> In addition to forcing actors to pay some accident costs, compensation performs a second efficiency related function. The tort system operates as a data bank providing actors access to information on the number of accidents that do occur, the damages that accident victims suffer, and the dollar value of those damages. In this regard the "fault" system facilitates actors' ex ante [beforehand] calculations by providing them with the data they need to calculate the value of the damages that their activities impose on others. Given a

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00091 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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> large number of similarly situated actors, over time damages paid might be expected to somewhat equal the actual value ex ante of an activity's accident costs … But in order for our current system to operate most effectively, some real relationship must exist between the accident costs society wants the actor to consider beforehand and the damages we force the actor to pay after the fact. The damages we award to compensate plaintiffs in personal injury cases and the categories of accident costs we want actors to consider ex ante should highly correlate. If actual damages awarded in tort suits do not reflect the costs we want actors to consider ex ante, but the system relies upon those actual awards as a "definition" of accident costs, then the system will not optimally deter. If the damages awarded in tort suits are less than the total costs we want actors to discount ex ante, we are encouraging people to consider less than all of the costs of that activity and to overengage in it. Likewise, if we overcompensate accident victims we are encouraging actors to underengage in the activity.

Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3, 25-29 (1990)(footnotes omitted).

To reiterate, to the extent tort law does not adequately compensate, it under deters and contributes to a more dangerous world than people have a right to expect. And, in the maritime setting the law under compensates because it does not compensate for loss of society in seaman and high sea death cases (other than commercial aviation disasters) and because courts have extended those no recovery rules to other maritime contexts. Of course maritime disasters and oil spills can cause more harm than injury and death. They cause damage to the environment and that damage to the environment devastates lifestyle, culture, and global well-being. It harms everyone.

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00092 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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Moreover, there is evidence that environmental disasters can have devastating mental health effects. *See, Brief Amici Curiae of Sociologists, Psychologists, and Law and Economic Scholars in Support of Respondents in Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008)(No. 07-219) at 8. In natural disasters the effects typically subside within two years, *id.* (*citing* Catalina M. Arata et al., *Coping with Technological Disaster: An Application of the Conservation of Resources Model to the Exxon Valdez Oil Spill*, 13 J. Traumatic Stress 23, 24 (2000)). But, technological disasters resulting from breakdowns by humans "consistently have social, cultural and psychological effects that are both more severe and longer-lasting." *Brief Amici Curiae of Sociologists, Psychologists, and Law and Economic Scholars*, *supra* at 8 (citations omitted). The effects are particularly acute where the disaster impacts renewable resource communities like fisheries. *Id.* at 9. These effects manifested themselves in the Prince William Sound community in the wake of the Exxon Valdez spill in: chronic feelings of helplessness, betrayal, and anger; high rates of anxiety, depression, and post-traumatic stress; increased health care demands; increased crime rates; and more. *Id.* at 13-18. These injuries were very real and absent some compensation or device to force actors to consider them when deciding what to do and how to do it, they will not be forced to do so, tending towards under deterrence and increased risk.

While OPA 90 provides liability for removal costs, property damage, economic loss, and more, it does not cure the problem of under compensation and under deterrence in maritime personal injury and wrongful death cases because it does not apply to maritime personal injury and wrongful death cases. The under compensation resulting from the current state of maritime personal injury and wrongful death law and the serious emotional harm that can result from a maritime, environmental disaster is not only unfair and inconsistent but it will potentially lead to

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00093 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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increased risk. These economic realities are exacerbated in the maritime setting by the existence of the 1851 Ship Owner's Limitation of Liability Act.

VII. Limitation of Liability

The Limitation of Liability Act, 46 U.S.C.A. § 30501 et seq., applies to these events. Originally passed in 1851 to encourage investment in maritime shipping and commerce, the limitation act allows a vessel owner (and some others) to limit its liability to the post-voyage value of the vessel if the liability is incurred without the privity or knowledge of the owner. 46 U.S.C.A. §§ 30505(a), (b), and 30506(e). And, the owner is entitled to retain any hull insurance. One may justifiably wonder whether an act passed at a time before the modern development of the corporate form (and other liability limiting devices) and the evolution of bankruptcy law is still salient; however, limitation is still extant as a matter of maritime law. The vessel owner creates a fund equal to the post-accident value of the ship (not including the hull insurance). The claimants then share the fund in proportion to the value of their claims. Personal injury and wrongful death claimants share with other claimants but if the vessel is a seagoing vessel and the fund is not adequate to provide the personal injury and wrongful death claimants with recovery equal to $420 times the gross tonnage of the vessel, the owner must provide the difference, up to $420 per ton but no more. 46 U.S.C.A. § 30506 (b).

OPA 90 has its own liability limitation scheme and the applicable limit in this matter seems to be $75,000,000. While the Supreme Court has not considered the matter, lower federal courts have held that the OPA 90 supersedes the limitation act on OPA 90 claims. *See, e.g., Complaint of Metlife Capital Corp.*, 132 F.3d 818 (1st Cir. 1997); *In re Southern Scrap Material*

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00094 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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Co., LLC, 541 F.3d 584, 595 (5th Cir. 2008) (dicta); *Gabrick v. Lauren Maritime (America), Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009).

But, as noted, OPA 90 does not apply to personal injury or wrongful death. Thus the Limitation of Liability Act is applicable in a maritime disaster to allow a vessel owner to limit its liability for personal injury and wrongful death claims. Clearly, this liability limiting device can lead to drastic under compensation to the victims of maritime disasters. Repealing the Limitation of Liability Act would, of course, cure the problem of under compensation and under deterrence in general. Making it inapplicable to personal injury and wrongful death claims would at least eliminate the problems in those areas.

VIII. Maritime Punitive Damages

The under compensation and under deterrence resulting from the dated, inconsistent no recovery rules described above and the Limitation of Liability Act might be alleviated by the availability of punitive damages; however, the U.S. Supreme Court in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), held that punitive damages in most maritime cases are limited to or capped by a 1:1 ratio between the punitive damages awarded and the compensatory damages awarded.

Punitive damages are damages in addition to compensation which are designed to punish and deter. They are only awarded where the plaintiff has proven fault; compensatory damages are awarded; *and* the plaintiff proves that the defendant's conduct was worse than negligence; *i.e.* it was intentional, willful, wanton, or reckless.

But how could punitive damages potentially alleviate the under deterrence caused by under compensatory damage awards?

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00095 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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> It is common ground among legal scholars and economists that inefficient behavior will not be deterred unless actors are forced to internalize all of the costs associated with their activities. Although adequate deterrence may generally be achieved through an award of compensatory damages, an award of punitive damages may be necessary to achieve complete deterrence in cases in which compensatory damages fail to fully account for the costs of a tortfeasor's actions.

Brief Amici Curiae of Sociologists, Psychologists, and Law and Economic Scholars, supra at 2.

The United States Supreme Court has twice in the last two and one half years held that punitive damages are recoverable under general maritime law. *See, e.g., Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009); *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008). After these two decisions punitive damages are arguably are available in seaman related cases given the holding in *Townsend* that a seaman may recover punitive damages under the general maritime law arising out of the arbitrary and willful failure to pay maintenance and cure. But punitive damages have not been traditionally recoverable in DOHSA cases. The matter will now be the subject of future argument and litigation. Notably, however, the potential absence of punitive damages in cases involving deaths for which no loss of society and/or no recovery of pre-death pain and suffering are available may inadequately deter those who engage in activities that may cause injury or loss of life because it can result in an undervaluing of human life and the tragic ramifications when it is lost. *See*, Thomas C. Galligan, Jr. *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3 (1990).

Additionally, even if available, the Court in *Exxon Shipping Co. v. Baker*, limited the amount of punitive damages recoverable in maritime cases to a 1:1 ratio between the punitive

VerDate Nov 24 2008 10:06 Nov 02, 2010 Jkt 061745 PO 00000 Frm 00096 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\61745.TXT SJUD1 PsN: CMORC

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damages awarded and the compensatory damages awarded. Justice Stevens was among the dissenters and of one of the reasons for his disagreement with the majority was that maritime law was under compensatory.

The majority noted that studies did not indicate a "marked increase" in the frequency of punitive damages over recent years. *Id.* at 2624. It also noted that the dollars awarded had not grown over time in real terms. *Id.* And the Court pointed out that the mean ratio of punitive damages to compensatory damages in the cases studied was less than one to one. *Id.* But the Court was apparently concerned with the potential unpredictable spread between high and low punitive awards and it was that concern which prompted the decision to generally limit the ratio of punitives to compensatories to 1:1. *Id.* at 2625. Critically, the Court pointed out that the case before it involved conduct which was worse than negligence but not malicious. *Id.* at 2631. It also noted that the activity was "profitless" to the tortfeasor. *Id.* The decision and the ratios should arguably not apply to cases involving higher levels of blameworthiness or "strategic financial wrongdoing." *Id.* n.24.

Whatever one might argue about cases to which the *Exxon Shipping Co. v. Baker* 1:1 ratio should not apply, I believe that most lower court judges sitting in admiralty cases would apply the ratio to maritime cases they decide due to a concern about being overruled. The ratio cap then deprives a judge or jury of the traditionally available ability to tailor a punitive award, within Constitutional due process limits, *see BMW of North America v. Gore*, 517 U.S. 559 (1996), to the particular facts of the case, including the level of blameworthiness, the harm suffered, the harm threatened, the profitability of the activity, and other relevant factors. Indeed one wonders if the 1:1 ratio aspect of *Exxon Shipping Co. v. Baker* would have been decided the same way if another maritime environmental disaster had occurred before the decision.

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Senator Whitehouse's proposed bill, S. 3345, would restore the traditional ability to tailor a punitive award to the facts of the case by providing: "[I]n a civil action for damages arising out of a maritime tort, punitive damages may be assessed without reference to the amount of compensatory damages assessed in the action." The effect of the proposed amendment would be to increase the deterrent impact of punitive damage awards in maritime cases.

Moreover, it should be noted that at common law any fines paid by the wrongdoer are taken into account in order to avoid any over punishment or over deterrence. Thus the increase in OCSLA fines proposed in Senator Whitehouse's bill S. 3346, would actually have the effect of potentially reducing any punitive awards in civil suits; at least those penalties would be taken into account in deciding the proper punitive award.

While the Supreme Court has never considered the issue, several courts have held that punitive damages are not available under OPA 90. *See, e.g., South Port Marine LLC v. Gulf Oil Ltd.*, 234 F.3d 58 (1st Cir. 2000); *Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127 (D. Ore. 2001). *See* the discussion in: Wright, Roy, Stephens, and Colomb, *BP Deepwater Horizon Gulf of Mexico Oil Pollution Disaster, Preliminary Analysis: Law, Damages, and Procedure* May 2010 (Available from Louisiana State Bar Association and the authors). The cited decisions say that OPA 90 preempts maritime law and therefore punitive damages are not available in a case involving maritime law and OPA 90. Interestingly, OPA 90 actually provides that it does not affect admiralty or maritime law. 33 U.S.C.A. § 2751(e). Moreover, OPA 90 does *not* provide that punitive damages are *not* recoverable; it is merely silent on the subject. And both *South Port Marine LLC v. Gulf Oil Ltd.*, 234 F.3d 58 (1st Cir. 2000) and *Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127 (D. Ore. 2001) were decided before the Supreme Court's affirmation of the right to recover punitive damages in *Townsend* and *Exxon*. Indeed in *Exxon*, the Court refused to

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find that the Clean Water Act, 33 U.S.C.A. § 1321 *et seq.*, which was silent on the subject of punitive damages, precluded the recovery of punitive damages under maritime law. Finally, OPA 90 does not, as noted, apply to personal injury and wrongful death claims. Consequently, any preemptive affect OPA 90 might have on punitive damages in personal injury and wrongful death cases would seem to be limited.

IX. Conclusion

Recovery in maritime tort cases is under compensatory. The failure to allow recovery of loss of society damages in seaman and high seas maritime wrongful death cases (other than commercial aviations disasters) is unjust, dated, inconsistent, and out of alignment with current values. The rules not only fail to compensate but they arguably lead to under deterrence and increased risk because economic actors do not have to take those risks into account in deciding what to do and how to do it. The extension of those rules beyond the contexts in which they arose exacerbates the problems and extends the climate of liability limitation. This risky state of affairs is aggravated by the 1851 Ship Owner's Limitation of Liability Act and the potential positive effect of punitive damages is limited by the 1:1 punitive damages to compensatory damages rule of *Exxon Shipping Co. v. Baker*. Amendment and reform is both possible and necessary. The tragedy in the Gulf of Mexico provides a sad but necessary opportunity for our nation to reconsider and improve our law in the aftermath of this disaster.

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POLITICO

A built-in incentive for oil spills

By: Michael Greenstone
June 3, 2010 04:50 AM EDT

The Deepwater Horizon oil spill is likely the worst in U.S. history from both the environmental and the economic perspectives — and it is still not contained.

While the federal government, BP and others try to cope with this unfolding disaster, it is not too soon to consider how economic incentives may have contributed to it — and make the chances of future spills unacceptably high.

Existing law creates incentives for spills.

In the wake of the Exxon Valdez spill, the 1990 Oil Pollution Act capped firms' liability for economic damages from oil spills at $75 million, not adjusted for inflation and in addition to all removal costs.

Any economic damages beyond that amount are covered by a government-funded Oil Spill Liability Trust Fund, which has a per-incident spending cap of $1 billion for expeditious oil removal and uncompensated damages.

The rub here is that the $75 million cap on liabilities for economic damages now protects oil companies from full responsibility for damages.

This misalignment of incentives is a classic case of moral hazard. Firms or people behave differently when they are protected from risk.

Consider that oil companies make decisions about where to drill and which safety equipment to use, based on benefit-cost analyses of the impact on their bottom line. For example, in choosing a location, oil companies assess whether the expected value of the oil exceeds the costs.

These costs include equipment used and wages paid employees. But they also include the expected payouts for potential spill damages to shorelines, local economies and the environment.

So the cap inevitably distorts the way companies evaluate their risk. Locations where damages from a spill may be costly — for example, places near coasts or in sensitive environmental areas — seem more attractive for drilling with the cap than if firms actually were responsible for all damages.

The cap effectively subsidizes drilling in the very locations where the damages from spills would be the greatest.

Further in all drilling locations, it reduces the incentives for investing in the best safety

equipment or using the safest, but time-consuming, methods.

While an estimated 500,000 to 800,000 gallons of oil are pouring into the Gulf each day, the jury is still out on the spill's total economic damage.

If the "top kill" approach had stopped the spill, one Wall Street analyst estimated that the economic damages would have been approximately $8 billion. This is more than 100 times the cap. Now, with top kill's failure, even this estimate may be too low.

Without the distortions created by the cap, it is unclear whether BP and its partners ever would have drilled at the Deepwater Horizon location. It seems possible, though, that they would have been far more careful in inspecting the blow-out preventers and other emergency units to provide a greater safety net against their own liability.

As Congress and the administration consider how to prevent future spills, there is much talk about creating more rigorous standards and certification processes for drilling equipment.

There also appears to be a strong case for reforming the Minerals Management Service to provide independent inspections.

But there is a clearer way to exert pressure on the industry so it will provide better safeguards against oil spills.

A critical aspect of any package of reforms should be the elimination of the liability cap or, at a minimum, greatly increasing it. Then real market forces would guide oil companies' investment decisions — including a consideration of oil spill costs.

We are bound to hear that lifting the liability cap will mean higher prices for consumers. Indeed, this is one reason given for the Senate's failure to pass legislation to raise the cap over the past few weeks. The answer to this charge is simple: In the massive global market for petroleum, lifting the cap will only have a small, likely imperceptible, impact on gasoline prices.

What lifting the liability cap could do, however, is shift U.S. drilling to safer places. It would certainly serve as an incentive for firms to take precautions against future spills.

Though we should have done so sooner, that is clearly a risk worth taking now.

Michael Greenstone is the 3M professor of environmental economics at the Massachusetts Institute of Technology and the director of The Hamilton Project at the Brookings Institution. The opinions here are Greenstone's, and do not represent the views of MIT, The Hamilton Project or the Brookings Institution.

IRIDES WEB HOSTING

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CHRISTOPHER K. JONES

BROTHER OF GORDON LEWIS JONES,
WHO DIED ABOARD THE *DEEPWATER HORIZON*

HEARING BEFORE THE SENATE COMMITTEE ON
JUDICIARY: "THE RISKY BUSINESS OF BIG OIL:
HAVE RECENT COURT DECISIONS AND LIABILITY
CAPS ENCOURAGE IRRESPONSIBLE BEHAVIOR?"

HEARING DATE AND TIME-JUNE 8, 2010 AT 10:00 A.M.
DIRKSEN SENATE OFFICE BUILDING-ROOM 226

Testimony Before the Senate Committee on Judiciary
United States Senate
June 8, 2010

Damage Caused by Transocean Deepwater Horizon Explosion – A Brother's Statement

Christopher K. Jones

Chairman Leahy, Ranking Member Sessions, and other members of the Committee, Thank you for the opportunity to appear before you today to tell you how this disaster has affected the lives of my family and the lives of the many other families impacted by this tragedy.

My name is Chris Jones. Seated behind me is my father, Keith Jones. Gordon is my only brother. Gordon is survived by his wife, Michelle, and two sons, Stafford and Max. Stafford is 2 and Max was born three weeks ago. Gordon is also survived by a mother, sister, in-laws and other family members, and many friends who miss him very much. Words cannot describe what Gordon meant to this family. And I hope this statement will give you a better understanding of the anguish experienced by all of us and the struggles and heartache we can expect in the future.

I appear before you as a representative of only one family affected by this accident. Unfortunately, there are many more. At a recent memorial event for the eleven men who died aboard the *Deepwater Horizon* I spoke with some of the other family members. We stood together during a service no one should ever have to experience. Although we never met before this disaster, I want those other family members to know that we grieve for them and are committed to telling our story so we can try and correct the inequities in the law and so no one else will find themselves in this situation in the future.

Of course, you are aware that Gordon died aboard the Transocean *Deepwater Horizon* oil drilling rig. He was employed by M-I Swaco, a contractor for BP

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hired to provide mud engineering services aboard the rig. He had worked aboard that rig for the past two years and was excelling in his profession. As many rig workers do, Gordon expected to spend his time on the rig, gain experience and continue to advance with his company. He never got that opportunity.

As an example of Gordon's thoughtfulness and good nature, I want to tell you about how he found himself at the immediate location of the explosions that fateful night. Although his shift did not start until later in the night, Gordon relieved a fellow mud engineer before his shift was up. He relieved him early so the mud engineer could head to bed. A few days after the accident, that mud engineer drove to Michelle's house to make sure she told Stafford and Max their father saved his life.

[Show Picture No. 1]

This is a picture of the fort Gordon built, with Stafford's help, for Stafford and Max. It sits in the middle of the backyard of their home. Although you may not be able to tell, it is not finished. Gordon planned to finish it when he returned home. He will never get that chance. Certainly, others will step in to make sure it is finished and try to fill the tremendous void left by Gordon's death. But this is yet another example of an incomplete life and what has been lost. I am at least comforted that it will be finished, and Stafford and Max will enjoy it for years to come and know their father built it for them.

[Show Picture No. 2]

The next picture is taken shortly after Max's birth. Notably absent is Gordon, whose presence in the delivery room was limited to a single family photograph.

[Show Picture No. 3]

Lastly, I show you possibly the last picture taken of Gordon before his death. It is taken just after Gordon gave Stafford his first golf lesson, an experience Gordon thoroughly enjoyed. You can see the joy in their faces. I am saddened

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that neither will experience this same joy again.

I want to take this opportunity to address recent remarks made by Tony Heyward, CEO of BP. In particular, he publicly stated he wants his life back. Well, Mr. Heyward, I want my brother's life back. And I know the families of the other ten men want their lives back. We will never get Gordon's life back and his wife will live a life without a husband and her two children a life without a father.

The last time I was here I walked in front of the United States Supreme Court. At the top of that building is the phrase "Equal Justice Under Law." As a United States citizen, and as a lawyer, I agree with that principle. Unfortunately, it does not exist in the cases of deaths occurring in federal waters. This is not a phrase that applies to Michelle, Stafford and Max in this instance. That is not right and I ask you to change the Death of the High Seas Act to ensure these families are protected by equal justice under law. I do not make this request only for my family, or the families of the other 10 men. Rather, I make it also for any families who could find themselves in our same position, and who will quickly learn that our current laws do not protect those who need it most.

I want to be very specific. We are asking you to amend DOHSA to allow for the recovery of non-pecuniary damages. Currently, Michelle, Stafford and Max can only recover pecuniary damages, comprised of Gordon's future lost wages minus income taxes and what Gordon would have consumed himself.

Stafford and Max will never play in the Father/Son golf tournament at the local golf course with their Dad. They will never go with him to breakfast at Louie's near LSU on a Saturday morning. They will also never see how proud their father would be after they caught their first fish out of False River. Likewise, Michelle will never again experience a quiet dinner at home after a hard day with her true love. She will also never celebrate another wedding anniversary. Gordon and Michelle were looking forward to celebrating their next one on April 23rd, three days after this accident. Most recently, Michelle did not have Gordon there to comfort her in the delivery room and tell her how much he loves her and the beautiful baby we now call Maxwell Gordon. These are all

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experiences, among many, many others, for which there is no compensation under the current law for maritime victims.

The overwhelming impression I have gotten from the parties responsible for Gordon's death, besides that no one wants to take responsibility for it, is that they are immunized by the current law. Under the current law there is a finite, maximum amount that Michelle and her boys can recover, and nothing more. Think of it as a drastic liability cap. While some, but certainly not all, of these same parties express their sympathies, and claim to want to do the "right thing," they can also hide behind the law and say they are protected from doing any more. As an example, like in Transocean's case, they seek protection under laws like the antiquated Limitation of Liability Act to limit the recovery of victims killed on their rig, as well as all other persons harmed by the resulting oil spill.

There is, of course, an exception for recovery of non-pecuniary damages under DOHSA. After a tragic plane crash that occurred in federal waters in 1996, this Congress passed a retroactive amendment to DOHSA to allow for the recovery of non-pecuniary damages. But, that recovery was limited only to commercial aviation victims. Currently, while victims of airline accidents are allowed recovery of these damages, victims of all other accidents occurring in federal waters are not, including aboard cruise ships, ferry boats, and in this instance, oil rigs where hard working men make their living to support their families.

During this past month and a half I have gained tremendous perspective on things. Certain things that I thought were important before April 20th are just not important any more. This is important. This is important to Michelle, Stafford and Max, and all the other families affected by this tragic event. This is also important to the other families who, unless things change, will experience the same anguish after another similarly tragic event. You have an opportunity to make this right and provide some comfort to the families who loved these men. I ask you to please create equal justice under law for these families.

Thank you, my father and I are more than happy to answer any questions you may have.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
June 8, 2010

Statement of Senator Patrick Leahy (D-VT),
Chairman, Senate Judiciary Committee,
Hearing On "The Risky Business of Big Oil: Have Recent Court Decisions
And Liability Caps Encouraged Irresponsible Corporate Behavior?"
June 8, 2010

It has now been 50 days since BP's Deepwater Horizon oil rig exploded and oil began gushing into the Gulf of Mexico. Deadly contamination has reached the shores and wetlands of the Gulf Coast. Our Nation faces an environmental catastrophe. Americans are angry.

The American people want to know how and why this happened. As Attorney General Holder and others investigate this disaster, I am confident that the facts will become known and if criminal conduct occurred, it will be prosecuted to the fullest extent of the law.

Senators on both sides of the aisle believe that those responsible for this disaster should be held fully accountable. We cannot let big oil companies play roulette with our economic and environmental resources. A region that has suffered so much is now enduring yet another tragedy, this time at the hands of one of the largest oil companies in the world.

Much attention is being given to the unfolding environmental disaster but we cannot forget that 11 men lost their lives -- men who have left behind children, wives, parents, brothers and sisters. Christopher Jones, whose brother, Gordon, lost his life on the oil rig, is with us today to represent these men and their families. He is accompanied by his father, Keith Jones. I believe President Obama is also having some families to the White House later this week. Mr. Jones, you and your family have our condolences. And you have my commitment to work to achieve some fairness under the law for your brother's family and the families of all who lost their lives in this disaster. You deserve a measure of justice.

Today's hearing will examine how the applicable laws have shaped big oil's behavior. Going forward we need to evaluate perverse incentives in our legal system. We will ask whether the Supreme Court's decision in the Exxon Valdez case and current liability caps in the Oil Pollution Act of 1990 and Limitation of Liability Act encourage corporate risk and misconduct. We will ask whether current maritime statutes that compensate the survivors of those killed are fair and whether the current legal structure tempts corporations to devalue human life in their calculus of profitability. No one's life should become an asterisk in someone's cost-benefit analysis.

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The Death on the High Seas Act is the exclusive remedy for the families of those killed in international waters. But this law does not recognize all that is lost with the death of a loved one, such as loss of consortium, care, or companionship. Contrast this with what happens when a BP employee is killed while working at a facility on land. The disparity adds further insult to the 11 families who are victims of this tragedy. Ten years ago, Congress amended the Death on the High Seas Act to achieve fairness for those who perish in airline crashes over international waters. It is time we modernized this law again. Later today, I will introduce the Survivors Equality Act to make sure that these families are treated fairly.

Another law that Congress should consider updating is the Limitation of Liability Act, which limits a vessel owner's total liability to the post-incident value of the vessel. That law was passed in 1851, for a different time and before the Civil War. The company that owns the Deepwater Horizon, Transocean, wasted no time filing a motion in Federal court to limit its total liability under this arcane law to the value of the sunken drilling rig. That is perverse. Congress should act to avoid this absurd result.

Then, of course, there is the statutory liability cap of $75 million on consequential damages in addition to the costs of clean up for an oil spill that needs reexamination.

Two years ago, the Supreme Court's decision in Exxon v. Baker created an arbitrary limit on punitive damages in maritime cases. When I chaired a hearing to examine the decision, I expressed my concern at that time that the Supreme Court's Exxon Valdez decision would encourage corporate misconduct because it reduced the consequences to a discounted cost of doing business. Is anyone surprised that, after the Supreme Court effectively capped damages designed to punish corporate misconduct, oil companies cut corners and sacrificed safety?

The Exxon Valdez decision was another in a string of business friendly Supreme Court decisions in which a narrow majority has essentially written new law and disregarded laws duly enacted by Congress. The impact of these decisions on the lives and livelihoods of Americans is enormous. Two years ago, we heard from Alaskan fishermen. Now we are worried about the livelihoods of shrimpers and oystermen in the Gulf.

I have joined Senator Whitehouse's effort to overturn the Supreme Court's Exxon Valdez decision so that when juries determine that corporate wrongdoing is so egregious as to warrant punitive damages, those decisions will not be overturned on appeal based on the sympathies of business friendly judges.

I am also looking into legislation to prevent corporations from deducting punitive damage awards from their taxes so that they bear the full cost of their extreme misconduct.

Our laws should encourage safety and accountability. Where they do not create the right incentives, we must change them. Whether as the result of greed, incompetence, or negligence, BP's conduct has devastated the lives and livelihoods of countless people and their communities and may threaten the Gulf Coast's very way of life. The residents of the Gulf Coast deserve better and the American people deserve better from all big oil companies who exploit our natural

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resources for enormous profit.

In the months ahead, the people of the Gulf Coast will work to reclaim their coastline, their livelihoods, their wetlands, and their fisheries. Unfortunately, the families of those who lost their lives on that tragic day will not be able to reclaim their loved ones. The 11 men who were killed on the Deepwater Horizon rig deserved better.

I thank Senator Whitehouse for co-chairing this hearing and all of our witnesses for being here. We look forward to their testimony.

# # # #

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June 7th, 2010

United States Senator Sheldon Whitehouse

Dear Senator Whitehouse,

I know I speak for many Rhode Islanders when I express the outrage and frustration we feel over BP's Deepwater Horizon explosion and oil spill in the Gulf of Mexico. Our own State's unfortunate history with oil spills makes us empathize with all of those now affected in the Gulf region. I am writing with the hope that, by bringing some of our experience and expertise to bear, we can do something meaningful to help restore the lost natural resources and repair the damaged communities that will continue to be affected by this catastrophe long into the future.

It has now been 14 years since we worked together to respond to the worst oil spill in Rhode Island's history. As you recall, the North Cape spill in 1996 killed more than 12 million lobsters, hundreds of protected seabirds, and countless other marine animals along our southern coast in January of 1996. The slick closed 250 square miles of ocean to commercial fishing for months. Though there were many differences between the two oil spills, a number of the lessons we learned may be directly applied in this case.

Unlike the Deepwater Horizon, the North Cape oil spill was a finite event in which a tug pulling an oil barge caught fire in a winter storm and was disabled. The single-hulled, unmanned barge grounded on the rocks off Moonstone Beach and released 828,000 gallons of home heating oil into Rhode Island Sound. Heating oil is much lighter and less persistent than crude, but it is more toxic, so in North Cape, it made most of its environmental impacts acutely in the first few days and weeks, and then quickly weathered and dissipated in the winter ocean.

The North Cape spill became the nation's first full-scale test of the Oil Pollution Act of 1990, and the interaction between the responsible party and the various government agencies involved in the response and natural resource damage assessment process revealed some of the weaknesses of the 'responsible party' (RP) approach versus a federalized spill. It was clear from the early days of the spill that getting good, transparent public information about the spill and the response would prove extremely challenging.

In the case of the North Cape, Save The Bay was designated as the state's official volunteer management and coordination agency under the unified command, and we fielded requests from more than 5000 people, training and deploying thousands to assist in the damage assessment and oil reconnaissance efforts. Despite our best efforts, little of the oil spilled (10-15%) was ever recovered, and very few of the rescued animals survived to be released.

There are a number of areas, though, in which I believe we were able to be effective: improving vessel safety, future spill prevention, criminal enforcement, contingency

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planning and coordination, and habitat restoration. After the spill, investigations uncovered seriously unsafe conditions on the tug and barge that contributed to the accident. The tug had left in the face of a well-forecast storm lacking minimum safety equipment- an anchor on the single-hulled unmanned barge was rusted and painted onto the deck and rendered useless. This simple device might have prevented the grounding in the first place.

Even more appalling was the realization that, at that time, the tug and barge industry operated in a gray area of Coast Guard regulation that allowed major loopholes not present in other parts of the petroleum shipping industry. It turns out that, at that time, unmanned barges were not required even to have working anchors, and the tugs were not required to have charts, nor global positioning systems, voyage plans, nor a number of things that even the most casual sailors will not leave port without today.

It took an accident like the North Cape to uncover these weak and/or non-existent regulations, but even after the spill, legislative and regulatory reform efforts met with stiff resistance from the industry. Fortunately, the collective outrage of the people of Rhode Island created the political will to make real changes in oil spill laws and regulations- first through passage of RI's own law, and later through leading a process of creating regional Coast Guard regulations to close the loopholes.

Another important lesson we learned is that, while the environmental impacts from a spill may be severe and last for years, the ecosystem will repair itself over time, especially if it was healthy and resilient to begin with. We have pioneered coastal wetland and estuarine habitat restoration techniques that help damaged systems recover faster, and help bolster the coasts' natural defenses against future spills and other threats. Investment in habitat restoration and protection helps inoculate against oil and other pollution.

If there is anything good that can come out of the Gulf oil spill disaster, we will have to push through stronger safety and pollution prevention laws and regulations. We must also use this national tragedy as an opportunity to step back and look at energy policy including a thoughtful and thorough evaluation of the siting and regulation of oil and gas facilities. It underscores the need to avoid environmentally-sensitive areas and densely populated areas when choosing the locations for new oil and gas infrastructure. And it reminds us of the value of green and renewable energy sources and the need to reduce our dependence on fossil fuels.

We stand ready to assist you in any way to help the nation cope with this unprecedented environmental and human disaster. Please contact me directly if you have any questions or wish to discuss these issues further.

Sincerely,

John Torgan
Narragansett Baykeeper

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Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
June 8, 2010

NEWS FROM U.S. SENATOR SHELDON WHITEHOUSE

FOR IMMEDIATE RELEASE
June 8, 2010 Contact: Matt Thornton
(202) 228-6293 (press office)
press@whitehouse.senate.gov

Opening Statement of Senator Sheldon Whitehouse
Judiciary Committee Hearing, June 8, 2010
"The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?"
As Prepared for Delivery

Thank you Chairman Leahy, for holding this hearing.

Like you, I believe that Congress must do whatever it can to prevent another family from having to hear that their loved one has perished on an oil rig. Congress must also take every available measure to avoid the environmental destruction we are seeing unfold day after day as this spill continues. Shrugging our shoulders and hoping for the best in the future is not good enough. 11 men died. The Gulf ecosystem has been devastated. This is a national catastrophe.

How did it come to this? Well, we already know that BP, Transocean, and Halliburton all failed to meet important safety standards. They undertook their highly risky drilling without a proper degree of care – here, 5,000 feet below the surface of the Gulf, 18,000 feet to the oil reservoir, amid methane hydrate deposits that are highly dangerous when they get inside the drill column. They were irresponsible. The result was tragedy.

Sadly, key regulatory agencies were asleep at the switch, shirking their responsibilities to protect our oceans and American workers at sea. I am convinced that something was fundamentally amiss at the Minerals Management Service at the Department of Interior. I strongly suspect that MMS had been captured by the oil industry and that it had ceased to serve the public interest.

But even when functioning properly, regulatory agencies never have been America's sole line of

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defense against disasters. We also should make sure that it is in a corporation's economic interests to adhere scrupulously to the law. Meaningful civil and criminal fines and damages are one crucial tool for ensuring that an oil corporation takes proper precautions to avoid tragic errors. In contrast, a corporation that does not have to pay for its mistakes does not have to worry about making them.

Unfortunately many of our current laws – whether by statute or by court decision – cap the liability of big oil corporations, both for worker injuries and deaths, and for harms to the environment. Rather than making responsible parties pay for harm done, they foist this burden onto the families of the deceased and onto the American taxpayers. As a result, corporations lack proper market incentives to act responsibly. That must not continue. Congress must act.

One note of caution: in providing for appropriate liability, we must not pay heed to the endless and disdainful attacks upon the jury by powerful moneyed interests. The Founders put the jury in the Constitution and Bill of Rights three times, and for a reason: to ensure that in at least one forum, the powerful and the powerless have equal standing. Not for nothing did DeTocqueville describe the jury as "before everything a political institution; . . . a mode of the sovereignty of the people." That is as true today as it was at our nation's founding.

You know this as well as anyone, Mr. Chairman, and I am proud to cosponsor the legislation you are introducing today. It will eliminate the strange quirks in American law that, left unchanged, would result in the survivors of the eleven men killed on the Deepwater Horizon being treated unfairly. The Senate should pass that legislation promptly. I also urge my colleagues to support two bills that I have introduced. The first would raise penalties for worker safety and environmental violations under the Outer Continental Shelf Lands Act. The second would overturn the Supreme Court's misguided Exxon v. Baker decision that capped maritime punitive damages at the level of compensatory damages. The Exxon Court believed that predictability for corporations was more important than deterring misconduct, and that it understood the case better than the jury that heard the testimony. I disagree.

I know that the people of my home state Rhode Island – the Ocean State – would put our environment and our safety ahead of profits for irresponsible corporations. In fact, that is exactly what Rhode Islanders have done. John Torgan, the Narragansett Baykeeper in Rhode Island, has submitted a letter which I will introduce for the record, cataloguing the legislative and regulatory reforms put in place after the 1996 North Cape/Scandia oil spill off South Kingstown.

Rhode Islanders know what an oil spill can do to an ecosystem. We know just how important penalties and fines are to keeping our seaman safe and our marine ecosystems healthy. Like my fellow Rhode Islanders, I demand that, in the future, oil companies do everything they can to prevent needless deaths and catastrophic environmental harm, whether in the Gulf, off the coast of New England, or anywhere in our great country. Today's hearing is an important step toward that goal.

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