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Kenneth Feinberg

## *D.C. Economic Club Address on BP Oil Spill Compensation*



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I want to thank David for the introduction. It's correct -- we go back a long, long way to our days working together in the U.S. Senate. And whatever we do, whatever David does, whatever I do, nothing is as difficult as chairing the Kennedy Center and being president of the opera. I assure you. I assure you there is nothing quite like that.

David's correct when he says that I've been a special master in some tough assignments. That's a legal term, special master. I once said to my wife, you know, I'm the special master for the 911 Fund. And she said, that's fine with me, but if anybody calls me the special mistress, there's going to be trouble.

You might wonder how can we in a few minutes blend the work that I'm doing for Secretary Geithner as the special master for pay, TARP executive pay and BP? How do you blend those two in just twenty minutes? But you can, because if you look at both of those assignments, there is a common denominator. Every once in a while, fortunately not that often, but every once in a while there is a public policy dilemma, that requires public policy makers to think out of the box.

Now put aside the issue of whether or not you agree with the resolution of that public policy. Put aside the merits of whether or not a special master for pay is a good idea or a BP twenty billion dollar fund is a good idea. Put that aside for a minute. But understand that what is unique about these assignments, Agent Orange was another one, the 911 victim compensation fund, Virginia Tech, other examples.



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The conventional way of resolving these dilemmas won't work. And whether it's government or the private sector, a decision is made that we better go off and try something new. It may not work but conventional resolution won't get the job done.

Now in...when it comes to Treasury and pay, my job there was made easier by the fact that Congress spoke like in the 911 fund. Congress spoke and Congress said for those seven companies that received the most taxpayer assistance and just those seven, somebody at Treasury ought to set their pay, for the top people, for the top people. Congress delegated that assignment to the Secretary, who delegated it to me. And for those seven companies; AIG, Citigroup, Bank of America, Chrysler, Chrysler Financial, GM, and GMAC; Congress said Treasury, Feinberg set the pay of the top hundred officials in each of those seven companies, until they repay the taxpayer. Once they repay the taxpayer they are out from under your thumb.

So in 2009, I, at the request of the Secretary, I determined and calculated the actual dollars for each of the top 25 officials in those companies and we established a regimen of pay for officials 26 to 100 in each of those seven companies and only those seven companies. I did that in 2009.

Citigroup and Bank of America for reasons you can ask them, one being to get out from under my thumb, borrowed money to repay the taxpayers so they could get out from under my jurisdiction. And they did.

So in 2010 there were five companies. Chrysler Financial which is in runoff. They're out from under my thumb. So today as we meet here this morning, there are only four companies left. But as to those [\[audio interrupted at source -- 4:58-5:01\]](#) their pay will be established by a Treasury official. Congress has spoken.

Now I would have thought as to that assignment, it would have been a great deal of criticism. Government regulation of private pay is none of the government's business. I would have thought that. I would have thought that would have been a big issue. Turned out to be a non-issue.

Turned out to be a non-issue I think, I've concluded for two reasons. First, Feinberg's only dealing with a hundred some odd officials and then what are we getting excited about? It's a rout, it's a sideshow. It's a rather very limited role that I'm playing and if you really want to see impact on pay don't look to what I'm doing, which is relatively modest. Look to the other initiatives that are out there being promoted by this Administration. The regulatory reform bill is about to become law; corporate governance reform; Secretary Geithner has taken the lead on the G20 in trying to make sure that competitive pay in the United States is not disadvantaged by foreign pay; The SEC and Commissioner Schapiro with her transparency rules; Sheila Bair at the FDIC; the Federal Reserve. There's a lot more going on, on executive pay than my limited role. That's one reason there hasn't been a hue and cry.



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The other reason there hasn't been much criticism at all is because after all, these companies survive because of the American taxpayer. So when you talk to other corporate officials, their basic approach to me is, "I have no problem with what you're doing. Those companies only maintained their financial stability because the taxpayer came to the rescue. Why shouldn't they have their pay set? Don't touch my pay! But in terms of those seven companies, why not? The taxpayer is a creditor of those companies. Why shouldn't there be some say in what these companies get paid."

Now because of that there hasn't been a great deal of criticism. I am somewhat surprised at the degree of interest in what I'm doing. Why if I'm only establishing pay for a very small number of people is there such interest? Well, I think there is a reason, again two reasons. First, at a time of great economic uncertainty, populous fervor is very high. People are upset. Unemployment rates high. People want to know what are those Wall Street guys getting. It's an historical thing, was no different in the gilded age or J.P. Morgan or whatever. I mean if you look at American history, there's always a tension between Wall Street and Main Street. And what you find at this time in America because of economic uncertainty, people are focused on pay, more than they might otherwise be.

The second reason is a very practical one. I'm the only fellow in government who takes rather vanilla prescriptions about pay and actually calculates to the penny what somebody ought to make. And that I think allows people to hone in not on well, it's very important that compensation be tied to performance. You know, what else is new. But, and that means that this person should make eight hundred thousand or a million eight or three million or six hundred thousand. For that reason this tends to be a good deal of focus.

Now the one remaining issue I've still got to deal with, within the next week or so, under the statute, I've got to look back at what 419 companies received in terms of TARP assistance. How much bonus money did they give out and should there be an effort under the statute to try and recoup some of those funds? And that project's been underway now for about three months in about 419 companies, not just the seven. This is a purely voluntary program. I can't enforce efforts to recoup money. The question is should I try and get any of it back from two years ago? We're finishing up that look back and those decisions will be rendered by me, sometime I think within the next week or so. There's been some interest among 419 companies as to whether there will be an effort to recoup any of those dollars or impose any other or voluntarily suggest any other remedial steps to prevent excessive bonuses going forward.

So that's pay and what makes the pay assignment so interesting is its uniqueness. The assignment from the Secretary, who has been unbelievably supportive of my role while at the same time as the President has said we are not micro-managing these companies. This is a very narrow, limited role that I am engaged in.



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So that's one assignment that I juggle these days with a second assignment, quite different in scope, magnitude, and source. But similar in that conventional thinking won't work, BP. Now it's all together different from pay. The Administration and BP on their own, I had nothing, nothing to do with it, decided to set up an alternative mechanism for resolving BP claims. BP agreed voluntarily, no Con., no legislation. This is a voluntary compact. BP agreed to put up 20 billion dollars to pay claims arising out of the spill. And BP said if 20 billion dollars is insufficient and I hope it is sufficient, but if it's insufficient BP will honor all supplementary financial obligations in the Gulf.

So now I have this assignment of designing, implementing, and administering a 20 billion dollar escrow fund designed to pay eligible claims. And that fund will I believe, I'm recommending, will be a fund that will last for three years. And during that three year period I will evaluate, analyze, determine independently what individual, individuals, businesses, small businesses, large businesses in the Gulf impacted by the spill should receive.

Now I'm totally independent. I do not answer to the Administration nor to BP. It's very, very clear when I spoke and accepted this assignment from the Administration and from BP, that I am an independent actor.

This is a program that everybody voluntarily can enter into. They don't have to; any fisherman, any businessman, any real estate owner, any motel, any crabber, oyster harvester, food processor. Anybody can decide, "I want nothing to do with this. I'd rather go to court or, or implement my other legal rights." Go ahead! You're crazy to do so though. Go ahead if you want, because under this program you'll receive, if you're eligible, you will receive compensation without having to go to court for years, without the uncertainty of going to courts since I'll be much more generous than any court would be. And at the same time you won't need to pay lawyers and costs. So, you ought to come into this program and until you know exactly what you'll get to the penny, you're under no obligation to waive any right you might have to litigate against BP.

In fact, as I have announced anybody who needs money immediately who's eligible can come in and immediately receive a check for six months emergency payment. You have to prove it. But you'll get six months payment without any release. If you decide after that to litigate, you still keep the check. I mean who wouldn't come into this program and take that which is offered with no obligation and then at the end of the day with your offer to lump sum payment for all present and future injury calculated by the administrator. Only then when you know that amount do you decide whether or not you want to take it in lieu of going to court.

It is to my way of thinking an easy call. But do not underestimate the problems associated with human nature. I've seen it over and over again. Do not assume everybody sees these funds 911, Virginia Tech, Agent Orange, this one; do not assume that people automatically will opt into these programs. People are skeptical, angry, dispirited, worried about their financial certainty, their financial future.



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Human nature being what it is, you have to sell these programs. And that's why I've been spending so much time in the Gulf. You cannot do this program from Washington. Impossible.

You've got to go down there to Louisiana, Alabama, Florida, Mississippi. I've received tremendous support from the Governors of those states. I've received support from the Attorneys General. I was on the phone the other day with Attorney General McCollum in Florida, very helpful. I plan to meet with the Attorneys General this week or next, to meet with them to talk about their concerns.

This, I am not adversarial to the people in the Gulf. I'm trying to distribute the money. At the same time I'm trying to corral the claims, you see. So the courts don't get inundated with cases. There are certain tragedies in American life where public policy seeks a creative alternative to conventional thinking and that's what pay is about and that's what BP is about.

Now with BP, let me just give you two hurdles to success, substantive hurdles. One: How attenuated will you allow the claims? "Mr. Feinberg I own a restaurant in the north end of Boston. I have the best shrimp scampi in the city. I can't get Gulf shrimp where's my money?" Highly unlikely. At some point you have to say as a matter of public policy and law, claims are so attenuated they can't be compensated. "Mr. Feinberg, I own a motel on the beach. There's oil there and I've lost customers." Pay them. Pay the claim. "I own a golf course 50 miles from the Gulf. I'm down 30 percent. People aren't coming to play golf." Dubious. But where do you draw that line? That's a judgment call and it's, you look to the law, Pollution Control Act. But the law only helps you so much. At some point you have to make a call. So one challenge I've got, these claims are eligible. These claims are not eligible. Judgment. I could be wrong. You people could draw the line somewhere else. That's one problem.

Problem number two is the corroboration problem. A problem of proof. "Mr. Feinberg I was making five thousand dollars a month as a fisherman. Now I can't fish. Pay me five thousand." Okay, what do you have to corroborate? "Corroborate, what do you mean?" Proof. "I was a cash business." Nothing illegal about a cash business. What's your proof that you were making five thousand? Do you have a tax return? "I lost it." Okay, you lost your tax return, okay. Do you have a profit and loss statement? Do you have a checkbook, check stubs, something? "No, I... don't." No, than I have no payment. Will the ship captain vouch for the five thousand a month? I mean I cannot just pay claims. You've got to prove your claim. I can be very lenient as to proof. There's nothing illegal about a cash business but I've got to have proof and you know, fisherman, you're getting a 1099, the law requires. Well, you see you could create barriers to participation which is unfortunate. And you've got to try and work with the people. That's a challenge, to get people to come into a fund like this.

So that is sort of just a... brief summary. We could spend a seminar on both pay and BP, but what's important about both of these and Agent Orange and Virginia Tech and the 911 Victim Compensation Fund which was an absolute horror to administer, eleven weeks after the tragedies. What's the common denominator of all of these programs is out of the box thinking. Don't be circumscribed by traditional ways of resolution.



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Don't assume that there's only a linear, one way to do these things. That's not true. With these assignments, it's creativity. It's practicality. It's coming up with incentive-based alternatives that will voluntarily channel people into a better way of resolving these public policy dramas that come up.

I believe that thanks to the Secretary and the help of Neal Wolin and the people at Treasury, I think that the executive compensation approach, in a very narrow realm, worked. It really did. It worked. And I think also that the BP program once it's up and running next month, it'll work. It'll work because you create creative ways to voluntarily entice people to participate. With very, very little down-side risks. And that's the challenge.

So I think, I want to thank all of you. You don't say no to my friend David, who has been a friend and an ally for many, many years. And I jumped at the chance to be here. This is a very, very distinguished group. I think substantively you understand better than most what I'm trying to do and I welcome now the opportunity under David's approach, I follow his lead for Q and A.

Thank you very much.