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THEY SAID IT

The \$20 billion escrow fund that Obama pried out of the BP treasury at the White House when he talked for the first time, 57 days after the rig exploded, with BP Chairman Tony Hayward. It's pleasing to think that those injured by BP will be paid off speedily, but House Republican Joe Barton had a point, though an impolitic one, when he called this a "shakedown."

For there already are laws in place that insure that BP will be held responsible for damages and the company has said it will comply. So what we have is government transferring property from one party, an admittedly unattractive one, to others, not based on pre-existing laws but on decisions by one man, pay czar Kenneth Feinberg.

Feinberg gets good reviews from everyone. But the Constitution does not command "no person . . . shall . . . be deprived of life, liberty or property, without due process of law except by the decision of a person as wise and capable as Kenneth Feinberg." The Framers stopped at "due process of law."

Michael Barone, "Obama's Thuggery is Useless in Fighting Spill," June 20, 2010.

WHAT'S WORSE THAN A SHAKEDOWN?

If you are a friend of Congressman Joe Barton of Texas, the Republican ranking member of the House Energy and Commerce Committee who sprang to national prominence late last week when he apologized to the good people at BP for President Obama's \$20 billion "shakedown," then please accept our sympathy and our apologies – sympathy for the fierce negative press your pal has endured and apology for what we are about to say about him. Indeed, if you and Congressman Barton are really and truly tight, you might just want to skip this piece altogether, or at least the next three paragraphs.

The fact of the matter is that Joe Barton is a fool, and not just any fool, but a mind-numbingly stupid fool; a fool who has all but certainly done irreparable and unspeakable violence to the probability that justice will be served in the case of the BP/Gulf oil spill disaster.

How'd he do that, you ask? By speaking the truth, but by doing it poorly, crassly, and inexpertly; and, worst of all, by losing both his confidence and his perspective at the first sign of controversy, and thus retracting said statement of truth, replacing it with some sticky, sappy, half-truth, half-apology that was less honest, less constructive, but far more politically palatable. Yuck.

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In short, he showed himself to be just another politician armed with just enough knowledge to be dangerous, but nowhere near enough to understand the subject at hand; who thought that his moment in the spotlight was actually about him instead of the people he represents; and then, after succeeding in making it about him, got nervous, got cold feet, and thought he might warm up those froze toes by peeing down his own leg.

There is no question that what Barton said about the Obama administration's efforts to establish a \$20 billion claims fund for the victims of BP was inartful, politically tone-deaf, and, worst of all, bombastic and self-serving. There is also no question that while the terms everyone will remember from Barton's rant – “shakedown” and “slush fund” – were hyperbolic, they were, from both a legal and political perspective, not entirely inaccurate.

Consider, just for starters, the legal justification for the compensation fund the Obama administration and BP agreed to set up last week. The administration claims, rightly, that this is hardly the first time that such a fund has been established, and, that, in fact, the creation of similar funds has been, generally speaking, non-controversial.

The Obama team insists, for example, that Kenneth Feinberg was chosen as the administrator of the fund specifically because he has experience in such matters, having served as the administrator of the 9/11 compensation fund, after which the BP fund will, according to media and administration reports, be modeled. The administration also notes that the new compensation fund will simply replace and update the old method of compensation, itself a compensation fund, the Oil Spill Liability Trust Fund, which was funded and reinforced in the wake of the nation's last great oil disaster, the 1989's crash of the Exxon Valdez. All of this is unquestionably and indisputably true.

What the administration does not note, however, is that each and every one of the funds cited as precedent for the BP deal was established not by an

angry president worried about his poll numbers and determined to look tough, but by an *act of Congress*. The September 11th Victim Compensation Fund, for example, was established by Congress in the Air Transportation Safety and System Stabilization Act, which, for the record was passed by Congress almost immediately after the 9/11 attacks.

As for the Oil Spill Liability Trust Fund, that provides an even more interesting and relevant precedent. The fund itself was established in 1986, but *it was unable to collect revenue or disperse funds* until 1990, when President George H.W. Bush signed the Oil Pollution Act. This is critical. As with the 9/11 Fund, Superfund (used to clean up and compensate victims of toxic waste sites like Love Canal, NY), and all other similar funds, the Oil Spill Liability Trust Fund was inoperable until it had the force of law behind it.

When conservative critics of the administration complain about President Obama circumventing the law and undermining the rule of law in his “negotiations” with BP, this is precisely what they mean. The President of the United States simply does not have the authority to establish a liability fund. More to the point, he does not have the legal right to determine the criteria for payments to and from the fund unilaterally. As precedent demonstrates, *an act of Congress is required to give such determinations the force of law*. And despite the fact that the President's party currently controls both houses of Congress, he has chosen simply to ignore precedent here and to do whatever he sees fit. Such actions may or may not rise to the level of a “shakedown,” as per Joe Barton, but they certainly are aggressive and set a treacherous precedent for dealings with private corporations that happen, for one reason or another, to be out of political favor.

The Obama administration claims that it has technically covered its backside here, insisting that its actions are allowable without Congressional approval because the agreement between it and BP is (in the words of the *Wall Street Journal's* Jeffrey Weisman) “grafted” onto 1990's Oil Pollution Act. Now, we're not lawyers, of course, but this is, we believe, highly

dubious, given that the parameters and conditions of the newly established fund are, under this legal justification, subject to no legislative oversight and can therefore be used exclusively at the discretion of the executive branch. We doubt seriously that any congress, particularly the veteran Democratic congress that passed the legislation two decades ago would have intended to give such broad and unencumbered authority to the executive, especially given the fact that said executive was, at the time of the law's passage, a Republican.

The bottom line here is that a compensation fund for those who have been hurt – physically, professionally, or otherwise – by the BP spill makes sense. No one disputes that. But the process for establishing such a fund is critical. And the President of the United States, no matter who he is or how angry he wants people of this country to believe he is, cannot unilaterally declare the existence of such a fund, no matter how much sense it makes. For practical as well as procedural reasons, the establishment of such a body requires the force of law, and that requires the participation of the legislative branch, in addition to the executive.

And this brings us to one final compensation fund precedent that we have not yet discussed, but that we believe may be the most relevant to BP when all is said and done, and that is the asbestos relief compensation fund.

Haven't heard of that one, you say? Well, you're not alone. Such a fund doesn't exist, though not for lack of trying.

In January, 1993, the relevant parties in the asbestos litigation mess – the plaintiff's bar and the defendant corporations that had used or produced asbestos – petitioned The United States District Court for the Eastern District of Pennsylvania to certify a settlement that would ensure fair payment of compensation to the victims of asbestos while maintaining the viability of the companies involved so as to allow them to continue compensation. The agreement came after

years of negotiations, years of investigation and advice offered by legal panels, including one appointed by the Supreme Court itself, and years of victims bankrupting asbestos companies in tort litigation. The agreement was, in short, carefully crafted, unquestionably necessary, and nearly universally agreed upon by all relevant parties. And it was agreed to out of desperation. As the United States Judicial Conference Ad Hoc Committee on Asbestos Litigation (appointed by the Supreme Court in 1990) put it:

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether."

Now, that same Ad Hoc committee declared that the only real answer to the problem was "a Congressional response." But that response never came. And so the parties took matters into their own hands, much as the White House and BP took matters into their own hands, absent a "Congressional response."

This agreement was ultimately rejected by the United States Supreme Court in 1997, in its ruling on *Amchem v. Windsor*. Not surprisingly, both the majority opinion in the case (authored by Justice Ruth Bader Ginsburg) and a concurring opinion (written by Justice David Souter) virtually begged Congress to take action, given the fact that the courts had no jurisdiction.

Now, the technical justification for the Court's ruling in the Amchem case hinged on the creation of a "settlement only class," which, the Court ruled, violated Rule 23 of the Federal Rules of Civil Procedure. According to the Supreme Court, the judiciary could not create such a class; it required an act of Congress.

Obviously, this specific justification does not apply in this case, since the Obama-negotiated fund does not create a “settlement-only” class. But – if you’ll bear with us here for just a moment – that’s sorta the point.

As the Ad Hoc Committee on Asbestos Litigation noted in its 1990 report, a “settlement-only” class was necessary in order to end distortions of the process and ensure that ALL victims would receive compensation. If victims were allowed to continue to proceed with their cases outside of the class, then their attorneys would continue to prey upon hand-picked juries and would continue to be awarded disproportionate settlements, thereby bankrupting the liable companies. And this, in turn, would prove disastrous for the unlucky victims not yet compensated. The lawyers would get rich; the companies would get knocked around; and the victims would get screwed.

Enter the Obama team and BP. Obviously, the Obama administration knew that it could not create a settlement-only class in this case, given the Supreme Court’s ruling in *Amchem*. Therefore, the way the administration’s plan is set up, anyone who doesn’t want to participate doesn’t have to. Anyone who so chooses may bypass the settlement procedure and either claim damages from the Oil Spill Liability Trust Fund or take his or her case to court. What this means, in turn, is that the lawyers will get rich, the company will get knocked around, and the victims will get screwed.

A great deal of ink has been spilled over the past week or so discussing BP’s liability and the cap on that liability. As the Obama deal is structured, there is no cap. Period. BP’s liability is, quite simply, boundless. Barack Obama has said that he has given BP no assurances that the \$20 billion it has promised will be the sum of its liability. The reason for this, naturally, is because, by law and Supreme Court precedent, such assurances are not his to give. Essentially what Obama has convinced BP to do is to hand over \$20 billion as a gift, a PR stunt.

For its payment, BP receives nothing tangible by way of protection against outrageous court settlements and, therefore, nothing tangible by way of protection from bankruptcy.

In the years immediately following the Supreme Court’s *Amchem* ruling, companies such as Babcock & Wilcox, G-I Holdings, W.R. Grace, and Owens Corning were forced into bankruptcy because of their exposure to asbestos litigation. Others, notably Georgia-Pacific, 3M, and Halliburton, were gravely threatened for the same reason. Without the liability guarantee provided by the *Amchem* settlement-only class, too many of these companies were simply unable to continue. And, not coincidentally, too many of their former employees and other plaintiffs were simply unable to recover damages.

Now, anyone who believes that the bankrupting of BP is not possible is simply not paying attention. As the asbestos precedent clearly demonstrates, it can happen. And it may.

Some on the right (or the far right, if you prefer) believe that this is precisely what the Obama administration wants to happen. If BP is forced into bankruptcy, the federal government will reap the benefits, essentially nationalizing BP America’s assets. Any remaining victims of the spill, of course, will be last on the list of “creditors” with claims against the company. Adding insult to injury, given the fact that the BP fund will be established over time and not with a lump-sum payment, if the company is forced under, even those victims using the Obama-created compensation process may get screwed, depending on the total size of claims and the amount contributed by BP before its hypothetical collapse.

For our part, we tend to think the whole business is nuts. The idea of the Obama administration intentionally setting BP up for collapse strikes as more than a bit paranoid.

But that’s not to say that such an outcome might not be the unintentional result of the actions the administration has undertaken in its half-hearted

and late attempt to save political face here. BP is, essentially, screwed. It is out \$20 billion, and it has nothing whatsoever to show for it. Frankly, if it survives the American torts process, we'll be surprised.

And that, sadly, brings us back to the hapless Joe Barton. The essence of what Barton did with his ill-timed and poorly worded rant was to destroy a valid argument by associating it with sympathy for the country's currently most-hated company.

The compensation fund set up by the Obama administration is a legal mess, to put it mildly. It is a bad idea; it sets a perilous precedent, and it offers nothing by way of reassurances to BP's millions of stockholders or even its tens of thousands of victims. And Barton stepped on this point so hard that there's nothing left of it, save some entrails in the tread of his shoe.

Like we said, Barton is a fool. Unfortunately, he is only one of many.

A FAREWELL TO RAHMBO?

Like many political junkies, we've spent some time over the past few days pondering the potential causes and repercussions of a report, published over the weekend by the *The Telegraph* of London, suggesting that President Obama's omnipresent chief-of-staff, Rahm Emanuel, would be leaving the White House before the end of the year. Rahm is, according to most accounts, the "glue guy," the guy who holds the administration together, if "holding together" is what you'd call what it's been doing lately.

Although the *Telegraph* report is not sourced and sounds a little thin, the idea that Rahm would be on his way out is hardly new or hardly surprising. As Daniel Foster, the news editor for *National Review* noted:

Politicos have been saying Emanuel would leave by the end of 2010 since the beginning of 2010. And remember the spate of profiles and stories about Rahm around the time Obamacare

passed? Most or all suggested Emanuel was tiring of his job — some said it was out of frustration with other senior Obama advisers, while others reported it was a desire to spend more time with his family.

Not to mention, Emanuel admitted to Charlie Rose that he wants to be mayor of Chicago all the way back in April . . .

The Telegraph claims that Rahm is fed up with the "idealism" of Barack Obama's inner circle." NBC in Chicago is reporting that Rahm is in deep in the Rod Blagojevich scandal and therefore needs to distance himself from the President. And, as Foster notes above, others believe simply that Rahm has other, bigger plans.

For our part, we care about why Rahm is leaving only in so far as what it tells us about what effect his leaving will have on the Obama administration. If, for example, Rahm is leaving because he is still loyal to his last presidential boss, Bill Clinton, then that might tip us off to the possibility of Hillary following him out the door and mounting a challenge to Obama for the Democratic presidential nomination in 2012. Such a move would not only be interesting, but would be incredibly helpful to know about before the machinations begin in earnest.

Whatever the case, the "why" of Rahm's departure is far less interesting to us, and far less important in the long run, we believe, than the "so what" of the move. Will Rahm's absence leave Obama further crippled in his relationship with Democrats on Capitol Hill? Already a great many of the administration's biggest and most embarrassing mistakes have been the result of its inability to deal effectively with Speaker of the House Nancy Pelosi, Senate Majority Leader Harry Reid, and others in the Democratic congressional machine, and that's *with* the former Congressman Rahm running the show. With Rahm gone, does anyone doubt that Obama will get rolled even more often and more ruinously by his alleged "friends" on the Hill?

Will the Blago corruption mess creep even closer to Barack himself? Will the media turn even more aggressively on Obama without media darling Rahm around? And of course, what will Bill and Hill do?

All of these and more are pertinent to the question of what will happen when Rahm is gone from the White House. But all of them are entirely speculative and some (e.g. the Bill and Hill business) are pretty far-fetched. Sitting around guessing about what could, might, in theory, possibly happen is a great deal of fun, but it's not all that productive. In general, we don't know any more than anyone else, which is to say our guesses might be interesting, but really, who cares? Moreover, most chiefs-of-staff come and go without anybody noticing, much less caring, and there is no real reason to suspect that Rahm will be any different.

Now, you'll note the disclaimer in the penultimate sentence above, which reads "in general." We inserted that for a reason, namely the fact that there is one likely consequence of Rahm Emanuel's departure that we think will be the exception to both the above-noted rules; one consequence that we are fairly confident in predicting and that we believe will have rather notable consequences.

Let us start with a little bit of background.

Last week, Caroline Glick, the inimitable foreign affairs columnist for *The Jerusalem Post*, wrote a piece arguing that the West – and the Obama administration in particular – had made a conscious decision to abandon its support of Israel in its struggle against Hamas, the consequences of which are likely to be ruinous for Israel. She put it thusly:

Led by US President Barack Obama, the West has cast its lot with Hamas against Israel . . .

The West's decision to side with Hamas against Israel is devastating. But whatever the reasons for it, it is a fact of life. It is Netanyahu's duty to swallow this bitter pill and devise a strategy to protect Israel from their madness.

Glick, whom we admire much, makes some very serious charges in this piece. And to be perfectly honest, our first read didn't convince us that she had much to back-up those charges, other than her instincts. Of course, since those charges tend to jibe with charges that we ourselves have made over the last several months, we were more or less sympathetic to her case, if not entirely convinced.

A couple days after reading Glick, though, we stumbled upon a piece by former New York Mayor Ed Koch, who was far less definitive in his accusations and far less critical of President Obama himself than was Glick, but who was nonetheless equally convinced that the proverbial playing field was shifting under Israel's feet. To wit:

Occasionally, readers say that I write too much regarding the hostility directed toward Israel, particularly by the United Nations. My reply is this: shouldn't I defend Israel when I believe it is being unfairly attacked day after day at the U.N. and throughout the world? Shouldn't I defend Israel when it is undeniably mistreated by the President of the United States, who enlisted me in his campaign in 2008 to campaign for him in Jewish communities in Florida? Shouldn't I defend Israel when I believe much of the anti-Israel invective is actually a manifestation of anti-Semitism, which is rising throughout the world?

I have been disappointed in President Obama's actions towards Israel, and I have also been dismayed by the lengthy acquiescence of members of Congress to Obama's actions, particularly Jewish members of Congress in both the House and Senate. When the members of both House and Senate finally spoke up and voiced their differences with the President – albeit through letters addressed to Secretary of State Hillary Clinton – the President got the message.

In total, 333 House members and 76 senators signed the protest letters. I was surprised by the names of those who did not sign. Key among those missing signatures was that of John Kerry, former presidential candidate of the Democratic party who ran against George W. Bush in 2004 and lost by three million votes.

Clearly, Koch is worried about the shifting sentiments of America's elites – and its liberal elites in particular – toward Israel. He wrote two weekly columns (twice his normal output) decrying Helen Thomas and her blatant anti-Semitism and he is dismayed by Obama's behavior, Hillary Clinton's behavior, and John Kerry's behavior. For an establishment liberal like Koch, all of this has to be very hard to take and even harder to understand. These are the people he knows best and loves most, the people with whom he has long shared a political philosophy and ambition. And yet he senses their inability to see clearly the critical moral issues extant in the Israel-Hamas confrontation. This is important.

While it's true that Koch has had his problems with the Democratic establishment before, among other things campaigning for George W. Bush's re-election in 2004, this time, he claims, things are different in that it's not just him. Other Jews are upset and they are growing ever more leery of Barack Obama. Koch writes:

Senator Obama received 78 percent of the votes of the Jewish community nationwide. The only group giving him a higher percentage was the African-American community. [But] Many Jewish leaders, myself included, have concluded that President Obama has reneged on his support for the security of Israel - a major priority for most American Jews and many Christians - and is shifting American foreign policy to favor the Muslim, and in particular, the Palestinian cause. It should come as no

surprise that in response to a poll taken by Quinnipiac University asking, "Do you approve or disapprove of the way Barack Obama is handling the situation between Israel and the Palestinians?" 67 percent of Jews disapproved and 28 percent approved. That same poll showed support by Democrats for Israel was 46 percent and among Republicans, 70 percent. Did this shock me and many others? You bet.

And this, naturally, brings us back to Rahm Emanuel. As we have written countless times before, Rahm is not only Obama's strongest connection to the old-school Democratic machine, he is also Obama's principal connection to the Jewish Community. Rahm's very presence in the White House has done a great deal to reassure many in the Jewish community, even as the President himself has treated Israel rather poorly. Or, as we put it in the April 6 edition of this newsletter, Obama "trusts virtually the entirety of his presidency to . . . Rahm Emanuel. It would be hard to imagine Obama (or anyone else for that matter) placing that much faith in the son of a member of the Irgun if he truly hated Jews."

Would that reassurance remain without Rahm? Maybe. But there's no guarantee that it would. And, obviously, a great deal of the impact of Rahm's departure on the Jewish community would depend on Obama's actions going forward. If he takes this country's obligations to Israel seriously, then all will be well. If, however, he continues to struggle to conceal his loathing of Netanyahu and his manifest belief that Israel has been the beneficiary of an "imbalanced" American foreign policy for several decades, then Rahm's absence could hurt him with Jewish voters.

We are, we should note, loath to make predictions about shifting allegiances of longtime partisan stakeholders. We have done so in the past – most notably with Jewish and black voters – only to be spectacularly wrong. We thought that black Americans would eventually lose their affinity for the Democrats who clearly take them for granted, and we expected

that the war on terror would compel more Jews to behave like Ed Koch, considering the GOP exclusively on foreign policy grounds. And we were wrong. Face-plantingly, embarrassingly, ridiculously wrong.

Of course, never before has the evidence suggesting the need for a shift in allegiance been more compelling. On matters of importance to Jews and specifically to supporters of Israel, Obama has more than proven his pre-presidency critics right. Indeed, he has been every bit as bad on Israel as even the most hysterical critic could have dreamed.

Three weeks ago, we argued that the future of American-Israeli relations and perhaps the very future of Israel hinges on the Obama administration's response to the current provocations of Israel being directed by the Turks and Iranians. The gist of the argument was that if Obama blinks, Israel is in big trouble.

Allow us to update and amend that argument for domestic political purposes: If Israel is in big trouble, Obama and the Democrats are in big trouble. And if Rahm is gone as well, then it's possible that one of the Democratic Party's oldest and most devoted constituencies will join him in getting as far away from Obama as possible.

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