What Can We Learn from the 2010 BP Oil Spill?: Five Important Corporate Law and Life Lessons

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What Can We Learn from the 2010 BP Oil Spill?: Five Important Corporate Law and Life Lessons

Joseph Karl Grant*

I. INTRODUCTION

The spring and summer of 2010 will live in infamy. To be specific, on April 20, 2010, catastrophe struck when the Deepwater Horizon drilling rig exploded off of the coast of Louisiana.¹ Eleven rig workers were killed in the explosion, and at least seventeen other workers were injured.² The Deepwater Horizon was positioned about fifty miles southeast of Venice, Louisiana, in water nearly 5,000 feet deep.³ Transocean, the Swiss-based owner of the rig, had been leasing it to BP since September 2007.⁴ The earliest estimates indicated that the Deepwater Horizon was leaking about 13,000 gallons of crude oil per hour.⁵ Initially, the cause of the explosion was unknown.⁶ However, early indications that were later confirmed pointed to a malfunction of the rig’s blow-out preventer.⁷ Three inspections of the rig were performed in 2010, including one in the month leading up to the explosion, and no cause for concern was found.⁸

At the time, the Deepwater Horizon explosion had the potential to be “the biggest blowout of an oil and gas well in the Gulf of Mexico in 30 years.”⁹ BP’s Chief Executive Officer (CEO) stated “[w]e are determined to do everything in

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* Associate Professor of Law, Capital University Law School. J.D. 1998, Duke University School of Law; A.B. 1995, Brown University. First and foremost, I thank my parents, Joseph and Hannah Grant, my siblings, Thomas Grant, Joretha Johnson, Elizabeth Grant, and Arleen Van Vijfeijken, and my extended family for their unwavering support and encouragement. I wish to warmly thank Dean Rich Simpson and Associate Dean Rachel Janutis, and Director of Faculty Development, Professor Regina Burch at Capital University Law School for supporting and encouraging my scholarship. I thank all of my colleagues at Capital University School of Law for their constant support and encouragement. Last but not least, I thank the student editors at the McGeorge Law Review for their helpful comments and insight in preparing this Article for publication.

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
8. Robertson, supra note 1.
our power to contain this oil spill...[t]here should be no doubt of our resolve to limit the escape of oil and protect the marine and coastal environments." These were his famous last words. As it turns out, the 2010 BP oil spill in the Gulf of Mexico was the largest oil spill in the history of the United States. It is estimated that the Deepwater Horizon leaked 4.9 million barrels of oil before the oil well was capped on July 15, 2010. Scientists estimate that BP captured only a fifth of the leaking oil—around 800,000 barrels—in its clean-up operation. Additionally, BP used potentially toxic and environmentally harmful dispersants to control the spill, leaving a thick undersea residue.

The BP oil spill was one of the biggest media topics during the spring and summer of 2010. Oil leaked from the damaged well for over 100 days. The oil spill in the Gulf of Mexico was so bad that some were discussing the nuclear option—literally using a nuclear explosion to stop the oil from leaking. While this might seem like a laughable solution now, at the time, some "armchair engineers" were discussing it.

Long before the lapsing of the spill's first anniversary, several books relating to the explosion of the Deepwater Horizon drilling rig had been purchased by publishers, and several more proposals are still circulating today. If the book contracts are any indication, the story of the oil spill riveted the nation. This Article contributes to the literature and scholarship on the BP oil spill in the Gulf of Mexico.

What can be learned from the 2010 BP oil spill in the Gulf of Mexico? As a student of corporate law and governance, and of life in general, my reflections on the monumental events of the spring and summer of 2010, have conveyed five readily discernable lessons:

- **Lesson One:** If you lie, or are perceived to be lying, or if you make an inaccurate statement, people will lose trust in you.
- **Lesson Two:** Persons are not judged based on how they act in times of comfort, but based on how they react in times of crisis.
- **Lesson Three:** The Emperor or King may be toppled.

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10. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
17. *Id.*
Lesson Four: Regulators and the regulated make for strange bedfellows—society must vigilantly guard against regulatory capture.

Lesson Five: Your Big Brother or Big Sister can and will twist your arm when he or she has a chance.

In order to place these lessons in context, this Article draws on quotations to frame the discussion and to provide a framework for thinking and analysis. Hopefully, you will take these and other lessons away from the 2010 BP oil spill in the Gulf of Mexico.

II. LESSON ONE: IF YOU LIE, OR ARE PERCEIVED TO BE LYING, OR IF YOU MAKE AN INACCURATE STATEMENT, PEOPLE WILL loose TRUST IN YOU

Accuracy of statement is one of the first elements of truth; inaccuracy is a near kin to falsehood.

—Tryon Edwards

Honesty is the best policy—when there is money in it.

—Mark Twain

One central question dogged BP throughout the spring and summer of 2010: just how much oil was being released from the Deepwater Horizon oil well? In May 2010, BP estimated that 5,000 barrels of oil were leaking per day.21 By June 2010, BP’s estimates had risen to nearly 19,000 per day.22 Meanwhile, scientists working under the auspices of the U.S. Geological Survey estimated the flow rate from the leaking oil well to be somewhere between 20,000 and 40,000 barrels per day.23 These astonishing new estimates “only [added] to BP’s woes.”24 As Michael Brune, Executive Director of the Sierra Club, noted: “We’re finding out more and more information about the extent of the damage . . . . Clearly we can’t trust BP’s estimates of how much oil is coming out.”25

With the wide swing in the estimates of leaking oil, BP soon lost credibility and integrity with federal and state governments, as well as with the public, on the issue of just how much oil was actually leaking. BP started out with low

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22. Id.
23. Id.
24. Id.
25. Id.
numbers and estimates. However, once faced with pressure from scientists, BP revised its estimates upward. This immediate switch created a credibility gap between BP, policymakers, and the general public.

Growing up, many older members of my family told me that if you lie concerning small matters, people will not believe you when you attempt to tell the truth on bigger matters. Basically, the lesson was that it was not a good practice to lie or tell half-truths. Credibility, honesty, accuracy, and trustworthiness were virtues extolled in my household. As I grow older and navigate through life, I have learned that if you value the trust and confidence of others, you must be accurate and precise in all statements that you make. If not, you risk losing the trust of those around you.

Somewhere along the way, it is clear that those at BP either missed this lesson or never learned it—because in the wake of a disaster, they failed to tell the truth. By failing to seek credible outside estimates of the oil leaking, and clinging to low-ball estimates of leakage and damage, BP did immeasurable damage to its own reputation and credibility. In essence, BP shot itself in the foot. Accuracy is an identical twin of truth, and inaccuracy is an identical twin of falsehood and deceit. Lesson One for both corporations and animate humans is simple: if you lie, or are perceived to be lying, or if you make an inaccurate statement, people will lose trust in you. Unfortunately, BP violated this basic maxim and will continue to pay a price because of it. Yes, humans and corporations will one day learn that one profits more by telling the truth. Mark Twain got it right, especially when we relate his sage wisdom to the modern corporation: “Honesty is the best policy—where there is money involved.”

III. LESSON TWO: PERSONS ARE NOT JUDGED BASED ON HOW THEY ACT IN TIMES OF COMFORT, BUT BASED ON HOW THEY REACT IN TIMES OF CRISIS

Every little thing counts in a crisis.

—Jawaharlal Nehru

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.

—Dr. Martin Luther King, Jr.

26. Quotationsbook.com, Quotes by Mark Twain, supra note 20.
In life, we all face good times and bad times. At times, life can be comfortable, and at other times, it can be turbulent and full of crisis. Often, the times of crisis outweigh the times of comfort. In hindsight, individuals are commonly judged by how they conduct themselves in the times of crisis, challenge, and controversy, rather than in times of comfort. Undoubtedly, from a public image and environmental disaster standpoint, BP faced one of the largest corporate image crises known to humanity. At many turns, BP made a number of missteps and miscues through its public representative, CEO Tony Hayward, which tarnished BP’s reputation for years or perhaps generations to come. Ultimately, as a corporate citizen and for better or for worse, BP will be forever judged by how it managed the oil spill in the Gulf of Mexico during the spring and summer of 2010.

It is always important to get out ahead of a crisis or storm before it takes on biblical proportions. Because BP failed to do so, it will be studied in business and law schools as a model of ineffective corporate crisis management for many years.

In 2007, BP brought in a new CEO, Tony Hayward, to reverse the corporation’s tarnished image after a major oil refinery explosion in Texas in 2005 and a pipeline leak in Alaska in 2006.29 In April 2010, perched in his London office, Tony Hayward posed the following question to BP executives: “What the hell did we do to deserve this?”30 Hayward posited that “[r]eputationally, and in every other way, we will be judged by the quality, intensity, speed and efficacy of our response.”31 Hayward was right.

BP’s reputation will remain tattered and the corporation will take a major financial hit for years to come. “But regardless of the out-of-pocket costs, the long-term damage to BP’s reputation—and possibly, its future prospects for drilling in the Gulf of Mexico—is likely to be far higher, according to industry analysts.”32 BP spent millions of dollars per day to clean up the oil spill. Early on, it was estimated that BP was spending “$6 million a day on fixing the mess . . . .”33 Nonetheless, and “[r]egardless of the final assessment of blame, Wall Street analysts [warn] that everything BP does from now on will come under increased scrutiny by regulators and that potential partners in drilling ventures may well look elsewhere.”34

30. See Krauss, supra note 29.
31. Id.
32. Id.
33. Id.
34. Id.
Financially, we can look at how BP was performing in times of comfort, as compared to times of challenge, crisis, and adversity. Through April 2010, BP remained in a comfortable position as its stock was trading around $60 per share on the New York Stock Exchange. However, as the crisis and challenge of the Gulf oil spill set in by the end of June 2010, BP shares had dropped as low as $26.75 per share, resulting in a more than fifty percent price drop per share. Figure 1, below, illustrates the 52-week price range of BP shares from October 13, 2009 to October 13, 2010.

![BP Stock Chart](http://finance.yahoo.com/q/bc?s=BP&t=ly)

Fig. 1. 52-Week Price Range for BP (October 13, 2009 through October 13, 2010)  

Clearly, in times of comfort Wall Street investors viewed BP as a sound investment. However, as turbulence and crisis set in, investors fled the market and sold their BP shares in droves. For Wall Street investors, BP was not managing the Gulf of Mexico oil spill crisis to their liking. This is evident from the volume spike in the months of June and July 2010, as indicated in Figure 1. The public, policymakers, and investors assess how corporations manage crisis, and they keep scorecards. If a corporation is evaluated poorly by the public, the public may boycott that corporation and refuse to buy its products or services, thereby hurting its bottom-line. Policymakers may scrutinize a corporation more

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35. See BP Common Stock Chart, infra note 37.
36. Id.
38. Id.
closely in crisis, and investors will flee in numbers if it appears that the corporation is poorly managing a crisis. As Jawaharlal Nehru explained: “Every little thing counts in a crisis.”

In the case of BP’s reaction to the Gulf oil spill, Lesson Two is apparent: the true and ultimate measure of a corporation (and a person) is not how it stands in times of comfort, but how it stands and deals with adversity, challenge, controversy, and crisis. On this account, in BP’s worst moment of crisis as a corporation, management failed to act confidently, decisively, and swiftly. I am a firm believer that you can learn one of two things from the people you encounter in life: either what to do or what not to do. Corporations, which are managed and directed by people, can also learn from each other. Wise corporations observing BP’s actions will take away lessons and use them when they are confronted by crisis. Undoubtedly, corporations have a great deal to learn from BP. One lesson in particular that corporate leaders should take from BP’s actions is summed up in the following maxim: Crisis will come—in times of comfort, prepare for crisis.

IV. LESSON THREE: THE EMPEROR OR KING MAY BE TOPPLED

*A king is one who has “few things to desire and many things to fear.”*
—Francis Bacon

*The modern king has become a vermiciform appendix: useless when quiet; when obstructive, in danger of removal.*
—Austin O’Malley

As CEO of BP, Tony Hayward made a number of gaffes in managing the Gulf of Mexico oil spill that ultimately led to his ouster and demise. For starters, on a couple of occasions, Hayward made public statements and comments that were awkward at best and insensitive at worst. In addition to these public statements and comments, Hayward engaged in personal activities that appeared inappropriate for a CEO managing a crisis, arguably threatening the very existence and viability of his corporation. For example, while oil was gushing out of control in the Gulf of Mexico, Hayward was caught on camera off the coast of England watching his yacht compete in one of the world’s largest races. While the American public wanted to see a CEO with his sleeves rolled up in the trenches trying to solve one of the nation’s biggest problems, the American public saw a rich CEO watching his yacht race.

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39. Quotationsbook.com, Quotes by Jawaharlal Nehru, supra note 27.
On one fateful day during the Gulf of Mexico oil spill crisis, Hayward made a statement he probably now regrets. In the midst of the BP oil spill, Hayward famously stated: “I’d like my life back.” Rahm Emanuel, White House Chief of Staff, observed that this statement was “part of a long line of P.R. gaffes and mistakes.” Most would agree that as BP’s visible public representative, Hayward botched and mismanaged its response to the oil spill. This was most evident in his incoherent and evasive responses to questions posed to him by members of Congress. “During his testimony, which stretched over seven hours, Mr. Hayward repeatedly said he was not responsible for the decisions that may have led to the accident and could not comment on its causes.”

Hayward received “lackluster reviews in the United States and Britain for his House performance.” Even if it is possible to forgive Hayward for his response to the crisis, which it is not, Hayward’s public comments, perhaps more than anything else, ultimately sealed his ultimate doom. In essence, Hayward signed his own death warrant when he publicly stated: “I’d like my life back.” From that moment forward, Hayward was a dead man walking—marching off to his own execution and saying a prayer for forgiveness. When Hayward testified before Congress, he further dug his own grave.

Over the last decade, thoughtful legal scholars and commentators have spent a great deal of time thinking about and exploring the dominance of the CEO in corporate law and governance. The ever-dominant CEO can now be dubbed the

43. Id.
44. Id.
47. Id.
"imperial CEO." Nonetheless, some commentators suggest that the pendulum has begun to shift from the dominant "imperial CEO" back to a level of dominance for shareholders. In fact, some legal scholars and commentators now speak about the "imperial shareholder."50 Perhaps, there is a lesson to be gleaned from Tony Hayward’s dismissal from BP.

History can teach us many lessons. As the age-old adage goes, those who don’t learn from history are doomed to repeat it. Modern corporate America can learn many lessons from ancient history. Harkening back to ancient Rome, the emperor reigned supreme. In modern corporate America, the CEO often reigns supreme within the corporate realm. Throughout the last decade, characters like Jeffrey Skilling (Enron), John Rigas (Adelphia), Dennis Kaslowski (Tyco), Bernard Ebbers (WorldCom), and a host of others, reigned supreme at their corporations—much like Roman emperors—just prior to their precipitous fall from grace. The Roman historian Tacitus highlights one brutal fact of being emperor: if one becomes a tyrant or is perceived to be one, or if one offends the sensibilities of elites or the general public, people in that power circle will plot the emperor’s demise and topple him or her from his or her position. In ancient Rome, emperors like Caesar, Tiberius,51 Caligula,52 and Nero53 were literally killed for their direct or perceived indiscretions. Hopefully, in modern America, the public is not so extreme as to ask for the CEO’s blood.

A lesson that can be taken away from Tony Hayward’s toppling at BP is that the CEO is perhaps no longer such a deified emperor, but rather just a human who can be pushed aside when people (especially enough people or influential people) start calling for his or her head. In modern and even in corporate America, no person’s position is certain. If a corporate figure makes what people perceive to be an unforgiveable mistake or misstep, forces will gather to topple and oust that person, even if he or she sits at the top of the organizational chart. In relation to corporate governance and scholarship, there is a huge and fundamental question that forces the public to reevaluate its thinking as it has developed and crystallized in recent years: have the days of the “imperial CEO” truly passed?


52. Unfortunately, Tacitus’ full description of Emperor Caligula’s depraved and unbalanced four-year reign from 37–41 A.D., which ended in his death, has been lost. Id. at 231.

53. Again, unfortunately, Tacitus’ full description of Nero’s death has been lost. We are lead to believe that Nero perhaps took his own life guided by a former slave named Epaphroditus. Id. at 397.
The demise of Tony Hayward forces one to pause and question the imperialism of the CEO’s throne within the corporation. The modern American CEO should have much to fear. At the end of the day, the “imperial CEO” must question the myth and reality surrounding his or her position and very existence within the corporation. Again, the take-away corporate law and life lesson is that no one should grow complacent in any life endeavor because the threat of removal is a constant danger lurking beneath the surface. In modern America, corporate or otherwise, one need not be an emperor to lose his or her stature and status. Tony Hayward likely thinks about this lesson at night.

V. LESSON FOUR: REGULATORS AND THE REGULATED MAKE FOR STRANGE BEDFELLOWS—SOCIETY MUST VIGILANTLY GUARD AGAINST REGULATORY CAPTURE

The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. . . . The part of wisdom is not to destroy the Commission, but to utilize it.

—U.S. Attorney General, Richard Olney, opining upon the Interstate Commerce Commission54

If the government is to tell big business men how to run their business, then don’t you see that big business men have to get closer to the government even than they are now? Don’t you see that they must capture the government, in order not to be restrained too much by it? Must capture the government? They have already captured it.

—President Woodrow Wilson55

“Three years ago, the national laboratory then headed by Steven Chu received the bulk of a $500 million grant from the British oil giant BP to develop alternative energy sources through a new Energy Biosciences Institute.”56 Dr. Steven Chu, President Obama’s current Secretary of Energy, received the grant from BP’s chief scientist at the time, Dr. Steven E. Koonin, “a fellow theoretical

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physicist whom Dr. Chu jocularly described as ‘my twin brother.’”57 In fact, Dr. Koonin followed his “twin brother” to Washington, and now serves as the Under Secretary of Energy for Science.58 “The relationships between Dr. Chu, Dr. Koonin, and BP illustrate the complexity of ties between the company and the government now playing out along the Gulf Coast as [we] struggle to cope with one of the nation’s worst environmental disasters.”59 Government and business sometimes develop “symbiotic business, technical and political interdependencies”60 and relationships. Pentagon and military contractors, for example, have developed such a relationship.61 In connection with the BP oil spill, a relationship has also arisen between the government and big oil interests.62

In this instance, “while there is no evidence that Dr. Chu or Dr. Koonin have represented BP’s viewpoints in internal deliberations or sought to influence administration policy in a way that would benefit BP, the mere fact of their shared history brought expressions of concern from environmentalists and other critics of the White House’s response to the spill.”63 “The fact that Steven Chu selected Steve Koonin, BP’s chief scientist, to be his under secretary could predispose them to think that they could maybe negotiate with BP, could be more like partners regarding the oil cleanup.”64 “It makes it more likely for [Drs. Chu and Koonin] to see BP as a legitimate partner in handling the cleanup operation.”65 In response to the oil spill, “what people are questioning, with good reason, is whether the government has been too soft on BP.”66 “This whole thing just underscores that corporate interests have created, over time, these relationships that give them unfair access to policy makers.”67 President Obama himself has noted the “often cozy relationship between government regulators and oil companies.”68 Although the Department of the Interior had jurisdiction over the BP oil spill,69 Secretary of Energy Dr. Chu was brought in as a sort of consultant “to continue engagement on strategies to stop the oil spill.”70

The Minerals Management Service (“MMS”), within the Department of the Interior, is in charge of regulating and collecting royalties from the oil industry.71

57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Eric Lipton & John M. Broder, Regulators’ Warnings Weren’t Acted On, N.Y. TIMES, May 8, 2010,
More than a decade ago, and again in 2004 and 2009, the MMS warned offshore oil rig operators that they needed to install backup systems to control underwater valves, known as blowout preventers, which are used to cut the flow of oil from a wellhead in case of emergency.\(^2\) The MMS “never took steps to address the issue comprehensively, relying instead on industry assurances that it was on top of the problem . . . .”\(^7\) “Agency records show that from 2001 to 2007, there were 1,443 serious drilling accidents in offshore operations, leading to 41 deaths, 302 injuries and 356 oil spills.”\(^7\) Despite this horrible track record, MMS “continues to allow the industry largely to police itself, saying that the best technical experts work for industry, not for the government.”\(^7\) “Critics say that, then and now, the minerals service has been crippled by this dependence on industry and by a climate of regulatory indulgence.”\(^7\)

Politicians have taken note of this regulatory and industry indulgence. For example, Florida Senator Bill Nelson, a Democrat, noted: “Everything that’s done by the oil industry is done for profit . . . . Throw in the fact that regulators have taken a lax attitude toward overseeing their operations, and you have a recipe for catastrophe.”\(^7\) Representative Darrell Issa of California, the senior Republican on the House Oversight and Government Reform Committee, further observed that “[t]here is a bureaucracy and dysfunctional culture that has to be held accountable.”\(^7\)

In 2009, BP “teamed with other offshore operators to oppose a proposed rule that would have required stricter safety and environmental standards and more frequent inspections.”\(^7\) BP insisted that “‘extensive, prescriptive’ regulations were not needed for offshore drilling, and urged the [MMS] to allow operators to define the steps they would take to ensure safety largely on their own.”\(^7\) “Numerous Congressional and internal investigations have called the [MMS] badly mismanaged and at times corrupt. It has been rocked by regular scandals, including disclosures in 2008 that agency officials took bribes and engaged in drug use and sex with oil industry officials.”\(^7\) As if these allegations were not enough, MMS’s “own scientists have said that senior agency officials in recent years revised staff reports to eliminate environmental concerns that might have

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72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
complicated oil-company drilling applications for offshore sites in waters near Alaska.\(^8\)

Leading up to the BP oil spill, MMS was at best inept and at worst a corrupt agency. Around the world, other governments have been keen on limiting ineptitude among their oil industry watchdogs. "Elsewhere around the world, the trend has been to split up agencies like the [MMS], separating the officials . . . responsible for overseeing natural resource extraction from those who are charged with ensuring . . . safety."\(^83\) "For example, in 2005, Australia followed Britain’s lead and created a separate regulator, the National Offshore Petroleum Safety Authority, which severed these functions after a 1988 oil rig explosion in the North Sea, known as the Piper Alpha accident, that killed 167 people."\(^84\)

David Doig, the British chief executive of an industry-owned nonprofit organization, the Offshore Petroleum Industry Training Organization, observed: "You need to divorce operations monitoring from the integrity monitoring, because operations will always be the one driving behavior . . . They’re motivated by the need to keep things going, and the finances rolling."\(^85\)

The entanglement between the oil industry and government begs just one major question in connection with the BP oil spill and this exploration of the MMS: was regulatory capture partially to blame for the BP oil spill? Regulatory capture occurs when private firms and interest groups, acting in their own private interests, come to dominate, over time, the regulatory agencies responsible for regulating their industries.\(^86\) In essence, the gamekeeper turns poacher, or at least aids and facilitates the poacher.\(^87\)

One thing is certain, regulators and the regulated make for strange bedfellows. Nothing good ever comes from this union. Modern society must be ever vigilant to guard against the symbiotic marriage between regulators and the regulated. Looking at the BP oil spill in hindsight, it is clear that regulatory capture played some role in the tragedy that occurred. The MMS did a terrible job of enforcing the safety concerns that the agency itself raised with the oil industry. The entanglement between BP and the government at other levels is troubling and merits further exploration, leading us to the fourth lesson to be

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82. Id.
83. Id.
84. Id.
85. Id.
87. Id.

Gamekeeper turns poacher or, at least, helps poacher. The theory of regulatory capture was set out by Richard Posner, an economist and lawyer at the University of Chicago, who argued that REGULATION is not about the public interest at all, but is a process, by which interest groups seek to promote their private interest . . . Over time, regulatory agencies come to be dominated by the industries regulated." Most economists are less extreme, arguing that regulation often does good but is always at RISK of being captured by the regulated firms.

Id.
learned from the BP oil spill—society must acknowledge regulatory capture and guard against it. If not, private interests might very well end up trumping and damaging the public’s interest to disastrous effect, as witnessed with the BP oil spill.

VI. LESSON FIVE: YOUR BIG BROTHER OR BIG SISTER CAN AND WILL TWIST YOUR ARM WHEN HE OR SHE HAS A CHANCE

I think it is a tragedy of the first proportion that a private corporation can be subjected to what I would characterize as a shakedown—in this case, a $20 billion shakedown.

—Rep. Joe L. Barton, Texas (R)88

BP should bear the full financial responsibility for the accident.

—Rep. Joe L. Barton, Texas (R)89

Your Big Brother or Big Sister can and will twist your arm when he or she has a chance. Growing up as the youngest of five children in Cleveland, Ohio, I think I am in a unique position to testify to this fact. Especially when my parents were not present, my brother and three sisters had an uncanny ability to latch onto my arm and twist it to remind me that I needed to behave and conduct myself in a more dignified manner. When they (my older brother and three sisters) did so, I immediately came to attention and stopped behaving badly. Arm twisting by my “Big Brother” and “Big Sisters” contributed to the man that I am today. In a metaphorical sense, the federal government’s Chief Executive Officer, President Barack Obama, took the shape of Big Brother or Big Sister in the case of BP. President Obama used the bully pulpit90 that the Presidency affords to exact monetary discipline and order on BP. Political power can be a useful tool in situations like these—the President can and will sometimes twist a few arms. Personally, I would not go as far as Representative Joe Barton in characterizing President Obama’s actions as a “shakedown.”91 I would definitely call it an arm-twisting, and a painful one at that.

In June 2010, after President Obama summoned BP’s top leaders to the White House, BP announced that it would create a $20 billion escrow fund to pay damage claims in the Gulf of Mexico.92 Separately, BP “voluntarily” agreed to

89. Id. Representative Barton made this statement later the same day. Perhaps this is a reversal of course? You decide.
91. See Fighting Words, supra note 88.
establish a $100 million fund to compensate oil rig workers left jobless by the Obama Administration’s deep-water drilling moratorium.\textsuperscript{93} The BP Recovery Fund is administered by Kenneth R. Feinberg, the former administrator of the 9/11 Victims Fund.\textsuperscript{94} It took four intense days of negotiations for BP and the White House to establish the Recovery Fund.\textsuperscript{95} “Under the famous portrait of a charging Theodore Roosevelt on horseback, administration and company officials haggled over the last details in an extraordinary White House meeting that went more than four hours, double the time scheduled, and was punctuated by breaks as each side huddled separately.”\textsuperscript{96} Finally, President Obama “sealed the deal in a private, 25-minute session with BP’s chairman, Carl-Henric Svanberg.”\textsuperscript{97}

The BP Recovery Fund “will be created over four years, at $5 billion a year.”\textsuperscript{98} “It is backed by the collateral of $20 billion in company assets in the United States.”\textsuperscript{99} BP indicated that it intended to “raise money by reducing spending programs and selling $10 billion in assets . . . .”\textsuperscript{100} In 2009, BP generated $17 billion in profits.\textsuperscript{101} One should not forget that in the midst of this crisis, BP faced ire and outrage over its intended plan to pay $10.5 billion in dividends to shareholders.\textsuperscript{102} “The escrow agreement was hailed in Congress. . . . Senator John McCain, Republican of Arizona, typically one of Mr. Obama’s most vocal critics, called it a ‘step in the right direction.’”\textsuperscript{103} As would soon become apparent, not all members of Congress appreciated President Obama’s efforts to establish the BP Recovery Fund.\textsuperscript{104} Some, particularly Rep. Joe Barton, Republican from Texas, vocally described President Obama’s actions as a “shakedown.”\textsuperscript{105}

Shakedown or arm-twisting, President Obama used his political capital to exert pressure on BP to bring about a just and equitable result in compensating residents of the Gulf region. Undoubtedly, President Obama used his bully pulpit to figuratively twist BP’s arm to force the company to do the right thing. President Obama’s actions as a representative of the federal government exhibited that the government—taking the form and shape of Big Brother or Big

93. Id.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. See Fighting Words, supra note 87.
105. Id.
Sister—can and will occasionally twist arms and force corporate actors to act responsibly and with a social consciousness where necessary. Again, we are reminded that political leaders have a great deal of power and authority to shape and mold corporate behavior to benefit the public good, and to advance collective goals and objectives—preservation of the environment certainly benefits us all. President Obama’s actions and negotiations with BP remind us of this fact. The takeaway lesson we can learn from the BP oil spill is that Big Brother or Big Sister—in the manifestation of government—can and will twist your arm when you get out of line just like my older siblings did when I was growing up. BP learned this lesson all too well in 2010.

VII. CONCLUSION

As a corporate law professor, I spend a great deal of my time studying and learning about the modern corporation and its role and place in American society. There are times when corporate law and governance intersect with life. I love and savor these moments. As this Article has demonstrated, from the 2010 BP oil spill in the Gulf of Mexico we have many lessons to learn and apply to our own lives. Yes, we can and do learn from the actions of corporations and their actors (directors, officers, and agents). From the BP oil spill I gleaned five (5) basic lessons. Allow me a moment to summarize and recap these lessons or maxims. First, if you lie, or are perceived to be lying, or make an inaccurate statement people will lose trust in you. Second, we are not judged based on how we act in times of comfort, but based on how we react in times of crisis. Third, the Emperor or King may be toppled. Fourth, regulators and the regulated make for strange bedfellows—we must vigilantly guard against regulatory capture. Fifth, and finally, your Big Brother or Big Sister can and will twist your arm when he or she has a chance. Hopefully, these and other lessons you have gleaned from the 2010 BP oil spill in the Gulf of Mexico will connect and resonate in your personal lives, and how you perceive and intellectually think about the role of corporations in our modern society.