The Role of Lawyers for Recovery from Disasters

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Introduction

Masayuki Murayama[ψ]

On March 11, 2017, six years after East Japan Disaster, we held a symposium to look back upon the role of lawyers in recovering from the disasters caused by the big earthquakes, followed by the tsunamis and nuclear plant accidents. At the symposium, we invited two U.S. lawyers and three Japanese lawyers to talk about their experiences in helping victims recover from disasters.

Retrospectively, the institutionalized means for nuclear damage compensation worked mostly as initially designed. The Nuclear Damages Compensation Act (Law No.147 of 1961) provides that the Nuclear Damages Compensation Review Commission (NDCRC) would be set up by the Ministry of Education and Science[1] when damages are caused by a nuclear accident and that the Commission would decide guidelines for damage compensation. The Act also provides that the Commission may organize an ADR center for settlements on disputes between a nuclear plant operator and victims of a nuclear accident. Clearly the Act provides with a settlement procedure to pay damages measured by the guidelines which are to be made by the administrative commission.

But it was not legally required nor institutionally inevitable to follow the settlement procedure, as the Act did not require victims to follow the procedure. The Japanese people have the Constitutional right to go to the court for litigation, and all the guidelines for settlement would not have binding effects upon victims. Yet what happened after the accident virtually followed the institutional scheme for settlement.

We consider that the procedure provided by the Act is based on the old idea of the pre-Justice System Reform years, as it is a one-sided procedure which the executive branch responsible for the nuclear plant manages the whole process of compensation. When the TEPCO

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ψ I would like to thank Reilly Morse and John Jopling for helping us understand differences in lawyers' work between Japan and the U.S., including their presentations at the symposium. The symposium is a part of our research activities funded by Grant-in-Aid for Scientific Research B2433005.

1 The official name of the Ministry is Ministry of Education, Culture, Sports, Science and Technology (MEXT).

nuclear accident occurred, we thought that the nuclear damage compensation would bring opportunities for lawyers to get involved in compensation issues widely among victims of the accident. But we were right only marginally, as the executive branch, not the judicial branch, controlled the whole process.

After the TEPCO accident occurred in March 2011, the NDCRC issued their guidelines by August 2011 and the government created the Nuclear Damage Compensation Facilitation Corporation (NDCFC, later changed to the Nuclear Damage Compensation and Decommissioning Facilitation Corporation, NDCDFC, as decommissioning was added to the task in August 2014) under the Ministry of Economy, Trade and Industry (METI)[2] to let TEPCO pay damages to accident victims in September 2011. The Corporation would lend money to TEPCO in exchange with assets of TEPCO. Therefore, within a year the Corporation became the virtual owner of TEPCO. But in this way, the damage payment procedure was straightened out, and TEPCO began to pay to victims who applied for payment with formats made by TEPCO.[3]

It was only natural that victims voiced objections to the one-sided procedure. The MEXT set up the Nuclear Damage Compensation Dispute Resolution Center (Nuclear ADR Center) and began to accept complaints about nuclear damages to be paid by TEPCO. The Nuclear ADR Center consisted of Executive Commissioners, Mediators, Investigators and supporting administrative officers. The Supreme Court did not set up any special division for nuclear compensation litigation at the Tokyo or Fukushima District Court, but sent a High Court judge to serve as Chair of the Executive Commission at the Nuclear ADR Center. All the Mediators and Investigators have been lawyers employed by MEXT as part-time officials. Although the Executive Commissioners tried to expand the scope of the guidelines, the Nuclear ADR Center worked to settle disputes generally relying upon the guidelines.

In this way, the official machinery for payment by TEPCO and dispute settlement by the Nuclear ADR was formed by the fall of 2011, but legal representation for victims was slow to come. In fact individual Tokyo lawyers[4] began to visit shelters for helping evacuees in Fukushima in summer and a group of Tokyo lawyers (Genpatsujiko Hisaisha Shien Bengodan [Representation Group to Support Nuclear Plant Accident Victims] was organized to represent victims individually and in group in August 2011 and similar yet smaller groups of lawyers were also organized in Tokyo and other prefectures, but lawyers could not coordinate their efforts effectively.

There were, roughly speaking, two kinds of lawyers' groups, the first and majority of which sought to increase amounts of damages by settlement through the nuclear ADR, as they believed that litigation would take too much time for victims to wait. Their strategy was to fist settle to get damages based on the guidelines and then sue for damages not recognized by the guidelines.[5] The other groups sought to sue TEPCO from the beginning. But whichever strategy

2 NDCDFC is under the joint jurisdiction of the Cabinet Ministry, MEXT and METI.

3 Formats for claim had many versions, depending upon whether an applicant was an individual resident or a business owner and in what industry an applicant worked. Items and amounts of damages were mostly based on the guidelines.

4 As the lawyer population has been heavily concentrated in Tokyo and lawyers in Fukushima were themselves victims of the disasters, most lawyers who worked to help victims came from the Tokyo metropolitan area, which included not only Tokyo but also Saitama, Kanagawa and other Prefectures.

5 This strategy is possible since TEPCO was forced not to get release in exchange of damage payment. This

one chose, it was extremely difficult for Tokyo lawyers to represent victims in Fukushima, while there were not many lawyers practicing in Fukushima Prefecture.[6] Therefore, it was necessary to set up local centers where lawyers would coordinate their activities. There were two possibilities of setting up such centers: either by the Japan Federation of Bar Associations (JFBA) or the Japan Legal Support Center (JLSC).[7] But both failed to persuade Fukushima Bar Association which tried to keep the "invasion" of lawyers from outside as little as possible.

When we look at the U.S. situation after the BP accident, the Mississippi Center for Justice (MCJ) played the role as a local center to coordinate various restoration efforts, including claiming damages. The MCJ has 24 members, 11 of whom are lawyers. These people work at two offices in Jackson and Biloxi in Mississippi. When the Hurricane Catarina and BP disasters occurred, the MCJ already existed there and was widely trusted for their activities.[8] Unfortunately, there was not such an office in Fukushima. The JLSC office had only two lawyers at the Fukushima City office at the time of the accident and reduced them to one next year. The JFBA had established a public interest office but with only one lawyer at that time. The infrastructure for lawyers to represent individuals or small business entities was weak and insufficient in Fukushima. And there was little political impetus inside or outside of the legal profession strong enough to reinforce and expand the infrastructure effectively.

The weakness might come from the small population of lawyers. But it could be more than that. When TEPCO began to pay damages to victims, NDCFC, the Corporation to lend money to TEPCO, began to provide free legal advice to evacuees. The Fukushima office of NDCFC took lawyers to shelters every weekend for legal consultation with residents at shelters. This legal consultation was given for accepting TEPCO's payment or settling disputes at the Nuclear ADR Center, but never for litigation against TEPCO. Yet, ironically, NDCFC provided evacuees with the best organized and most efficient legal consultation.[9] This is mostly a matter of logistics, that is, how to organize activities of legal advice. Some lawyers said that their activities were organized well as the Corporation was under the jurisdiction of METI, the powerful Ministry. In contrast, JLSC has been under the jurisdiction of the Ministry of Justice (MOJ). Both activities are financed by tax. But MOJ could not coordinate lawyers' activities effectively, only making legal advice at JLSC offices free in East Japan.[10]

Finally, the most conspicuous difference between the Japanese and U.S. case is found in the role of the court. In the U.S., a large number of law suits were consolidated into a class

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group of lawyers now began to sue TEPCO for additional damages.

6 There were 153 lawyers registered at Fukushima Bar Association, but most of the lawyers practiced in the central area of Fukushima Prefecture, particularly in Fukushima City and Koriyama City, while there were not many lawyers practicing in the Coastal Area where the TEPCO nuclear plants located.

7 The JLSC was created in 2006 to provide civil and criminal legal aid. It established 50 local offices nationwide, employing lawyers as their staff lawyers.

8 This was why Feinberg chose MCJ as one of the local centers for his settlement payment. Kenneth R. Finberg, *Who gets What: Fair Compensation after Tragedy and Financial Upheaval*, Public Affairs, 2012, p. 162

9 This is based on my observation of legal advice sessions provided by the Corporation. Lawyers in Fukushima Prefecture and also in the largest representation group of Tokyo lawyers shared my view on their activities.

10 Even before East Japan Disaster, JLSC had faced resistance from local lawyers in establishing their offices and extending their activities. Here we cannot go into further, but the problem resulted from political, economic and social causes.

action and the settlement in the class action was supervised by the court both in the process of deciding on criteria for damages and in the process of payment. But in Japan, most payments have been done without legal consultation and, if victims have complained, ADR has been used for settlement based upon the guidelines decided by the administrative commission, except scattered litigation cases. How TEPCO's compensation has been paid is as follows:

TEPCO paid three trillion Yen (three hundred billion US dollars [100 Yen = US$1]) to about one million individual evacuee cases, 354 billion Yen (3.5 billion US dollars) to 1.3 million voluntary evacuee cases, and four trillion Yen (four hundred billion US dollars) to 0.4 million business entity cases, in total, having paid 7.5 trillion Yen (7 hundred fifty billion US dollars) to more than 2.6 million cases.

On the other hand, the Nuclear ADR Center worked successfully to settle 17,591 cases. By January 12, 2018, the Nuclear ADR accepted 23,248 cases, 21,462 of which it disposed, while 1,786 cases of them are still in the process of mediation. Among 21,462 completed cases, 17, 591 cases have been settled for payment, while 2,193 case withdrawn, 1,677 cases failed for mediation, one case dismissed. A case for the Nuclear ADR can be a collective case that contains dozens or a hundred of individual cases.[11] In 2014 and 2015, one case included, on average, 5.7 individuals as claimants, while in 2016, 3.4 individuals. [12] If we assume that the average ratio for claims, 5.7, can be applied to settled cases throughout the period, the Nuclear ADR would have settled 0.1 million cases paid by TEPCO. This would be only 4% of all the cases TEPCO paid for. If these cases of 4% had been paid by court judgments, those judgments could have become official criteria by which subsequent amount of damages could have been measured. But these payments were made in individual settlements. Although Executive Commissioners of the Nuclear ADR Center tried to make their settlement proposals as criteria for later settlements by publishing their decisions, to what extent those decisions had the force of precedents has not been clear.

It must be also noted that not all the complaints filed to the Nuclear ADR Center have not been represented by lawyers. Initially the percentage of the represented cases for ADR was around 20% in 212, but it increased to be about 40%, including collective cases. That would mean that less than 2% of all the cases TEPCO paid for were represented by lawyers. It is clear from these numbers that the overwhelming majority of the nuclear accident victims simply received what TEPCO considered appropriate.

The Justice System Reform Council declared in its final report in 2001 that the rule of law should prevail in every corner of the Japanese society. But our experience shows that the aspiration is far from reality. The experience of the MCJ presents us a contrasting picture of lawyers' work. Japan and the U.S. have different legal traditions and it would be unreasonable simply to assume that Japan should follow the U.S. But the role that the MCJ played in the process of recovery from disasters from Hurricane Katrina and the BP oil spill may give us suggestions to think about how we could improve our institutions to cope with next disasters.

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11 There is no class action nor any special procedure for a collective case that includes many claimants. A collective case means that there are many claimants whose causes of claims are more or less similar.

12 Nuclear ADR Center, "Genshiryoku SongaiBaisho Hunso Kaiketsu Senta Katsudo Jokyo Hokokusho [Report of the Nuclear ADR Center on Its Activities]", February 2015, p.5; March 2016, p. 5; March 2017, p.6.

The Role of Lawyers after Natural Disaster

Reilly Morse

Thank you for the opportunity to speak to you about this important topic. I am honored to be joined by my colleague John Jopling for this symposium. Please let us convey our deepest sympathy for all the victims of the earthquake, the tsunami and the nuclear accident. The scale and intensity of these disasters are extraordinary and pose impossible challenges for any legal system in any country to adequately deliver justice. We hope that some of what we share with you will be of assistance. Our experience having helped thousands of victims of the worst natural disaster and worst oil spill in US history makes us aware of just how difficult it is to deliver legal support to those in Japan. The disasters are more intense here and pose more severe health risks than what we have experienced. In addition, there are important differences in the social culture and the legal systems between the United States and Japan. We are aware that some of what we describe may not be a natural fit for Japanese society or the Japanese legal system. We express our respect for your efforts and our hope that some of what we offer will help you help those in greatest need in your nation.

Let me begin with a basic point. In the United States, there are many layers of lawyers. Lawyers represent and advise government, also referred to as the public sector, at all levels at taxpayer expense. Lawyers represent private persons, businesses, and organizations who pay for their services. And lawyers also represent people and organizations who cannot afford lawyers. Here we speak of lawyers in legal aid programs similar to the Japan Legal Support Center. In the US, there is federal taxpayer funding for civil legal aid to support offices across the nation. There also are privately funded public interest law organizations, some national, some statewide or local. These groups actively seek support from private philanthropy. This is the category occupied by our organization, Mississippi Center for Justice. Finally, there are volunteer programs at law firms, bar associations, and law schools.

After a disaster, there are various kinds of interaction and interplay between public sector attorneys, private attorneys and attorneys who provide free legal support. For example, a legal service lawyer may know of an obscure state law that enables a state Governor to declare a moratorium on home foreclosures during a disaster. That lawyer passes the word to the state attorney general, who shares it with the Governor's legal team, and then the Governor may decide to exercise this authority. Private lawyers after a disaster receive many calls about cases where the value of the case is too small for them to earn a fee, and so they may refer those cases to Legal Services or Public Interest lawyers. This can happen the other way around, too. Legal aid lawyers can recognize that the client has a paying case and should talk to a private lawyer. Lawyers on legislative staffs may turn to public sector or public interest lawyers to hear how to improve disaster recovery. This can include inviting them to testify, to draft recommendations, or to submit proposed questions to ask in a committee. Law firms or law schools may volunteer to work with Legal Services or Public Interest lawyers to assist disaster victims or advocate for improvements.

Disaster typically produces severe shocks throughout society, the legal system, the economy, and individual lives. Where there is a shock, there usually is a disruption, a breaking

up of ways of thinking, and this can cause the mind to revert to a blank state and be susceptible to new ways of thinking or behavior. Some in the US view shock as an opportunity to force unpopular or unfamiliar change. This idea was expressed by the Chicago School economist Milton Friedman who said. "Only a crisis – actual or perceived – produces real change. When that crisis occurs, the actions that are taken depend upon the ideas that are lying around. That, I believe, is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes the politically inevitable." This idea has generated considerable public debate and a critique of this approach to disaster is found in the book, "The Shock Doctrine," by Naomi Klein. She points out that following a disaster, we see concentration of power in the executive branch. Emergency powers are exercised to accelerate and streamline decision making and response. Disaster often involves the augmentation or replacement of local law enforcement by the military and temporary periods of martial law with curfews. The Shock Doctrine warns that the conditions of emergency make it easier for leaders to weaken or privatize traditional government institutions and to change their direction permanently.

What the role of lawyers will be in response to a natural disaster is shaped in part by what role the government takes on to enable people to recover from disaster. Up until the 1970s, the American response was largely left to the states. People looked to personal resources or insurance. Occasionally there might be a state program. There was no direct federal compensation or support, despite the US having suffered some very costly large scale losses, such as the Chicago fire, the San Francisco earthquake, the Galveston hurricane, and the Mississippi River Flood. The Three Mile Island nuclear accident dramatized the need for better federal planning and coordination. President Carter consolidated disaster response into a single agency, Federal Emergency Management Agency, FEMA, and later Congress passed the Stafford Act to authorize and fund emergency public and private assistance.

Let me next outline the basic pattern of modern US federal disaster response. First, as soon as possible, the State will issue a disaster declaration and submit damage estimates and budget requests to FEMA. FEMA evaluates the requests to see if the disaster reaches a threshold to trigger support under the Stafford Act. If so, then FEMA will mobilize and begin to set up systems to provide individual and public assistance. The Stafford Act limits the scope, the amount, and the duration of assistance. For individuals, assistance can be in the form of cash, vouchers, or direct housing, such as FEMA trailers. For public bodies, like state and local government, the assistance is cash or loans.

Over the past thirty years, the US Congress also has responded on a case by case basis by sending disaster relief funds to the affected areas through Community Development Block Grants, or CDBG. Congress will appropriate funds to be administered by a federal agency, usually the Department of Housing and Urban Development (HUD). States submit damage estimates and a budget to HUD, who evaluates the requests and divides the money. States then submit action plans for approval by HUD, and invite public comment. HUD then acts to approve, deny, or modify the request. The state then implements its action plan, to offer homeowners compensation, construct a water system, or repair public housing. The state submits periodic financial reports and HUD monitors progress towards goals.

CDBG has been used for natural disasters and losses from terrorist attacks. Congress has been generous, but as the US has faced budget challenges and increasing fiscal conservatism,

there have been calls to scale back federal disaster response. For example, in 2012, there was a severe storm that struck the New York and New Jersey area, known as Superstorm Sandy. Fiscal conservatives resisted calls to appropriate federal funds for disaster recovery and this had political consequences. Ultimately about $10.5 billion was sent to the area to enable recovery from this disaster.

Decisions on disaster recovery in the US can become complicated as states compete for recovery dollars. For example, after Katrina, Congress initially appropriated $11.5 billion to be divided among 4 states. Louisiana had 300% more damage than Mississippi. But Mississippi's Governor was a former lobbyist and high ranking official of the party in power in the White House and Congress at the time of the disaster. So, a line was written into the appropriation that ensured that no state would receive more than 54% of the first appropriation. As a result, Louisiana received $6.5 billion and Mississippi received $5 billion out of this first allocation. In other words, Louisiana received only 30% more than Mississippi although it had 300% more damage. It took several more appropriations before Louisiana was funded close to the level it needed.

When thinking about how Congress capped a state's share of the initial appropriation at 54 percent, recall the words of Milton Friedman that the actions that are taken depend upon the ideas that are lying around. There is nothing inherently logical about a 54% cap. Someone on behalf of Mississippi, probably a lawyer, had this idea and brought it to the Congressional appropriators, who also probably were lawyers. This sentence put Mississippi at a major advantage over Louisiana in the early days of the disaster. In my personal opinion, it is not healthy for our states to have attempted to outmaneuver each other for federal treasury dollars in this way over badly needed humanitarian aid. And, to be clear, Mississippi was not the only one with sharp elbows. Louisiana's first proposal, floated months before this law passed, sought $125 billion for itself alone.

The legal needs following Hurricane Katrina came in waves. For the first several years there were spikes of evictions, first from private landlords, then from FEMA, which was under time and budget limits for temporary housing. There was a large early need to assist people with claims for temporary benefits, meaning cash assistance to individuals. Over several years, there was a sustained advocacy push to ensure an adequate supply of affordable housing and to prevent housing discrimination based on race, disability, and other grounds. This included persuading state and federal officials, writing reports, doing Congressional testimony, lawsuits, and engaging the media to report on the problems. Once homeowner grant programs were established, people needed legal help in applying for grants and proving they had title, or ownership, of the property. As the money arrived, so did unscrupulous contractors and so people needed lawyers to sue contractors who stole money or performed substandard work. Toward the end, people needed lawyers to help address their concerns that large economic development and infrastructure projects were hurting them and not delivering the benefits that were promised.

To meet these needs, lawyers were needed to do individual cases, or what we describe as direct service. Lawyers also brought impact cases, such as class actions on behalf of large groups of individuals with similar claims against one or more defendants. Impact cases also could be brought by an individual or organization to test the interpretation or validity of a federal or state action. Lawyers also participated in public advocacy, which means explaining

the legal duties owed to the public and what must be done to ensure that government or business complies with those duties. It is an effort to get decision makers to follow a particular course of action through public engagement. Public advocacy can take the form of testimony before Congress or legislatures, providing legal support in demonstrations or protests, and explaining legal aspects of public policy problems to the media.

To understand how MCJ did some of its public advocacy, it is necessary to know a little more about the structure and conditions of federal disaster aid. The long term assistance funded by CDBG requires that the funds spent achieve one or more national objectives. They must be used to (1) benefit persons of low and moderate income (2) remedy blighted urban conditions or (3) aid in any urgent public need. Many details spell out what does and does not count toward these objectives. HUD could waive some requirements but not all: the non-waivable ones included compliance with fair housing, federal wage and hour requirements, specific environmental protections, and federal labor standards. Finally, the state had to periodically report on progress towards goals and spending processes. Each of these afforded accountability opportunities.

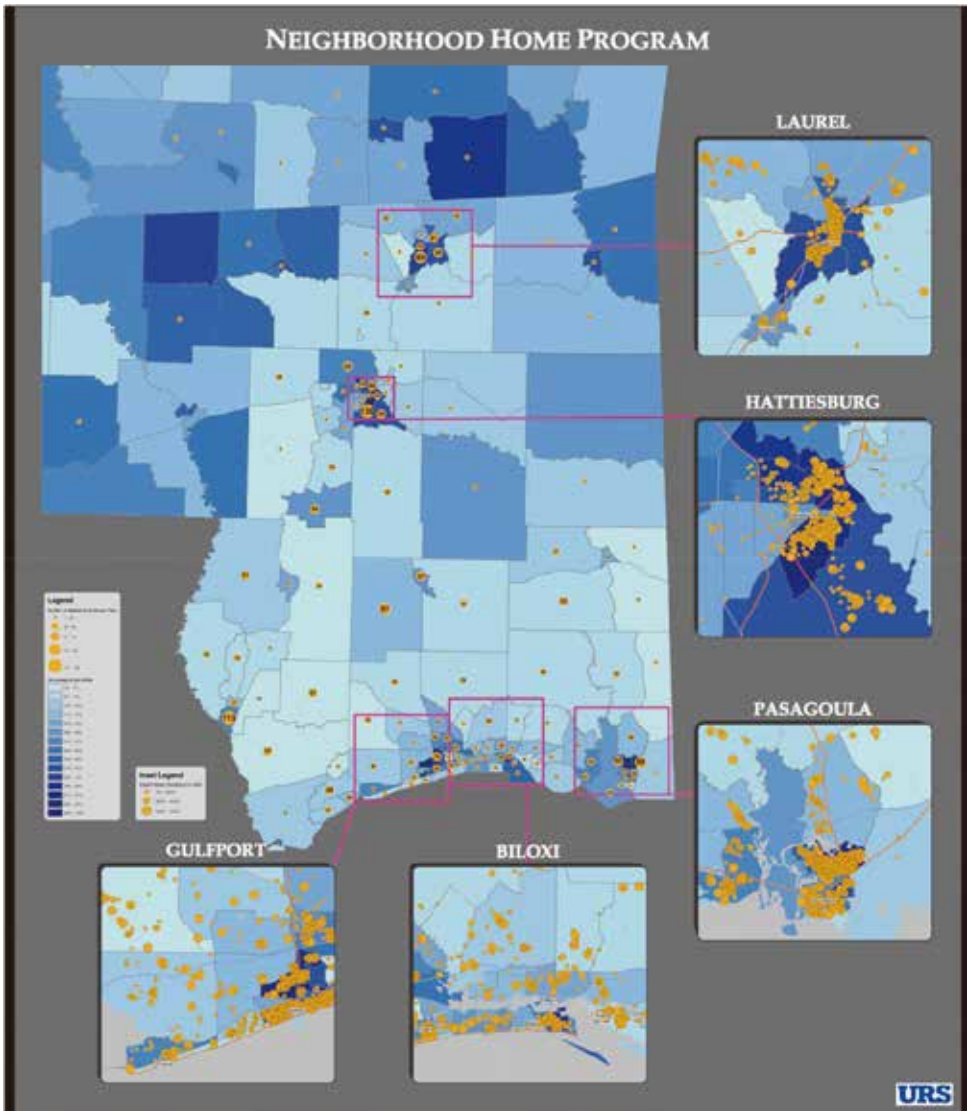
An example of advocacy that MCJ undertook concerns Mississippi's effort to get HUD to waive the national objective to all of its funds in ways that primarily benefit persons of low and moderate income. If the state had succeeded in doing so, then there would have been no duty to ensure that those with the least earning or borrowing power and with the fewest personal resources would receive priority assistance in restoring their homes. We opposed this effort in reports, Congressional testimony, and in the media and HUD ultimately refused to grant Mississippi's request to waive this requirement as to all of its grant money. But, HUD did waive the requirement for the first, most generous housing grant programs, which I will describe next.

To briefly recap the disaster housing programs, there were homeowner assistance programs called HAP that directly compensated individuals whose homes were damaged by the hurricane's storm surge. There also were grants to enable the homes to be elevated above the height of the storm surge. There was funding for public housing for very low income people, subsidized housing for tenants and low-income workers, and a modular housing program as a long-term alternative to the FEMA trailers, which emitted harmful formaldehyde fumes. Finally, toward the end there was an unmet needs program known as the Neighborhood Home Program, NHP. I will tell you more about this shortly. Overall, almost 40,000 households received direct assistance through one or more of these programs.

HUD specified in the original rules that the funds were to be used "Toward meeting unmet housing needs in areas of concentrated distress." "Unmet housing needs" is defined to include but not be limited to those of **uninsured** homeowners whose homes had major or severe damage."

But the first and most generous phase of the HAP specified that in order to be eligible, the homeowner must have maintained homeowner's insurance on the property. And, the State of Mississippi asked HUD to waive the requirement that 50% of the funds spent under this program benefit persons of low and moderate income. MCJ opposed both of these efforts over a long period of time. HUD approved these requirements but also required the state to set up a second phase of HAP that targeted low income residents and did not require insurance. The second phase offered less generous benefits and MCJ advocated to increase the cap from $50,000 to $100,000, and the state agreed.

For years Mississippi also refused to assist wind damaged homeowners. After a lawsuit and extensive negotiations, MCJ reached an agreement with HUD and Mississippi to create the Neighborhood Home Program that added 5,100 households to the total of homes repaired after Katrina. The total cost for this additional work was over $200 million.



In this map of southern Mississippi, the darker the blue, the higher the number of African American residents. The orange circles are homes repaired. The size of the circle indicates whether a small or large number of homes were repaired in the area. Our case claimed that the state's programs were set up in a way that had a discriminatory effect upon minority communities. The map shows the completed repairs and confirms our claim that there were large concentrations of unmet need in communities of color in our state.

Disaster recovery funds also were used for infrastructure and economic development. One large infrastructure project was over $550 million for an inland water and wastewater

facility. The rationale was that people would move inland into rural areas to avoid exposure to future storm surges. The forecasts of population shift proved to be incorrect and this facility has not seen the large participation used to justify the investment.

A variety of economic development projects were funded, including the dramatic expansion of a $125 million state owned port in Gulfport that largely depended upon banana imports. Forecasts of dramatic increases in cargo after the Panama Canal expansion were used to justify a $600 million investment in this port. MCJ represented clients who demanded that the national objective must be met to create jobs at this port that primarily benefited persons of low and moderate income. This project still is in progress but it has downsized, reduced its forecasts of job creation and struggled with corroboration of its jobs numbers. As a result of MCJ's work, state leaders changed the management of the state port and HUD imposed stronger reporting and inspection requirements.

In conclusion, MCJ has learned that lawyers using the courts are an important way to ensure justice for our clients, but it is not the only way to participate in the disaster recovery process. We found that combining direct service work with impact work and advocacy was powerful. We greatly benefitted from collaboration with pro bono support from law firms and law students and from national advocacy groups. We learned that it is essential to use the media to tell the story of our clients. We also learned that it is possible for public interest groups to do effective watchdog and oversight work. All this was possible thanks to enormous contributions from others in the legal profession who saw volunteerism as a core ethical responsibility of their profession. We are very grateful to all who assisted us.

Recovering from the Deepwater Horizon Oil Drilling Disaster: The Role of Law and Lawyers

John Jopling

Thank you for the opportunity to come to your country to join in this conversation about the role of the law and the legal profession in the aftermath of a major disaster. I would like to extend my special gratitude to Professor Masayuki Murayama and Meiji University for the support provided to make this participation possible. I would also like to echo the remarks of Reilly Morse in conveying our deep sympathy for your extraordinary losses due to disaster and our respect for the challenges that sudden and unforeseen disasters have created for your nation and the legal profession. I would also like to be very clear regarding the basis of my contribution today. I am a practicing attorney at the MS Center for Justice, a non-profit, public-interest law firm with the very specific mission of promoting racial and economic justice. I am not a legal scholar and everything that I share with you today is based upon 1) the very specific experience I had as the administrator of a regional consortium composed of sixteen lawyers in four states who handled claims for individuals damaged by the BP oil disaster from 2011 to the present; 2) my experience as an advocate in the various natural resources and environmental recovery decision-making processes.

When the BP oil drilling disaster occurred in April of 2010, it was in the first instance a

human tragedy for the families of the 11 workers killed by the explosion. As the weeks and months dragged on while BP formulated a response strategy, mobilized and positioned response crews and attempted without success on multiple occasions to seal off the leaking well, the disaster grew into the worst environmental catastrophe in U. S. history.

Approximately 200 million gallons of crude oil were discharged into the Gulf of Mexico, resulting in the closure of Federal and State waters for most of the summer of 2010, creating large-scale economic consequences to the gulf seafood harvesting industry. During this period, oil appeared along the shorelines of Texas, Louisiana, Mississippi, Alabama and Florida, disrupting the region's tourism and hospitality industry.

Let us turn to the role that the law played in shaping the recovery from the oil disaster. Perhaps the first point to be emphasized is that a basic legal framework of rights and responsibilities had already been developed and adopted by the U.S. Congress and that was the Oil Pollution Act of 1990.[13] The Oil Pollution Act of 1990 was a direct response to the Exon-Valdez oil drilling disaster that took place off the coast of Alaska in 1989. Prior to the adoption of the Oil Pollution Act, any claim by an individual – whether economic or medical – required the claimant to establish all of the traditional elements of a tort claim: duty, breach, causation and damages. Every American law student studying Torts knows that analyzing a case begins with the question "Is there a duty?" and, if so "To whom is the duty owed." The Oil Pollution Act created an express statutory duty on the part of any party responsible "for a vessel or a facility from which oil is discharged." Moreover, the Oil Pollution Act defined the scope of the duty in the broadest of terms, such that damages included the following forms of economic damages: natural resources (recoverable by Federal, State, Tribal or foreign government); real or personal property (recoverable by owner or lessee); subsistence use of natural resources (recoverable by any individual who uses such resources without regard to ownership); revenues (recoverable by Federal, State and Local governments); lost profits or impaired earning capacity (recoverable by anyone). The significance of legislation establishing a duty upon the oil drilling industry to avoid discharging oil into or upon navigable waters or adjoining shorelines cannot be overstated: violation becomes negligence per se. The Act further provided for the establishment of a fund for the payment of claims and also provided for the partial or interim payment of claims prior to final payment. It is also important to note that the Act provided the broad outline of a process for measuring environmental damages, known as natural resources damage assessment, and assigned responsibility for the cost of restoration to the responsible party. This feature will be discussed further when I talk about environmental restoration. The point for present purposes is to highlight the fact that it was the Oil Pollution Act that enabled the early establishment in August 2010 of a claims process for individuals affected by the BP oil disaster.

In the Spring of 2010, several months after the Deepwater Horizon explosion and before the pipeline was successfully sealed, it was apparent to those of us living along the Coast that the disaster would create an economic crisis for low and moderate income households, including those of workers in the seafood and tourism industries, as well as those of other wage-earners who had been laid off or experienced severe cutbacks in earnings since the disaster. Who was going to represent all these people? Who would pay for and administer such an undertaking?

13 33 U.S.C. §2701 et seq. (1990)

Most lawyers in the United States are private practitioners and many work in formal association with others, as in a law firm. The business model is a for profit delivery of professional services. While there are lawyers in private practice who specialize in handling tort cases, they typically do so under a contingency fee arrangement: the client signs a contract agreeing to pay the lawyer a percentage of any recover – percentages of 30% and 35% are common; 40% is not unheard of. How could a medium income victim of the disaster – someone with, say, a $7,000 loss – be made whole if they had to give a third of their award to a lawyer? Just as importantly, what lawyer would be motivated to handle a claim of such a modest size?

Since the 1970s, the only mechanism for providing legal representation to those who can't afford a lawyer is the network of legal aid lawyers established by the federally-funded Legal Services Corporation. This strictly means-tested program typically requires an individual to have a household income at or near poverty level. Many of those affected by the oil disaster would not be poor enough to qualify for legal aid. Moreover, local legal aid offices receive funding based upon population data. They wouldn't have the resources to help all of the affected individuals, even if they qualified for services. The Center for Justice was not constrained by means-tested eligibility requirements. Nor was the Center for Justice required to earn a profit. The Center was a non-profit, public interest law firm and – as Reilly has described – we had already created a model for providing legal services to large numbers of disaster victims after Hurricane Katrina. Our funding came from large private foundations, philanthropic organizations, private donors and proceeds from annual fundraising events. Our CEO convened regular meetings with other non-profit organizations in the region and those legal aid programs serving the Coast.

Over the summer of 2010, we became a consortium of five non-profit legal advocacy organizations and four legal aid organizations. Our CEO also mounted a campaign to lobby Mr. Fienberg for financial support from the administrative budget of the Gulf Coast Claims Facility. We secured the funding as the Gulf Justice Consortium in December of 2010 and began accepting clients that same month. As of October 2015, our consortium had assisted 15,000 individuals and recovered over $16 million and our representation continues today.

Our role in assisting low and moderate income individuals with economic claims has enabled us to observe firsthand the strengths and the weaknesses of the claims process under The Gulf Coast Claims Facility and the Deepwater Horizon Settlement Authority.

From August of 2010 to June of 2012, the creation of an infrastructure and process for the administration of individual and business claims arising from the oil disaster was overseen by Kenneth Fienberg, an American lawyer with significant experience in alternative dispute resolution of individual claims arising from mass tort actions. Fienberg served in this capacity at the request of President Obama, who had secured a pledge from BP of $20 million for a compensation fund. As provided by the Oil Pollution Act, all administrative costs associated with the claims process were to be paid by BP. This entity was known as the Gulf Coast Claims Facility (GCCF). Under the GCCF, individuals and businesses could apply for compensation in five categories, including individual economic loss, business economic loss.

From the outset, the GCCF was the subject of criticism regarding customer service, including overcrowded and under-staffed claims centers; poorly-trained personnel; lack of translation services for non-English-speaking claimants; and lost or mishandled documentation. For the most part, these conditions improved somewhat over time. Deficiencies in the analytical

framework applied to claims proved to be more intractable. The GCCF framework provided no compensation for future damages. This was a very real issue for commercial fishermen, particularly those who harvested shrimp, crab and oysters – the recovery of the health of the Gulf waters was far from an immediate certainty. In other industries, such as retail sales, the GCCF denied claims for losses based only upon the employer's physical distance from the shoreline, even where there was a direct link between the economic loss and the oil discharge. Other serious problems involved the GCCF's use of a "contemporary documentation" rule to exclude affidavits submitted by claimants' employers which verified that a reduction in hours worked was due to the decline in business caused by the oil discharge; the failure to set forth an explicit standard of proof and the resulting application of an indeterminate standard of proof; inconsistent results for similarly situated claimants; and the absence of an appeals process. Despite these shortcomings, the GCCF claims process operated for 18 months, processed approximately a million claims, determined 220,000 claims to be eligible for payment and paid $6.2 billion in awards.

In March of 2012, lawyers for BP and class counsel for plaintiffs agreed to a proposed settlement, subject to the approval of the Federal District Court. One of the conditions of the settlement was the establishment of a new, court-supervised settlement process that would replace Kenneth Fienberg and the GCCF. Following a very brief period of transition lasting about three months, this new process known as the Deepwater Horizon Settlement (DHS) Authority began administering claims. All of the existing claims on file with the GCCF were transferred to the DHS. In general, the DHS framework for compensating economic claims was broader than that of the GCCF. The framework organized the affected Gulf States in to zones labeled "A" through "D" as illustrated by this slide.

For example, unlike the GCCF, the DHS settlement provided compensation for likely future losses. This was accomplished by the application of a Risk Transfer Premium based upon the type of claim presented and the physical location of the claimant's employer at the time of the disaster. I will illustrate how this worked with some examples. Assume that the claimant was a commercial fisherman whose business location at the time of the disaster was near the shoreline. His employer's industry would be categorized as "Seafood" and his employer's location would be in Zone "A". Under the DHS formula, the claimant's actual losses would be adjusted upward by applying a Risk Transfer Premium of 3.0. An amount equal to three times the claimant's actual losses would be added to his/her compensation award. Let us look at another example from a different industry Assume that the claimant was employed in retail sales, non-seafood related. Assume that the plaintiff's employer is located directly on the beach or within a couple of blocks from the shoreline. The claimant's industry would be categorized as "Retail" and his employer's location would be in Zone "A". Under the DHS formula, the claimant's actual losses would be adjusted upward by applying a Risk Transfer Premium of 1.5.

These examples are sufficient to illustrate the greater nuance of the DHS framework. Of course, the most significant feature of the DHS was that it was supervised by the Federal District Court and subject to judicial review. From June of 2012 through February of this year, the Deepwater Horizon Settlement Authority has processed approximately 400,000 claims. Of that number, 153,413 were determined to be eligible for an award and over $9.8 billion has been paid.

I have been addressing in some detail the economic claims process and the role of lawyers in that process. It is important to understand that the Deepwater Horizon Settlement Authority is also adjudicating medical claims. The chief categories of recovery are: 1) individuals who a) resided along the shoreline at the time of the disaster, and b) developed one or more specified physical conditions as a result of exposure to oil or oil fumes; and 2) clean-up workers, whether BP employees or independent contractors, who developed specified physical conditions as a result of exposure to oil or oil fumes. Specific physical conditions include: eye-related conditions, respiratory conditions, skin conditions and ear-nose-throat conditions. The basic award amount for an individual who presents a sworn declaration of a medical condition without any supporting medical records is $900. If supporting medical records are available, the award amount is $5,400. For clean-up workers, the basic award is$1,300. If medical documentation is provided, the award is $7,750. Awards for both individuals and clean-up workers may be enhanced if they were hospitalized overnight: for the first day, the enhancer is $10,000; for days 2 through 6, the enhancer is $8,000 per day; for day 7 onward, the enhancer is $10,000 per day. All individuals and workers who qualify for an award are eligible for periodic medical consultation program for 21 years.

It is important to also mention the role of the law and the legal profession in the effort to repair the extensive damage to natural resources from the oil disaster. The Oil Pollution Act, the same law that imposes liability for damage to individuals, also imposes liability for damage to the environment, and provides a blueprint for determining the funding for environmental restoration and the decision-making structure for specific restoration projects. It provides for a Natural Resources Damage Assessment to determine the damage to the environment. It also provides for an Oil Spill Liability Trust Fund to pay for restoration to be established with the money from civil and criminal penalties assessed against the responsible party. The law that enables the assessment of such penalties is the Clean Water Act of 1972, which regulates the discharge of pollutants into U.S. waters.[14] Following the oil disaster, the U.S. Department of Justice sued BP and others for civil penalties. The amount of the penalties under the CWA was based upon the number of barrels of oil discharged and the presence or absence of gross negligence. In 2016, that suit was settled with an agreement that BP was to pay $8.8 million for natural resources damage. Ordinarily, this amount would be paid into the Oil Spill Liability Trust Fund to pay for cleaning up future oil spills.

However, in anticipation of the level of penalties following the BP disaster, Congress in 2012 passed the Restore Act, which provides that 80% of the Clean Water Act penalties will be placed in a Gulf Coast Restoration Trust Fund for use by the affected five Gulf States.

Decisions regarding specific restoration projects are made by a Trustee Council composed of Federal and State representatives in a process that includes input and comment by the public. This process is ongoing and the Mississippi Center for Justice is engaged in advocacy to promote an equitable use of recovery dollars.

In conclusion, I would emphasize again that my remarks are intended as a description –not a prescription. I would however note the role of existing legislation, such as the Oil Pollution Act of 1990 and the Clean Water Act of 1972, in supporting an early framework for both individual and environmental recovery. I would also highlight the innovative role of non-profit,

14 33 U.S.C. §1251 et seq. (1972)

public interest lawyers in the provision of legal representation to large numbers of economically damaged individuals who might otherwise have been unserved or underserved by the legal profession.