

# WebMemo



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## Oil Spill Response Sets Poor Precedent for Public–Private Cooperation

*Jena Baker McNeill and Brian W. Walsh*

Last week, President Obama squandered his primetime speech on the Gulf oil spill by belaboring the issue of BP's legal liability and monetary payments. No one—not even BP or its drilling partners—had been questioning whether the companies should bear the full cost of their legal liabilities for the oil spill damages and cleanup. Even without the huge escrow fund that the White House forced BP to surrender to the President's hand-picked pay “czar,” existing law (rather than executive muscle) would have required BP and its partners to pay multiple tens of billions of dollars in fines, clean-up costs, and damages to those harmed by the spill. Accordingly, the President could have made far better use of his primetime speech if he had laid out a clear plan for how the U.S. government, BP, and other members of the private sector should work in partnership to stop the flow of oil and restore the Gulf Coast region.

The exceedingly adversarial tone and relationship that Obama has established with BP and its partners will, at best, slow the response and recovery effort. It is almost certainly ruining the Administration's chances of receiving (or benefiting from) offers to help from other companies in the private sector. But President Obama's focus on the culpability issues of the spill and condemnation of BP leadership also creates a real risk of chilling future relationships between the federal government and the private sector. Given the indispensable role that businesses have played in responding to natural disasters and terror attacks, it is vital that the President allow existing law to govern the compensation

process while making use of his authority as chief executive to form robust, effective relationships between the U.S. government and business.

**A Vital Role to Play.** The private sector routinely plays an invaluable role in helping those hurt by disaster, especially through its ability to get equipment, services, and supplies to hard-hit areas. For example, the heavy and specialized equipment provided by private sector companies—as well as those companies' expertise—was instrumental in locating and rescuing survivors at Ground Zero in Manhattan after the 9/11 attacks. Disaster victims often lack essentials such as food, water, flashlights, and medications. After Hurricane Katrina, Home Depot, Wal-Mart, UPS, Federal Express, and hundreds of other large and small businesses were on the ground delivering goods and services long before the lumbering federal bureaucracy even began deploying its resources.

How the Obama White House works with (*or against*) BP and its drilling partners will set the tone for the federal government's—and especially the Department of Homeland Security's (DHS)—future relations with the private sector. The federal government should carefully and respectfully communi-

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(202) 546-4400 • [heritage.org](http://heritage.org)

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cate what it expects from the private sector and strive to understand the competitive realities of the marketplace that, necessarily, affect the way businesses interact with government.

For example, although it has been a priority to encourage private sector infrastructure providers to share information with one another and with the federal government, this effort has been stymied by an inability to create a framework that will protect the private sector organizations' competitive advantages while getting valuable information in the hands of counterterrorism authorities.

Further, when an Administration does not manage public-private partnerships expertly and diplomatically, the terms of such partnerships tend to be government-dictated. When this occurs, private sector organizations are either treated as an afterthought or essentially commandeered by government rather than respected as invaluable partners.

**Private Sector Should Be Fully and Effectively Engaged.** President Obama's discussion of "the steps we are taking to ensure that a disaster like this does not happen again" is naïve in that it promotes the unrealistic thinking that the government can somehow eradicate accidents and natural disasters and "childproof" America. Obama's rhetoric might give some Americans a false sense of security, but the grave danger is that it provides the U.S. government an excuse to not adequately prepare or mount a prompt and effective response when disaster strikes.

Given that terrorist attacks, natural disasters, and accidents like this oil spill are almost certain to happen again, the right way to move forward will focus on resiliency—the ability to bounce back when disaster strikes. Bouncing back quickly and with a minimum of collateral damage requires the President and his federal agencies to conduct world-class coordination and communication with the private sector.

As is evident from the U.S. government's impotence in the face of the Gulf Oil spill, the bulk of whatever technical expertise exists to stop the flow and spread of oil resides in the private sector—i.e., with BP and the other oil industry companies that Obama vilifies daily.

The government, however, still has a crucial role to play: It can coordinate federal agencies as they carry out their congressionally authorized duties in response to disasters, ensuring excellent communication among federal, state, and private-sector organizations. Next steps in terms of the oil spill should include:

- **Amend the Jones Act to allow for international assistance.** Offers of foreign assistance with the containment and cleanup of the Gulf oil spill have to date been ignored by the White House due to the requirements of the Jones Act (Merchant Marine Act of 1920), which requires such work to be performed by American-built, -owned, and -crewed vessels. To help improve the resiliency process and leverage valuable foreign aid, President Obama could direct the Secretary of Homeland Security to waive these Jones Act restrictions temporarily during the disaster response. In addition, Congress could amend federal law to ensure that the Jones Act automatically exempts from these restrictions foreign vessels providing disaster response assistance whenever the Secretary of Homeland Security declares a marine disaster to be an event of national significance.
- **Increase outreach to businesses.** DHS need to focus more on reaching out to businesses of all sizes. The importance of large businesses such as major producers and providers in the energy and communications sectors is apparent. But small- and medium-size businesses are vitally important in many critical infrastructure sectors, and they have unique vulnerabilities. Small enterprises usually have one location and generally do not have backup plans, nor do they store files, records, or other critical data off site. The Ready Business initiative mentorship program pairs larger private sector companies with smaller businesses, but more can be done.
- **Respect and rely upon the rule of law.** The Administration can—and should—rely upon existing law and law enforcement to ensure that BP and its drilling partners' liability is paid in full. Federal and state agencies and U.S. courts are second to none in imposing enormous financial penalties on businesses that cause harm.

These agencies and U.S. courts are likewise adept at providing enormous financial awards to those who have been harmed. Putting the best possible construction on it, circumventing the rule of law by creating another multi-billion-dollar fund to be administered at the discretion of one of the President's handpicked "czars" is a misfeasance of office.

The Administration's performance in coordinating the response to the Gulf oil spill has been dismal. No President can afford to delay establishing solid, productive relationships with the private sector until oil starts to spew, an earthquake hits, or a terrorist strikes. At almost every step, however, this Administration has taken actions that seem calculated to put it at odds with the private sector organizations it needs the most when confronting major disasters.

**Jeopardizing Future Disaster Responses.** BP must be held responsible for any and all damage it has caused and all cleanup efforts it has made necessary. However, the Administration's obsession with both criminal and civil penalties, to the virtual exclusion of an understandable plan for moving forward in partnership with BP, has only ensured that when the next disaster strikes, everyone who could help will just opt to play it safe—and call their lawyers.

—*Jena Baker McNeill is Policy Analyst for Homeland Security in the Douglas and Sarah Allison Center for Foreign Policy Studies, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, and Brian W. Walsh is Senior Legal Research Fellow in the Center for Legal and Judicial Studies, at The Heritage Foundation.*