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COURTING BIG BUSINESS: THE SUPREME COURT'S RECENT DECISIONS ON CORPORATE MISCONDUCT AND LAWS REGULATING CORPORATIONS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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COURTING BIG BUSINESS: THE SUPREME COURT'S RECENT DECISIONS ON CORPORATE MISCONDUCT AND LAWS REGULATING CORPORATIONS

WEDNESDAY, JULY 23, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:08 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Specter, and Cornyn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, and I apologize for the delay. I am delighted to have Senator Specter, who is one of the most senior members of this Committee, a former prosecutor here; and Senator Whitehouse, who is a former Attorney General and former Federal district attorney.

This is our second hearing in as many months to highlight how the Supreme Court's decisions affect Americans' everyday lives. We see the economy worsening; Americans are struggling to put food on the table and gas in their cars, and money, if at all possible, in their retirement funds. And I think most Americans are not aware of some of the decisions that have come down by the Supreme Court that, instead of protecting them from financial injuries, they have done just the opposite.

At last month's hearing, I noted the tragic decision in Lilly Ledbetter's pay discrimination case. The Supreme Court overturned her jury verdict. They created a bizarre interpretation of our civil rights laws. Basically, her employer, who had discriminated against her for years, kept that hidden—and she did not find out about it until after she had left the employment. She sued to recover payments for the discrimination, but as many you know, it was a case where male employees for lesser work were paid considerably more. She sued and, of course, got a recovery in court, and the Supreme Court overturned that, saying, well, you sued too late. Of course, the fact that it had been hidden was why she was so late. It basically was saying to employers, go ahead and discriminate, just as long as you make sure you keep it hidden so they cannot do it—which is not what was ever intended by the Congress nor in the years of interpreting these cases.

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Now we are going to look at a few others where big businesses have been rewarded. In the *Stoneridge* case, the Supreme Court held that pension funds and other investors in companies ruined by fraudulent managers, like Enron, cannot recoup the money they lost from those who knowingly facilitated the fraud. They are sending a signal, Now, look, don't go rob banks because they can go to jail for that; just defraud people because they cannot recover from you. And that leaves everyday Americans with no place to go.

More than a decade ago, the Exxon Valdez was run aground by a drunk captain, somebody with a history of drinking problems, leading to one of the worst environmental disasters to reach American shores. And the tragedy of it was that it was a totally preventable environmental disaster. A jury determined that Exxon Mobil knowingly and repeatedly allowed a relapsed alcoholic to operate a ship filled with oil through the Prince William Sound. They found that for destroying the livelihood of thousands of Americans, they should be punished by paying at least a small fraction of its annual profits.

Exxon Mobil paid millions to fight that, all the way up to the Supreme Court. It paid off for them. The Supreme Court protected them, read into the Constitution a protection for corporations that simply does not exist in its text or its intent. A very activist Supreme Court helping out Exxon Mobil.

In his powerful dissent, Justice Stevens concluded "that Congress, rather than this Court, should make the empirical judgments" contained in the Court's decision that slashed the jury award by $2 billion. Incidentally, that is just one-tenth of 1 percent of Exxon Mobil's revenue in a year. It is the equivalent to an ordinary American who may have created a terrible disaster in a town, and they say, well, here, we are going to give you a $5 parking ticket. It is about the same thing. And if Congress had wanted to cap punitive damages for disasters that impact thousands of Americans, of course, we could have done so. We did not, specifically did not. This is another line of cases where the Supreme Court has misconstrued congressional intent.

Then the Supreme Court has eroded the role of civil juries and shielded corporations from accountability through arbitration decisions. When we passed the Federal Arbitration Act, it was thought to provide sophisticated business interests an alternative venue to resolve their disputes. It was not intended to preempt State law or be a hammer for corporations to use against individual customers. It was never intended to be used for employment cases, but that is what they are trying to do, and large corporations have benefited from these expansive rulings, and they have inserted binding mandatory arbitration clauses in nearly every contract they draft. As a result, millions of Americans are being found to have somehow waived their constitutionally guaranteed Seventh Amendment right to a jury trial, oftentimes either because they had no choice or without even knowing it.

There are no juries of one's peers in the arbitration industry. There is no appellate review. There is no transparency, and some would argue no justice.

A jury found for the victims of the Exxon Valdez disaster. A jury found for Lilly Ledbetter. But the Supreme Court displaced those

judgments with their own. In so doing, it has removed the compensation initially awarded to these victims, and it prevents other victims from redress.

Worse than that, by doing this they do not deter corporations from the kind of conduct that created this in the first place. And the significant financial consequences is a deterrent that corporations tend to understand, and that has been taken off the table.

So I look forward to the testimony of our witnesses and thank them for traveling to be with us today. I know many came from Alaska, and I note that several others affected by the Exxon Valdez disaster came here today, and I appreciate your coming here.

Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman. I think it is very useful for this Committee to take the congressional lead in commenting on Supreme Court decisions, and that is especially true where we are dealing with matters which we can change by legislation.

The commentators have a great many opinions. Jeffrey Rosen has written in the New York Times that the Supreme Court has taken a turn favoring big business. Linda Greenhouse has written another article in the New York Times saying that while big business has pointed to some victories in some cases, their decision for older workers was a turnabout and a surprise. And even where you have the *Valdez* case involving punitive damages, you have the Supreme Court saying that it is not the exclusive remedy where preemption is a very big issue with the arguments being made that the Federal Government has preempted the field from state action.

But I would like to see the Congress move ahead on the *Ledbetter* case. Senator Leahy has described *Ledbetter*. A very short statute of limitations was held to bar a woman from asserting her rights to equality and employment opportunities. But as Senator Leahy has noted, she did not know she had a claim. How can you pursue a claim if you do not know that the claim is in existence? *Ledbetter* is a statutory matter, and we can act on it. And that is something the Congress ought to move ahead on. And showing due regard for the independence of the judiciary, if it is a constitutional matter, Congress cannot change it except by constitutional amendment. The issues become more difficult where the Court is acting on constitutional grounds.

We have had quite a series of events on the fundamental right of habeas corpus in this country. In the *Rasul* case, the Supreme Court said that habeas corpus was a constitutional right. The Supreme Court also said that habeas corpus was provided for by statute. Then the District of Columbia Court of Appeals in the *Boumediene* case made a distinction which I thought was not only a stretch but just wrong, saying that the *Rasul* case was decided solely on statutory grounds. And then if it is on statutory grounds solely, Congress has the authority to change it. And we did legislate to take away habeas corpus. I think it was a bad decision by the Congress, and my amendment was defeated 51–48. But there you have a lengthy opinion by Justice Stevens going back to the

analysis of habeas corpus to John at Runnymede, 1215, and the Magna Carta. And he also did describe the statutory remedy of habeas corpus.

But it is a very tortured reading of *Rasul* to say that the Court did not put habeas corpus on constitutional grounds. And then the D.C. Circuit, I think, just ignored their duty to follow the Supreme Court. And the Supreme Court denied cert. There was a lot of speculation as to what was going on, and then when it came out about how bad these Combat Status Review Boards were, there appeared to be a change in the attitude of some of the Justices, and the petition for re-argument was granted. It takes five votes, four for cert.

So it is a healthy thing in our society to have this Committee take a look at these issues. So I commend you, as usual, Mr. Chairman, for going into a very important subject.

Chairman LEAHY. Well, I appreciate your being here and—

Senator SPECTER. I want to make one other comment. All these empty chairs does not mean that people are not very concerned about this issue or about the testimony. We have a very distinguished line of witnesses. We have multiple hearings all the time. The Appropriations Committee is meeting as we speak on contracting in Iraq, and the Aging Committee is meeting as we speak on key issues there. And it is a busy place, and we have people who will be studying the transcripts and staffers will be. So we thank you for coming, and I am going to have to excuse myself.

Chairman LEAHY. Thank you for mentioning that about the other hearings. We all serve on half a dozen committees and subcommittees, and it seems they always meet at once. I especially wanted to be here for this one.

Ms. Osa Schultz is from Cordova, Alaska. As a result of the Exxon Valdez disaster, the fishing cooperative, the very successful fishing cooperative Ms. Schultz and her husband were part of, was forced into bankruptcy. So she experienced firsthand the devastation that the tragedy wrought on the livelihoods and lives of so many in Prince William Sound. So we welcome you here today. I know you are going to speak about the community and how they were affected by this, and thank you for making the trip to Washington. Please go ahead.

STATEMENT OF OSA M. SCHULTZ, CORDOVA, ALASKA

Ms. SCHULTZ. Thank you. Mr. Chairman and Senators, thank you for inviting me here today.

Given the many critical and consuming issues that you are already faced with resolving at this time, I can barely express how much I, the people of Prince William Sound, and the more than 30,000 plaintiffs appreciate your serious review of this case and the Supreme Court's decision.

It would be easy to assume that after 19½ years that justice has taken its course, the facts have been weighed, it is time to move on. But nothing could be further from the truth.

Exxon would have everyone believe that they cleaned up their mess and paid their dues for their wanton disregard of safe shipping practices. When you look at the true and verifiable facts, again, nothing could be further from the truth. Exxon recovered

less than 10 percent of the oil during their attempted clean-up, and its victims have not been fully compensated for their losses.

Exxon's vast power and influence has tipped the scales of justice. Now the largest corporation in the world with their inexhaustible resources, they have managed to draw this case out with appeal after appeal for over 15 years. For nearly a generation, our community has been the David to their Goliath.

I grew up in Portland, Oregon, and went to college in Eugene at the State university. In the fall of 1979, I took a quarter off to visit a friend who had recently moved to Alaska.

I was captivated by the town of Cordova and the incredible wilderness that surrounds it. It was on this trip that I met my future husband, Ric. Ric took me out gillnetting on his boat, the Hypnotic. I was hooked—on fishing and the skipper! The excitement, the beauty, and the satisfaction of catching the bright, lively, and often elusive salmon was addicting. Ric and I fished together for over 10 years and continued to invest in our equipment to improve our fishing operation.

In 1982, we joined a group of over 75 fisher men and women who had recently established the Copper River Fisherman's Cooperative. The co-op encouraged improved fish handling. Vessels started to carry ice to chill the fish in advance of delivery and we used the practice of "bleeding"—cutting the gills to reduce bruising. Both are now standard methods in the industry. We invested in significant advertising strategies for our high-quality product and became the vanguard for fresh salmon provided to a domestic market. By 1989, over one-third of the gillnet fleet was supporting the Copper River Co-op.

The Exxon Valdez spill tore that investment to shreds. With the sound unfishable and so many fishing boats working on the clean-up, the co-op was forced into Chapter 11 and still has a substantial outstanding loan. If the current ruling stands and the interest is paid, each investor will stand to receive at most only 45 percent of their original investment—for money invested as much as 20 years ago.

The devastation caused by the Valdez spill continues to this day. Without fish to send to the market, we lost our niche; salmon from other sources replaced it. Even with years of marketing strategy, we still struggle to get back to where we were in 1988. In addition, one of the four local processors, Chugach, went bankrupt as well—a facility that had the capacity to process more than all of the other canneries combined. As a result, in the following years when the fish were being caught in high numbers again, we lacked the processing facilities to handle them, and dollars that would have been generated in Cordova were taken to other ports. Our lives, the fishing community, and the economy of Cordova have been devastated, and because compensatory damages were calculated based on only a few years, Exxon stands to pay pennies on the dollar.

I am not a lawyer, but I have read some of the briefs filed in the *Exxon* v. *Baker* case. I urge the Committee members to read a brief filed by four former Alaska Governors because it lays out in painful detail the promises the oil industry made in order to win approval for drilling in the Arctic and building the Trans-Alaska Pipeline

and the provisions made by Congress to ensure that oil companies acted with the highest degree of care.

Well, Exxon did not act with the highest degree of care. Far from it, they acted recklessly. They knowingly put a relapsed alcoholic behind the helm of a tanker navigating the treacherous waters of Prince William Sound. That recklessness ruined the economic lives of thousands of hard-working fisher men and women. It caused the loss of traditional subsistence resources that are the cultural backbone of the Native people of Prince William Sound. It resulted in the total loss of our herring fishery, once a vital keystone species to the region's economy.

Exxon has delayed justice for nearly 20 years, and it seems likely now to end up paying just a fraction of the damages they actually caused. If our highest Court in America fails to hold them accountable, how can they ever be forced to take responsibility for their destructive actions?

I am just one person, but there are countless self-employed people and small business owners like myself that struggle to provide for our customers and support the infrastructure that keeps America the incredible country that it is. The influence of corporate power has become corrupt and divisive. Nowhere is this more true than in the oil industry today. And no other corporation is more accomplished at this corruption than Exxon. The only way to get their attention is to significantly affect their bottom line—Profit.

In setting a 1:1 ratio between the compensatory and punitive damages, the high Court sends the wrong message. Punitive damages are the only means by which citizens can punish a corporation for wrongdoing. In its ruling, the Court has said that the punishment should be equal to the losses of the victims. As great as our losses are—and they are substantial—comparing—sorry.

Equating punishment to a—equating punishment to a multi-billion dollar corporation with the losses of self-employed fishermen such as my husband and me is in no way punishment or deterrent. And it is not justice.

I call upon this Committee to lead the way in ensuring that no corporation can ever do again what Exxon has done to Prince William Sound. In America, bottom-line corporate interests should never trump the rights of individual citizens.

Thank you.

[The prepared statement of Ms. Schultz appears as a submission for the record.]

Chairman LEAHY. Thank you, Ms. Schultz. And from the letters I have received and others on this Committee have received, I think you speak for an awful lot of people from that part of Alaska.

Ms. SCHULTZ. I do.

Chairman LEAHY. Our next witness is Professor Bartholet, professor at Harvard Law School. She teaches civil rights and family law. The professor also has extensive experience as an arbitrator. She has worked with a number of arbitration organizations, including the National Arbitration Forum. Her experience as an arbitrator was featured in a recent BusinessWeek cover story entitled "*Banks* vs. *Consumers* (Guess Who Wins)."

Professor, please go ahead, and thank you for taking the time to be here.

STATEMENT OF ELIZABETH BARTHOLET, MORRIS WASSERSTEIN PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Ms. BARTHOLET. Thank you, Mr. Chairman, and thank you, Senator Whitehouse.

My focus is going to be mandatory pre-dispute arbitration in both the credit card and the employment areas. As you know, this is a practice in which the big players—the banks, the credit card companies, and employers—force upon the little players—the people who want credit cards and want jobs—so-called agreements to arbitrate. Now, these are not, obviously, real agreements because those who want and need credit cards and jobs have no real choice.

The practice of mandatory pre-arbitration is something that the U.S. Supreme Court brought into being by its startling interpretation of the Federal Arbitration Act, an interpretation that was a complete surprise to many of those who had taught or written in the area. It is an interpretation that Congress is free to correct by corrective legislation.

I want to talk about two kinds of quite different problems with mandatory pre-dispute arbitration. One is what I will call the private justice or biased forum problem: the risk that the big player gets the justice that he pays for, the results that he wants, and the little player gets no justice at all. The second problem is what I will call the private law problem: the transformation of our civil rights regime, designed by Congress to be important public law into something entirely different, something that fails to serve any public law function.

So, first, the private justice or biased forum problem. This arises from the nature of mandatory pre-dispute arbitration. The big player selects and pays the arbitration provider. Arbitrators only get paid if they get selected to decide cases, unlike judges. The big players, because they are repeat players in the system, are in a position to strike arbitrators who do not decide for them and, thus, to choose the arbitrator, who is, of course, supposed to be unbiased.

My experience serving as an arbitrator for the National Arbitration Forum, NAF, is telling, but it is only one of several troubling experiences that I have had as an arbitrator during the nearly three decades that I have so served. My arbitration experience with NAF began in 2001, when I agreed to be on a roster of arbitrators, knowing very little about what they did. I then discovered that they have locked up basically the credit card arbitration business of the country.

Out of the first 19 cases that I was assigned by NAF, I decided 18 for the credit card company because it appeared that debts were indeed owed, and I dismissed one case. After those 19 cases, I decided one case in which the alleged debtor happened to be a lawyer and asked for a hearing. Not a single person before this case had asked for a hearing. This alleged debtor also made a counterclaim against the company, claiming that he had been significantly damaged by the whole process, which included damaging his credit rating.

In the end, after hearing the case on the merits, the first case I heard on the merits, I ordered the credit card company to pay

this alleged debtor some $48,000 and, of course, wondered to myself whether I would ever see another NAF case.

I saw four more apparently because in the next four cases it was too late for either side to exercise what NAF has in its rules as a peremptory challenge—a challenge without cause. Of these cases already in the works, I decided two that involved the credit card company which had been involved in all prior 19 cases.

In the next 11 cases after that, all involving the same credit card company, I was not allowed to decide a single case. The company removed me by peremptory challenge in seven cases, and they moved to dismiss in the remaining four cases, dismissal giving them an opportunity to get the case before another arbitrator. They simply needed to refile it.

In the first three cases in which I was removed, NAF sent me copies of a letter that had been sent to the parties falsely informing the parties that I was unavailable because of a schedule conflict. Now, if a party is to have any opportunity to challenge the arbitrator for bias, they would like to know if a prior arbitrator has been dismissed for some reason. So this false information going out telling people that I had withdrawn because of a schedule conflict seemed to me a pretty major problem.

At that stage, immediately after getting those misleading letters and after having been disqualified for several cases, I attempted to discuss with NAF personnel—and I discussed with personnel on two levels—the problems I saw with the fairness of their system and got no satisfaction. At that point, I resigned from the NAF roster of arbitrators with a letter stating that the reason for my resignation was my concern about the NAF system's "apparent systematic bias in favor of the financial services industry."

After that, NAF did its best to silence me from telling any part of this story. A party who had a dispute which, by contract again, was supposed to be in the NAF forum, wanted to prove that the NAF forum was biased. Now, what the Supreme Court has told us, of course, as part of the guarantee that arbitration will work okay, is that people will have an opportunity to prove bias in the forum if there is any such bias. So this party wanted to prove bias and felt they needed my testimony because they had heard about my story. They wanted my testimony to try to prove bias.

At that point, NAF tried to prevent me from testifying. They moved to quash the discovery deposition. They claimed that the confidentiality provisions in my original assignment agreement with NAF, which I had terminated, barred me from testifying, even as to general matters relating to bias in their arbitration system. Obviously, I had told them I was not going to testify to anything with respect to parties or cases.

Although I believed the NAF claim to be entirely frivolous, I felt forced to hire a lawyer to protect myself. In the end, a Massachusetts court found that nothing in my agreement prevented my testifying about bias in the NAF system and ordered me to testify.

I concluded from my experience that the NAF pool of arbitrators is likely to be overwhelmingly stacked against the consumer, with arbitrators either being systematically removed if they rule against the credit card companies, or arbitrators feeling pressured into always ruling for the credit card companies out of fear of removal.

This, together with my other experience as an arbitrator and reading of the literature, leads me to believe that the Supreme Court's approval of mandatory pre-dispute arbitration has given banks and credit card companies a private justice system in which they can purchase the results they want, at the expense of the debtors forced into the system.

I want, much more briefly, to address the second problem, which I have called the private law problem. This problem is illustrated in the employment discrimination area, which is an area where I have taught for three decades and developed growing concern with the impact of mandatory pre-dispute arbitration, both because of the bias problem just discussed and because of the private law problem. And I want to emphasize that these are two independent problems. Even if the bias problem were to be solved, arbitration is incapable of providing the kind of public law that I believe Congress intended when it passed the panoply of civil rights legislation that includes Title VII, the Age Discrimination Act, and the Disabilities Act.

The Supreme Court in the 1960s, 1970s, and early 1980s treated this law as important public law. By "important public law," I mean law intended to have an impact on society in a far-reaching way. I mean what the Court did when they provided victorious plaintiffs with attorneys fees, with the idea that they should act as private attorneys general. I mean the class actions that enabled thousands of class members to get relief who would have been unable to get relief otherwise. I mean the systemic proof that class actions and broad discovery enabled. And I mean the systemic theories like the disparate impact theory. And I mean the public decisions which educated employers across the land—

Chairman LEAHY. Professor?

Ms. BARTHOLET. Yes?

Chairman LEAHY. I am going to put your full statement in the record because we want to leave time for questions in case we have to get interrupted by votes. If you want to make a conclusory—

Ms. BARTHOLET. I will make a very conclusory statement, which is simply that in arbitration, none of this public law exists. Arbitration is designed for two individuals to solve little tiny problems very quietly. And it is incapable of—and this is exactly why employers are flocking to arbitration—it is incapable of implementing public law.

I think that because of this, these mandatory pre-dispute arbitration decisions of the Supreme Court are the single most important and devastating decisions issued by the Court in the last three decades in terms of the rights of plaintiffs.

Thank you.

[The prepared statement of Ms. Bartholet appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Patricia Ann Millett is a partner at Akin Gump Strauss Hauer & Feld, here in Washington. She co-heads the firm's Supreme Court practice. From August 1996 to September 2007, Ms. Millett served as assistant to the Solicitor General at the Justice Department, had experience that most lawyers would envy. She has argued 26 cases before the Supreme Court.

Thank you for being here, Ms. Millett, and please go ahead. Is your microphone on? There you go.

STATEMENT OF PATRICIA ANN MILLETT, PARTNER, AKIN GUMP STRAUSS HAUER & FELD LLP, WASHINGTON, D.C.

Ms. MILLETT. Thank you, Mr. Chairman, Senator Whitehouse, and other Members of the Committee for inviting me here today. It is a real privilege.

Before I start, I just want to make clear that I am speaking in my personal capacity. I am not here as a representative either of my law firm or any particular client, and that makes sense because, as Senator Leahy pointed out, I have only been in private practice less than a year. Most of my observations of the Supreme Court and its decisionmaking are based on the 11 years I spent in the Solicitor General's office under both the Clinton and Bush Administrations.

I understand that two areas of interest for the Committee are arbitration and punitive damages, but I think it is very important in understanding what is going on in the Supreme Court to take a broad overview of the Term. Just as one cannot assess what this Congress has accomplished in a session by looking at one law or two, one needs to look at everything the Supreme Court did over a Term to assess what is going on there. And when you look at business cases from this last Term, they came down almost 50/50 between pro-business and pro-employee, or anti-business, however one wishes to characterize it.

The theme that I saw in those decisions that I think is most relevant for this body is the enormous deference to Congress. There were a lot more statutory decisions, and what the Court made clear was that it was taking the statutory text that this Congress enacts at its word and was going to implement it. And if things are incorrect, it will leave it to this body to change it because that is the role that the Court should play. The Court in areas of statutory construction should follow, not lead.

The Court also expressed important adherence to principles of stare decisis. There was concern that it would overrule precedents from some prior terms, in particular some precedent where Justice O'Connor had been the fifth vote, and that inspired discussion that this is the chance now for the new Roberts Court to overturn the rulings. They did not do that. They adhered closely to stare decisis, which means in the statutory area that when the Court makes a decision, if the Congress does not react and Congress goes along with the decision, does not change the law, then it is not for the Court itself to change course later in time without Congress' lead.

The other thing that is of interest, I think, is that there was broad consensus in the business area. The Court was more unanimous there than any of the other areas of law that it addressed, and it had only two 5–4 decisions, and they were in relatively obscure areas of the law—one involving the standing of assignees for collection, and one involving the rights of tribal courts to regulate non-Indians and the disposition of land that they hold.

In the area of employment rights, employees this term won four of five cases and essentially came to a draw with business in the fifth case. The Court upheld in two different cases the protection

of civil rights laws against not just core discrimination, but retaliation by employers against the exercise of those rights. And that is very important because a right does not mean much if you are not protected against being punished for asserting your rights.

They also adopted, in a case called *Meacham*, a strong rule in support of employees on the burden of proof for the "reasonable factor other than age" issue in age discrimination cases.

In *Federal Express* v. *Holowecki*, they adopted a pro-plaintiff rule on what it takes to trigger EEOC investigation of a claim.

In a case called *Sprint* v. *Mendelsohn*, they essentially said that there is no per se rule against the introduction of what is known as "me too" evidence in discrimination cases. "Me too" evidence is when the employee wants to introduce evidence that other employees have been discriminated against by other supervisors, not involving their particular discrimintory event, but obviously showing a broader atmosphere within a corporation.

The Court also addressed a number of preemption cases, and I do want to clarify one thing, I think, in my written statement. I left out the *Chamber of Commerce* v. *Brown* case, which was another preemption case the Court addressed this term. The Court was fairly consistent on ruling in favor of preemption, although it rejected a preemption argument in the *Exxon* case, and in that aspect ruled in favor of the plaintiffs. But, again, what is interesting about the preemption cases is even broader unanimity. One of them was 7–2; *Riegel* v. *Medtronic*, involving medical devices, was 8–1; two more were unanimous. And so what that means, I think, combined with a broad consensus that we saw in the employment right cases, is that in a lot of these areas of business, this is not a Court where one or two Justices are going to change anything. There is a lot of consensus that one does not always see in other areas from the Court.

In the area of arbitration, which I know this Committee is interested in, the Court decided two cases this term. One was called *Preston* v. *Ferrer*. That was decided 8–1 by the Court, and all it held was that, where arbitration has been agreed to by parties, there would not be a diversion to State administrative procedures. What the Court did there was simply apply what it had held in prior cases, holding that you do not get diverted to State courts when you have an arbitration agreement, and that there would not be a distinction for State administrative procedures. So, again, the Court simply applied prior precedent that preceded the Roberts Court and left it to direction from this body before it would change course.

And then in a second case called *Hall Street Associates* v. *Mattel*, the Court held that parties to arbitration cannot simply contract out of the statutory standards of review set by the Congress in the Federal Arbitration Act. That was a 6–3 decision. And in so holding, the Court again looked closely at the directive language of the statute itself, a statute that said that arbitration decisions must be enforced unless particular categories of exceptions delineated in the statute were satisfied. And the Court specifically voted that policy arguments were presented, but said those were for this body and not for the Court.

The last case I want to mention, is the *Exxon* case, the punitive damages case, which is obviously an incredibly emotional subject for many Americans. I think it is important to keep in mind what exactly was decided in that case. What the Supreme Court decided in a 5–3 decision written by Justice Souter was that, as a matter of admiralty common law, there would be a 1:1 ratio for punitive damages. There was no constitutional ruling, no constitutional question in the case. The Supreme Court opened this aspect of its ruling by noting that it had a common law job to do, but Congress could change the decision.

What the Court emphasized most that it was looking for in the area of punitive damages was some predictability and consistency when it adopted the standard for punitive damages, just as Congress itself had required such consistency across criminal defendants in the United States Sentencing Guidelines and has set particular penalty ratios in many statutes. And the Court emphasized that, because this was a case where the action was found to be non-intentional, and there was not proof that Exxon had profited from the activity, that a 1:1 ratio would be appropriate. The Court left open whether a different ratio would be appropriate in a case where there was intentional conduct or conduct that was taken with a specific profit motive in mind.

The conclusion, again, is that this Court in the business area, as in other areas, is demonstrating broad consensus. This is not the area of the controversial 5–4 decisions that one hears about in the press. And they are taking small steps and following paths that have already been laid out by prior precedent, deferring substantially to the Congress in statutory areas.

Again, I think one should keep in mind in characterizing the Supreme Court, if I could just say lastly, that slightly over half of the cases were decided this term in favor of business. They decided more cases in favor of criminal defendants than they did in favor of business this term. But no one wants to characterize it as a pro-criminal defense Supreme Court.

The important message is to look at everything in context and look at an overall view of the Supreme Court's term, and I think it shows a fair amount of balance in the business area this term.

Thank you.

[The prepared statement of Ms. Millett appears as a submission for the record.]

Chairman LEAHY. Thank you very much. I am going to have to be here, and I know others are going to have to leave, so I am going to yield first to Senator Whitehouse for questions. But I am going to put in the hearing record written testimony submitted by Simon Lazarus of the National Senior Citizens Law Center; Jocelyn Samuels of the National Women's Law Center; and Doug Kendall of the Constitutional Accountability Center; and several fishermen and Native Alaskans affected by the Exxon Valdez disaster.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Ms. Schultz, thank you very much for being here. It makes a big difference to us, dealing with what are often very kind of processy and legalistic and legislative issues, to hear from people who have been affected so directly and who, after—how many years since—

Ms. SCHULTZ. Nineteen and a half.

Senator WHITEHOUSE. Nineteen and a half years, still feel that the justice system has not served them and has instead been far more beneficial to the big corporation at fault in this. And the question of the big corporation being at fault, one of the phrases that stood out to me in the Supreme Court's opinion was that the Supreme Court said it found "no earmarks of exceptional blameworthiness on the part of Exxon." And it was very much that determination that there were no earmarks of exceptional blameworthiness on the part of Exxon that drove the decision. In fact, it appears that if they had found earmarks of exceptional blameworthiness, the rule might have been different. That is where the standard cuts off.

So I am just wondering—I have not been up to see the damage. You have lived with it for 19½ years. Did you see any earmarks of exceptional blameworthiness in what took place and what led to the destruction of your co-op?

Ms. SCHULTZ. Absolutely. The main thing is the loss of the herring fleet and the loss of the herring fishery, because that was a keystone species. It started our season in the spring. That is where the fishing activity started rolling. That is when the town came alive. The work that was done on that fishery got everything financed because of that income. That was a third of the fin fish collected income for the season. It is gone completely. And it was not until just recently that science has been able to prove that it was a result of the spill. So that is why there was not any substantial evidence for the court case in 1994.

Senator WHITEHOUSE. Professor Bartholet, it strikes me that the jury system in our governmental structure, our constitutional structure, has a significant governmental role. It is not just there as a means for adjudication of disputes, at least in my view. I see it as a vital part of what the Founders saw as popular Government. And as I look around Washington and see the extent to which, you know, money flows in this town and vested interests have huge throw weight, we have an executive administration that often seems, at least to me, to be in the pockets of certain industries, and I doubt that the Founding Fathers were blind to the possibility that the executive branch or the legislative branch could become enthralled to special interests. And it strikes me that in that context, the independent jury system of people chosen at random from the community to stand up for a real sense of justice was sort of the last bastion of true democracy and a core piece of the popular input that makes American democracy. And yet I see it constantly under assault and getting very little of the respect that other institutions of Government ordinarily obtain. And I just wonder if you would comment on those observations.

Ms. BARTHOLET. Well, certainly one of the many important rights that mandatory arbitration takes away is the right to the jury trial, so that when you are forced into arbitration by the kind of agreements that the Supreme Court has now approved, people lose their right to a jury trial. I do think that is important. However, I would say it is simply one of a range of hugely important rights that are lost. I think the right to an unbiased judge is also important, and I think that is gone with mandatory pre-dispute arbitration. I think

the right to a judge or an arbitrator who actually understands the law—you are not going to get arbitrators who understand sophisticated employment discrimination theory. So—

Senator WHITEHOUSE. Before my time runs out, which it is about to, let me jump into the peremptory challenge rule, which strikes me as institutionally biased when you are dealing with repeat players. The credit card companies keep coming back and back and back and back again. They wrote the contract. They set this up. They are there every time. And the individual litigants, if you will, the supplicants, if you will, are there just that one time. And they have no real idea who is for them or who is against them. They have no institutional or vested interest in striking anybody. And so it looks as if a very, very significant permanent bias has been deliberately built into the system. And I am wondering if you would evaluate that in the light of laws that we have, frankly, against outright rackets and schemes and artifice to defraud. Because it strikes me that if you deliberately set up a mechanism whereby one side has the ability to twist the system so that they win, and you then sell it to people as a fair arbitration, somebody is being defrauded out there, and I am wondering if you have considered it from a civil or prosecutive point of view.

Ms. BARTHOLET. I would agree with you that it is a racket. I think this system is completely stacked to simply benefit the credit card companies. And peremptory challenge can sound fair to people because, yes, it is a typical thing that exists in our court system. But it is very different when, as you say, there is a repeat player and the little guy does not have a lawyer, does not know the system, does not know who has been disqualified before or who might have ruled for the credit card company before.

Senator WHITEHOUSE. And does not repeat.

Ms. BARTHOLET. The additional problem here is the financial pressure that arbitrators are under, so most arbitrators, unlike me, do arbitration as their main livelihood. Sometimes it is 100 percent of their income, or it is most of their income. For me, it was 1 percent when I was working for NAF. My NAF income was 1 percent.

If you depend on your livelihood for these cases and you know one side is going to use its peremptory challenge to get rid of you if you displease them—and that word is out. I mean, I learned it and can testify about it. But the word is out. I mean, to me, one of the really shocking things is that when I told my story to people in the American Bar Association, on arbitration committees, talked—you know, people know this system is stacked, but nobody is doing anything about it.

Senator WHITEHOUSE. My time has expired. Thank you very, very much.

Chairman LEAHY. Thank you.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman, and thanks to each of the witnesses for being here.

I wonder, Ms. Millett, I see that you have argued before the U.S. Supreme Court as an assistant to the Solicitor General during both the Clinton and the George W. Bush Administrations. Could you tell the Committee of your impressions of whether the way the Court has handled its docket, the way it has conducted its business

has been, in your view, dramatically different or not as compared to those—comparing those two administrations?

Ms. MILLETT. Thank you. I have seen very little change, certainly no dramatic change at all. There are little things that would be of no interest to the Committee but that are of interest to people who argue in the Court about how Chief Justice Roberts conducts the courtroom. But, overall, if anything, there is, as expressed this term, really strong allegiance to stare decisis in the statutory area and to following Congress' lead when it writes a statute, giving full effect to the terms of the statute, and to not jumping ahead and overruling precedents. They were very firm about that this term.

But, overall, I think statistically is there a big difference? No. If there is any big difference, it is the fact that they decided 58 percent of their cases in favor of criminal defendants this term, fewer cases in favor of business. But, overall, there has been no dramatic change. There are small ups and downs, and that is the way the Court has always been. It is a reactive institution. It does not go out like Congress and find issues. It waits for people to bring issues to it. And some terms it has more of one issue than another, and that is why it is very important to look over time at the Court's operation.

Senator CORNYN. Some, including me, have been very pleased with the elevation of Chief Justice John Roberts and Justice Samuel Alito. Have you noticed from any empirical evidence any dramatic changes in the way the Court approaches its business as a collegial decisionmaking body or the outcomes since those two Justices have been elevated to the Court?

Ms. MILLETT. This term saw a fair amount of unanimity, particularly in the business area. It goes beyond their two votes. As I said, a number of the cases are coming down 8–1, 7–2 in the business area and elsewhere. But what I saw this term that I think was most interesting was that you saw—on hot button issues like the death penalty, the lethal injection case, or the voter ID case that the Court addressed this term, where one might have thought before you would have 5–4 decisions or splintered decisions, we actually saw broader consensus with 7–2 and 6–3 decisions from the Court. I think part of that is because Chief Justice John Roberts and Justice Alito have made clear their allegiance to principles of stare decisis and to a limited role for courts, taking small steps and incremental measures. And Justice Stevens and some of the other Justices—sometimes Justice Souter, sometimes Justice Breyer—have joined in that.

Now, this is not universal. There are still controversial decisions. But—

Senator CORNYN. That will always be the case, I guess by definition, as those are the cases that make their way to the U.S. Supreme Court. But I agree with your comment about the apparent influence of Chief Justice Roberts in particular, and not to take anything away from Justice Alito, but since Chief Justice Roberts is the Chief, it does appear that there are more consensus decisions and not as many 5–4 sharply divided decisions on the Court, or at least that is my impression.

But I am sure that with any court you are going to find cases that you agree with, outcomes you agree with, and that you dis-

agree with. As far as I am concerned, the Court was about batting .500 over the last few decisions. The *Boumediene* decision I thought was moving the goalpost right after the Court told Congress it needed to be involved in the process of creating—of setting out detainee rights and creating a military commissions process, and then we did so, and then the Court came back, moved the goalpost, and Justice Kennedy's opinion I thought really represented an overreach by the judiciary on what should be the job of the executive and legislative branches.

Again, in the Louisiana child rape case, where the Court talked about emerging consensuses with regard to views of capital punishment and apparently missed the fact that the U.S. Congress had passed the death penalty for child rape in some instances and just flat did not even note that fact in talking about its consensus. I mean, the Court is—there are always going to be decisions that we agree with and disagree with, which is our right. But ultimately in our system it is the Court that makes the final decision, at least until Congress then comes back and changes the statute, if it is a statutory interpretation, or the people decide then in the Constitution to come out with a different outcome.

I want to ask—Professor, I know you are critical of mandatory arbitration provisions in contracts, but I want to ask you a little bit about the history of alternative dispute resolution. I remember that Chief Justice Burger, in particular, was critical of the delay and the expense to ordinary litigants in litigation and worried that that might be just as an effective bar to access to justice as anything else. And so the legal profession, working with the judiciary, came up with a system of alternative dispute resolution, which I concede is not perfect any more than our system of deciding cases by litigation, ordinary litigation, is not perfect. But it was an attempt to try to address those concerns about the delays and the cost of access to at least some impartial tribunal.

Do you agree that that is important to try to find mechanisms, if we can, that can provide access to an impartial decisionmaker that costs less money and reduces the time that could be otherwise consumed in ordinary litigation?

Ms. BARTHOLET. Absolutely. I am a fan of ADR, which is part of why I have served as an arbitrator for almost 30 years. But there is an enormous difference between mandatory pre-dispute arbitration and post-dispute arbitration where the two parties genuinely agree to have arbitration. When they make a genuine agreement like that, the alternative is to go to court. In mandatory pre-dispute, it is all in the hands of the big player forcing it down the throat of the other, and it is in the hands of the big player to design the process, pick the arbitration provider, and ensure the kind of biased outcome that I think my experience with NAF illustrated.

Senator CORNYN. So you just think the fix is in and there is no such thing as an impartial decision by an arbitration panel?

Ms. BARTHOLET. No. I just said that I believe in ADR, and I think there is a huge difference between mandatory pre-dispute ADR and authentic ADR, if you will, that if two parties genuinely agree to do arbitration, it is a completely different matter.

Senator CORNYN. I see my time is up.

Chairman LEAHY. Thank you.

Now, Ms. Millett, I should point out—Senator Cornyn has mentioned the cases on the military commissions. There are some of who feel that when the Supreme Court stands up for the Constitution, they are not really moving the goalpost. But I do take your point that corporations have lost some cases in this term along with big cases that they have won. My only concern is the trend and its effect on ordinary Americans. In a lot of terms, the Supreme Court has ruled with the Chamber of Commerce 70 percent of the time when they filed a brief. Now, that number by itself does not mean that they are wrong. But I wonder, when you look at the 19-year litigation ordeal that Ms. Schultz went through, or the arbitration process that the professor has talked about, does that sound fair to you?

Ms. MILLETT. To be clear, this term the Supreme Court ruled in favor of the Chamber of Commerce—only about 50 percent of the time, not 78 or 80—

Chairman LEAHY. I was talking about the last two terms.

Ms. MILLETT. Well, the last term was about—I guess if you average them, I suppose—I am not good at math. Is that 68 or 60-something percent? It has not been 80 percent over the last two terms.

Chairman LEAHY. Seventy. I said 70.

Ms. MILLETT. I am sorry if I misunderstood, but I want to make clear that this term business sort of won as much as it lost. And I think questions of fairness are at some level policy questions. What the Supreme Court was doing in these cases was applying statutory text that was enacted by this body, signed by an assortment of Presidents, and adhered to its stare decisis rule in the statutory area, which is that Congress leads and the Court follows. A lot of these decisions, especially the arbitration decisions, have their roots back 10 to 20 years. All they did this term in arbitration were very narrow applications of what had already happened before. So I think—

Chairman LEAHY. Of course, there are cases where one would argue that they did not follow the Congress's lead, the *Ledbetter* case being an example of that. Many feel that not only the congressional—not only the legislation, but the way that legislation has been interpreted was not followed by the Court.

Ms. MILLETT. The Court does not always get it right. I am not here to say that they do, and people will think different ones are wrong and different ones are right. As a woman, I have enormous sympathy for Mrs. Ledbetter and an understanding of how difficult it is for someone faced with discrimination to realize it and to have the courage to bring a complaint. It affects their livelihoods. Part of that problem may also be it is good to have a Supreme Court that has people who come from different backgrounds and different experiences.

Chairman LEAHY. Well, you preach to the converted there. I have recommended to the last four Presidents that they go outside what I call the "judicial monastery" and pick somebody—I have done this with both Democratic and Republican Presidents, recommend they go outside the judicial monastery and pick somebody more in the real world. When I hear members of the Supreme Court talk about, well, if somebody can just take the time to do this or take the time to do that, these are people that could plan something for 2:30 on

June 12th 2 years from now and know they could do it. Most people in real life cannot plan something for 2:30 this afternoon. It is things like that that are of concern.

The *Exxon* decision, I was concerned that what they are saying is that the corporations have to be able to predict punitive damages. I am more concerned about the rights of people. I look at what Ms. Schultz has said. They found damages after 19 years of this on something where the Exxon Valdez and the corporation were totally at fault. I think everybody agreed with that. Your losses that you have suffered are not covered by that decision. Is that correct, Ms. Schultz? I am speaking about you. I mean you and the others in a similar position.

Ms. SCHULTZ. The compensatory damages were calculated for the first 1 to 3 years, and they did not foresee how long it would take our fishery to recover or that the herring would not come back at all. And it also excluded a lot of claims, for instance, the devaluation of vessels and permits owned by fishermen which fell 60% or more. These investments represented the equity that people had. It was their retirement. And it just disappeared and it was never in any way compensated for.

Our attorneys told us the punitive damages will take care of that, don't worry about it. And now with the reduction not only from the original case in 1994 being from $5 billion, down half, and then down to a tenth, it has left us with nothing.

Chairman LEAHY. Professor, is there any doubt in your mind based upon misleading letters that NAF sent to parties about your unavailability, as you have testified, the unsatisfactory explanations you got from their legal counsel, that you were prevented from deciding cases because you ruled once out of 19 cases against them? In other words, you were not one who could be seen as every single time ruling with them? I am not trying to put words in your mouth. I will let you explain it the way you want.

Ms. BARTHOLET. There is no doubt in my mind, and indeed when I said to the two staff people with NAF that this was what I had to assume was the reason for my disqualification, one of them agreed with me, and the other one did not deny it.

Chairman LEAHY. I am thinking when Professor Robert Lawless, who testified in our first hearing, in this series of hearings on Supreme Court decisions, he talked about the National Arbitration Forum. He said, "Arbitrating a debt collection bypasses the normal procedural safeguards that a court proceeding will give, and before the NAF, the debt collector will almost always win. According to the San Francisco city attorney, in 18,075 cases, the NAF ruled against consumers in 18,045 of them." Professor Lawless suggested they are acting more as a debt collector than an arbitrator. Would you agree?

Ms. BARTHOLET. Well, yes, although I think there is nothing necessarily wrong with debt collection cases, and I will point out that I myself ruled almost all the time, 18 cases, for the credit card company. So I think there definitely are valid claims that can be brought to collect debts, and I do think the statistics do not tell the full story in that sense that it makes it perhaps look—well, I think the importance of my story really is that it gets beyond the statistics, because you might well have a fair system in which credit card

companies would win most of the time. And I think you have to get beyond just the statistics to understand why the system is intrinsically unfair.

Chairman LEAHY. Might they feel more—might people feel happier about the arbitration system if they felt they had a real choice in whether to go before arbitration or not?

Ms. BARTHOLET. I think they would not only feel happier, but they would get a—they should feel happier because they would get a different brand of justice, that if they were in a position after they had a dispute to decide whether or not to agree to arbitration, then the other side would have to be offering them an arbitration system that was a fair deal as compared to going to court.

I mean, again, I am not a defender of the court system. It is in many ways too expensive, takes too long; there are lots of problems with it. So there may well be lots of times when it is better for consumers to have an arbitration system, and that is why, you know, if you banned pre-dispute arbitration—

Chairman LEAHY. What you are saying is give them a choice.

Ms. BARTHOLET. Give them a choice, and then you will get a better brand of justice.

Chairman LEAHY. Thank you.

Any other questions? If not, we have another hearing. Senator Cornyn?

Senator CORNYN. If I could just ask questions on another brief area, Mr. Chairman.

Chairman LEAHY. Of course.

Senator CORNYN. Thank you very much. While we are all concerned about the fairness of our justice system, I want to just ask a couple of questions. I have introduced legislation that would address abuses by securities class action counsel, basically breaching their fiduciary duty to the members of a class by not keeping them fully informed or by perhaps even paying kickbacks to the class counsel. Of course, this followed on the heels of a couple of high-profile scandals involving Melvyn Weiss and William Lerach for which they ended up going to prison.

What was so shocking, I think, about that was that the Wall Street Journal reported that Mr. Lerach, when he was confronted about his conduct, he said, "Believe me, it was industry practice."

And the Washington Post editorialized in response to the scandal that "what is needed now is a sober discussion about how best to achieve a fair, more balanced legal system through comprehensive tort reform. . . . Smart and ethical businesspeople and lawyers—and, yes, there are many who fit the bill—would be wise to start working together to craft such a fix."

The Dallas Morning News in my home State called the scandal evidence of "one of the dirty little secrets of securities fraud cases—kickbacks and other secret arrangements that provide a pile of cash to lawyers and far less to the supposedly defrauded ordinary investors."

And I would just ask Ms. Millett, is this an area that you think would be worthy of Congress's scrutiny, perhaps even holding hearings to look at whether there are things we might be able to do to help make sure that when securities class action litigation is initi-

ated, that it actually benefits the class members, the defrauded investors, and not just the lawyers who bring the lawsuits?

Ms. MILLETT. This is not my area of expertise, but I do not think anyone, certainly any lawyer, could be opposed to efforts to make lawyers and the legal system be responsive to the people it is supposed to serve. And it is always an embarrassment to me as a lawyer when things like this come out, because I believe very highly in the integrity of our profession and of our court system. And so I think certainly when problems arise, it is very important for this body to look and to examine those, and those kinds of measures are what the Supreme Court then follows. The Court cannot solve these problems alone. It can only deal with the cases that come to it. It is for this body to deal with the more intrinsic problems. Beyond that, I am not an expert to know the details of it one way or the other, but no one can be opposed to making lawyers and the system more responsive to the people it serves.

Senator CORNYN. On the panel, you have two former Attorneys General and a former prosecutor, and it would be my hope that—you know, certainly we all as members of the profession do not believe that all lawyers are bad.

Ms. MILLETT. I hope not.

Senator CORNYN. Most lawyers in my experience do try to practice in an ethical and upright way, but I think this is an area that would certainly be worthwhile to make sure that the persons for whom the litigation is brought actually benefit and not just a lawyer who is engaged in perhaps unethical or even illegal activity.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, and we will keep the record open. You will see your transcript, and if you look at it and think, "I should have added" whatever, obviously we will leave it open for that. I appreciate all three of you taking this time to be here. We are not trying to play a game of "gotcha." If you want to add things to it, feel free, and I will also hold it open if others want to ask questions.

I thank you for taking the time. We have hundreds of hearings going on on the Hill every day, and I always feel so gratified that people take time from their own busy lives to come here to testify. It means a lot to all of us.

Senator Cornyn, I thank you, and, of course, Senator Specter and Senator Whitehouse, and the others and their staffs who will have questions.

Thank you very much. We stand in recess.

[Whereupon, at 11:20 p.m., the Committee was adjourned.]

[Questions and answers and submissions follows.]

QUESTIONS AND ANSWERS

Elizabeth Bartholet Written Responses to
Written Questions Submitted by Members of
the United States Senate Committee on the Judiciary
for hearing regarding "Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations" on July 23, 2008

1. *In your written testimony, you assert that employees and consumers are at a great disadvantage in the arbitration system. Would you be supportive of legislation that would require greater due process protections to be used by all arbitrators, including requiring that the same legal remedies available in court be made available in arbitration proceedings?*

My assertion is that employees and consumers are at a particularly great disadvantage in *pre-dispute* arbitration systems, but they are also at a disadvantage in post-dispute arbitration systems since they are almost certain to be up against repeat players. While repeat players have an advantage in judicial systems also, they are likely to have more of an advantage in the relatively lawless universe of arbitration. Legislation mandating increased due process protections would not do much to solve the problems inherent in pre-dispute arbitrations systems. It would help some but also not solve the repeat player problem in post-dispute arbitration.

Legislation should in any event, however, require that the same legal remedies be made available in arbitration as in court.

Real solutions to the problems I discuss in this area would require: elimination of mandatory pre-dispute arbitration, and transformation of the private arbitration system to a public system, in which arbitrators like judges were selected and paid by some public system rather than by the private parties to the dispute.

2. *In your written testimony you discuss a systematic bias in the process and procedures that the National Arbitration Forum (NAF) uses when arbitrating cases. However, NAF is only one administrator of arbitrations. Are you familiar with any of the other arbitration organizations and the procedures they use? In particular, are you familiar with the American Arbitration Associations' Consumer Due Process Protocols? If so, do these protocols protect against bias and the other problems you have mentioned with arbitration?*

I am familiar with, and have served on arbitration rosters for JAMS/Endispute and its successor organization JAMS, the Federal Mediation and Conciliation Service, the Mediation Research & Education Project, and the American Arbitration Association (AAA). I have done extensive labor and employment arbitration over the past few decades in connections with these various organizations.

I am not familiar with the AAA's Consumer Due Process Protocols, but am familiar with the AAA's Employment Due Process Protocol. I think such protocols can alleviate somewhat but cannot solve the bias problems in this area. As discussed in my response

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to Question 1 above, real solutions to the problems require much more radical solutions. At the moment the only kind of arbitration I am familiar with in which there is no significant bias problem is labor arbitration, and the reason that works decently well is that there are two powerful players negotiating the arbitration agreement, and two repeat players operating in the arbitration system.

3. *The Supreme Court only decided two arbitration cases in the past term. Preston v. Ferrer was an 8-1 decision and Hall Street Associates v. Mattel, Inc., was a 6-3 decision. Ms. Millet asserts in her written testimony that these were not surprising developments in the law and build on longstanding precedent. Do you share Ms. Millet's view?*

The key Supreme Court decisions on arbitration that damage consumer and employee rights and opportunities for any fair hearing are the *Gilmer* and the *Circuit City* decisions of 1991 and 2001, respectively. Other harmful decisions came down in subsequent years, and it is true that most of the harm was done prior to this past year. The current Court is, however, as or more hostile to consumer and employee rights as any prior Court.

4. *In Ms. Millet's written testimony, she argues that in the Supreme Court's recent term, the Court consistently came down in favor of the employee or in middle ground between employers and employees. Additionally, Ms. Millet argues that the Court has shown substantial deference to Congress in the employment discrimination area. Do you agree with Ms. Millet?*

The Supreme Court did enormous damage to employee rights during the later 1980s, the 1990s, and the early years of this 21st Century. It has limited the use of class actions and of statistical proof, undermined disparate impact and systemic disparate treatment doctrine, and gutted the Americans with Disabilities Act. The decisions legitimating mandatory pre-dispute arbitration are among the most important decisions eviscerating employee rights. While again, most of the harm was done prior to this past year, the current Court is as or more hostile to employee rights as any prior Court.

5. Senator Kohl's Question 1 – *A growing number of long-term care facilities now include arbitration agreements with their admission contracts. How do the concerns you raise regarding your experience with pre-dispute arbitration agreements in credit card cases relate to such agreements between nursing homes and their residents?*

The concerns I raise regarding pre-dispute arbitration in the credit card industry are directly relevant to the use of such arbitration systems in the nursing home industry. Nursing homes, like credit card companies and banks, are powerful players which will be able to force these arbitration "agreements" upon nursing home residents, design arbitration systems which will favor the nursing home industry, and take advantage of their repeat player role to get the "justice" they purchase.

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6. Senator Kohl's Question 2 – *The American Health Care Association's (AHCA) model arbitration agreement, provided to its member long term care facilities, requires the use of National Arbitration Foundation [sic] (NAF) as an arbitration provider. Do the NAF practices and rules that you express concern about, such as the use of preemptory challenges, apply to other types of arbitration services provided by NAF, specifically long-term care facility arbitration?*

I am not familiar with NAF's arbitration services in contexts other than the bank and credit card industry, but I would worry about the nature of the services it provides elsewhere given my experience and given some of the literature claims regarding NAF.

7. Senator Kohl's Question 3 – *Supporters of pre-dispute mandatory arbitration argue that both parties to arbitration have a fair choice of arbitrators because arbitration agreements, such as AHCA's model agreement, merely dictate the arbitration provider and not the actual arbitrators who hear the case. Do you agree?*

No I don't agree. Repeat players in the arbitration process are in a position to know the past history of decisions made by every arbitrator and thus to eliminate through apparently neutral procedures like the preemptory challenge rule any arbitrator who ever decides a case against the industry that the repeat player is part of. Since arbitrators depend for their income on being assigned cases to decide, and on not being disqualified, they are subject to pressure to consistently rule for the repeat player who might otherwise blackball them. Arbitrators who do not respond to this pressure are likely to be systematically disqualified.

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August 14, 2008

VIA HAND DELIVERY

Senator Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I want to thank you for inviting me to testify before the Senate Judiciary Committee on July 23, 2008, on the subject of "The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations." Enclosed please find my responses to the follow-up questions submitted by Committee members. Please let me know if I can be of any further assistance to you or the Committee.

Sincerely,

Patricia A. Millett

Enclosure

Robert S. Strauss Building / 1333 New Hampshire Avenue, N.W. / Washington, D.C. 20036-1564 / 202.887.4000 / fax: 202.887.4288 / www.akingump.com

ANSWERS TO QUESTIONS FROM THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY REGARDING THE SUPREME COURT'S RECENT DECISIONS ON CORPORATE MISCONDUCT AND LAWS REGULATING CORPORATIONS

1. *Ms. Millett, in your written statement you mention five plaintiff-friendly employment rights cases decided by the Supreme Court this past term. You describe the cases as "notable not only for their consistently employee-favorable outcomes, but . . . for (1) the respect they demonstrate for Congress's leadership role in making the difficult yet critically important policy choices and balances that inhere in the regulation of workplace relationships, and (ii) the broad consensus on the Court in these cases." Explain what you mean by that and why it's important?*

Answer: Each of the five cases from the most recent Supreme Court Term to which I referred in my written statement can be considered either a pro-employee outcome or a middle-ground decision between employers and employees. Collectively, those decisions were notable for the substantial deference they provided to Congress and the broad consensus among the Justices reflected in the decisions.

First, the decisions demonstrated enormous deference to Congress as the body constitutionally responsible for and charged with making the difficult policy judgments implicated by legislation regulating the workplace and combating employment discrimination. The Court demonstrated that respect in two ways. To begin with, the Court hewed closely to the plain language and structure of the relevant statutes when interpreting their meaning. The Court refrained from interpolating additional meaning beyond the plain statutory language and from substituting its judgment for the policy making judgments of Congress. For example, in *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008), the Court considered whether an employer or employee bore the burden of persuasion that discrimination was not based on a "reasonable factor other than age," 29 U.S.C. § 623(f)(1), under the Age Discrimination in Employment Act (ADEA). The Court concluded that the employer bore the burden. Rather than making a policy judgment as to where the Act should place the burden, the Court applied a "longstanding convention" of statutory construction that reflected a well understood "backdrop against which the Congress writes laws." 128 S. Ct. at 2400. Specifically, the Court applied the principle of statutory construction that, "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Id.* at 2401 (citation omitted). The Court noted that it must "respect" the established backdrop absent clear evidence that Congress intended a different result. *Ibid.* The Court also adhered closely to the specific language of 29 U.S.C. § 626(b), requiring courts to enforce the ADEA in accordance with the "powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA). Because the Court had previously interpreted a similar provision of the FLSA to place

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the burden of proof on the employer, the Court relied upon its prior holding to heed the statutory command of Section 626(b).

Congressional deference was also highlighted in *CBOCS v. Humphries*, 128 S. Ct. 1951 (2008), and *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008). In those cases, the Supreme Court held that two anti-discrimination statutes (42 U.S.C. § 1981, and the Age Discrimination in Employment Act, respectively) prohibit not only direct discrimination, but also retaliation against those who assert their rights under the law. In both rulings, the Court relied heavily on principles of *stare decisis*, explaining that a series of earlier decisions under other civil rights laws had recognized that retaliation is an aspect of prohibited discrimination.[1] *Stare decisis* recognizes that, in statutory cases, the Court should be loathe to reverse precedent because the Congress can better speak to whether the Court's decision departed from congressional intent. Thus, the Court's decisions reinforced the rule that the Court will leave it to Congress to alter the meaning of statutes and that, as a consequence, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Those two decisions thus display substantial deference to Congress by leaving to the Legislative Branch the task of either staying or changing course under a particular law.

Such judicial respect for and deference to the decisionmaking role assigned to Congress under the constitutional separation of powers is critically important to the smooth and effective operation of our democratic form of government. It is the job of Congress to make important policy determinations that form the basis for legislation, and the job of the judiciary to interpret that legislation consistent with the Constitution. That is particularly true in the employment context, where Congress has accumulated decades of experience enacting legislation to govern the American workplace. By adhering to statutory text and not reading policy judgments into the relevant statutes, this Term's employment cases illustrate the Court's deferential and limited role – and Congress's determinative role – in regulating employment relationships and combating the difficult problems of discrimination.

Second, the Court's decisions displayed broad consensus in the employment area. There were no 5 to 4 decisions. The cases were resolved either unanimously or by a substantial majority of the Court. The decision in *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 128 S. Ct. 2531 (June 23, 2008), was unanimous. The decision in *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008), was nearly unanimous, with Justice Thomas dissenting only in part and Justice Breyer recused from the case. *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008), and *CBOCS v. Humphries*, 128 S. Ct. 1951 (2008), were resolved by a vote of 7 to 2. The decision in *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008), was by a vote of 6 to 3. That level of consensus is important because it shows that these business decisions were not driven by a single, "swing" Justice. Nor were their outcomes materially affected by the recent changes in Court membership. Such consensus is also important in the business context to give both employers and employees the stability in the law that is needed to

[1] *See, e.g.*, *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005) (Title IX); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (42 U.S.C. § 1982).

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make day-to-day business decisions and to give employees confidence in their protection against unlawful discrimination.

2. *Ms. Millett, you have had an opportunity to hear Professor Bartholet testify in opposition to arbitration agreements, correct? How does her testimony compare with a July 14, 2008 Wall St Journal op-ed by Christine Varney, a former Secretary to the Cabinet in the Clinton administration, entitled "Arbitration Works Better Than Lawsuits"?*

Answer: As I understood it, Professor Bartholet's testimony registered two central objections to pre-dispute arbitration. First, she testified that, based on her personal experience as an arbitrator for the National Arbitration Forum, arbitration agreements are inherently unfair to consumers because repeat corporate players obtain certain advantages over the consumer. Second, she argued that private resolution of civil rights litigation through arbitration threatens the viability of civil rights legislation enacted by Congress because public resolution of such litigation performs an important societal function.

In a July 14, 2008, *Wall Street Journal* Opinion entitled "Arbitration Works Better Than Lawsuits," Christine Varney, a former commissioner on the Federal Trade Commission and Secretary to the Cabinet in the Clinton Administration, argued that arbitration has generally benefited consumers and is cheaper, quicker and more flexible than filing suit in court. Ms. Varney concludes that banning arbitration provisions in most, if not all, consumer contracts would do more harm to consumers and plaintiffs than good. In response to concerns, like those expressed by Professor Bartholet, that arbitration agreements "stack the deck" against consumers, Ms. Varney explains that, in fact, "[g]enerally, consumers do at least as well in arbitration as they would in court." She cites to studies by the American Arbitration Association and National Workrights Institute showing that consumers prevailed in 63 to 80 percent of the disputes they initiated. Ms. Varney also noted several recent victories where consumers won multimillion dollar arbitration awards. While recognizing – like Professor Bartholet – that "arbitration is not perfect," Ms. Varney notes that there is no need to take the extraordinary step of barring pre-dispute arbitration agreements because federal law already responds to and prevents abuses. "Courts can – and do – refuse to enforce arbitration agreements if they are unfair, and they overturn arbitration awards resulting from a biased or corrupt arbitrator." Thus, while Professor Bartholet addressed her particular experience with the National Arbitration Forum, any fair assessment of the arbitration process must consider the practices and results of all of the leading arbitration organizations, such as the American Arbitration Association, which has a Bill of Rights for participants that has further enhanced the fairness of the process.

Even more tellingly, Ms. Varney expressed concern that efforts to eliminate pre-dispute arbitration agreements (permitting only post-dispute agreements to arbitrate) would be unworkable because, once a dispute has arisen, parties' positions become hardened and the opportunity for agreement on a decisionmaking process largely disappears. For example, an employer or business with deep pockets would have the ability to veto the plaintiff's request to arbitrate in favor of forcing the plaintiff into lengthier, slower, and much more expensive civil litigation in court. As Ms. Varney explained, barring pre-dispute arbitration "will not make arbitration 'fairer'; it will make it go away, because it is very difficult to get two sides of a dispute to agree to much of anything once a dispute has started."

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Furthermore, courtroom litigation virtually forces the plaintiff to retain a lawyer, which inevitably entails high costs. And that assumes that a lawyer would even be willing to take the case. As Ms. Varney explains, based on her experience at the Federal Trade Commission, "[f]ew, if any, lawyers will even take cases involving small potential recoveries[,] [a]nd without a lawyer, navigating the court system is nearly impossible." As she notes, Justice Breyer too has expressed substantial concern that, without effective pre-dispute arbitration, "the typical consumer who has only a small damages claim" will be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). Indeed, Professor Bartholet herself acknowledged that litigation "is in many ways too expensive, takes too long, there are lots of problems with it." Accordingly, taking the testimony of Professor Bartholet and the views of Ms. Varney together, there is substantial risk that eliminating or significantly curtailing pre-dispute arbitration will harm consumers and will only help the lawyers who will profit from plaintiffs' cases.

I am not an arbitration expert, and undoubtedly the arbitration system is not perfect. But I appreciate Ms. Varney's comprehensive, candid, and expert assessment of the arbitration system as a whole and her realistic appraisal of the often crippling barriers to recovery that consumers and individual plaintiffs can face in the courtroom setting. Her op-ed expresses the view that the broad-brush elimination of pre-dispute arbitration agreements is overkill, and I share her concern that severely restricting pre-dispute arbitration agreements will, in effect, throw the baby out with the bath water and thus will (in Ms. Varney's words) "benefit lawyers but will leave most consumers out in the cold."

3. *Ms. Millett, you briefed but did not argue Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S.Ct. 2531 (June 23, 2008), a case involving Article III standing under the Communications Act. That case was decided 5-4 in favor of standing, correct? You represented AT&T, a long-distance provider who petitioned the Supreme Court to challenge a D.C. Circuit decision holding that "aggregators" had standing to collect debts allegedly owed a long-distance providers to payphone operators. How does the decision there demonstrate the Court's most recent jurisprudence in cases with business interests on both sides?*

Answer: That is correct. The case was resolved 5 to 4 in favor of standing. More particularly, the Supreme Court concluded that an assignee of a legal claim for money owed has standing to pursue that claim in federal court. I, of course, regret the Court's decision not to rule in favor of my clients. Beyond that, I think the case encapsulates how difficult it can be to pigeonhole or label Supreme Court decisionmaking. Rulings in favor of standing are generally considered to be pro-plaintiff rulings, so in that sense the decision counters efforts to label the Court as protective of civil defendants or big business interests. More relevantly, when one reads the opinion in this fairly arcane area of law, one sees what the Supreme Court is most about. The Court is working hard and wrestling with case law and constitutional policy to decide difficult legal questions that need to get resolved. This case, like about 90% of the Supreme Court's docket, was not a headline-maker. And it defies a liberal or conservative label, as do the vast majority of the Supreme Court's decisions. Were one to read all of the Supreme Court's decisions for a Term (not just the publicly captivating or politically sensitive ones), I think the most likely impression one would walk away with is not that the Court is politically divided or

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agenda driven, but that, across the board, the Justices work very hard to do their difficult job to the very best of their abilities.

4. *Ms. Millett, you argued for several taxpayer companies in the United States v. Clintwood Elkhorn Min. Co., 128 S. Ct. 1511 (April 15, 2008). The Court described your arguments as "gamely" and "ambitious" yet ultimately ruled against your clients. Is it fair to say that to the extent businesses disfavor paying what they contend are unconstitutional taxes, the outcome in Clintwood Elkhorn was decidedly not business-friendly?*

Answer: That is certainly true. The decision was markedly not business- or taxpayer-friendly, since the Court's ruling limited the ability of all taxpayers to collect refunds of taxes that the government *admitted and conceded* were unconstitutional from the moment of their enactment and imposition. Like the *Sprint* case, this case is part of the larger and more comprehensive portrait of the Supreme Court's term. And I think it is very important that, when passing judgment on the Court, the public should view the Supreme Court's decisionmaking from that broader perspective, which shows businesses (like other litigants before the Court) generally losing as often as winning.

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SUBMISSIONS FOR THE RECORD

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July 4, 2008

The Honorable Patrick J. Leahy
Chairman
Senate Judiciary Committee
SR-433
Washington D.C. 20515

Dear Honorable Mr. Chairman Leahy:

Thank you for your efforts to ensure corporate accountability. This letter addresses the failure of Exxon Corporation to protect workers who conducted the cleanup of the Exxon Valdez oil spill and the health consequences of Exxon's negligence. We, the undersigned public health, labor, environmental health and justice organizations request your assistance to hold oversight hearings and/or initiate a Government Accountability Office (GAO) investigation with the goal of amending the Occupational Safety and Health Act (OSHA) and related legislation to improve protections from and remedies for work-related chemical-induced illnesses. We appreciate the commitment and leadership that you have demonstrated to protect health and the environment.

This letter is prompted by our concern that the cleanup workers for the 1989 Exxon Valdez oil spill (EVOS) are suffering from long-term health problems resulting from chemical exposures and that the lack of adequate OSHA and National Institute of Occupational Safety and Health (NIOSH) standards and oversight have contributed to these devastating outcomes. Most of these workers have been deprived of (a) accurate diagnoses, (b) appropriate treatment of their illnesses, and (c) fair compensation, and thus fundamental justice. A significant number of the workers have died. Illnesses include neurological impairment, chronic respiratory disease, leukemia, lymphoma, brain tumors, liver damage, and blood diseases. As workers blasted oiled beaches with hot seawater from high pressure hoses, they were engulfed in toxic fumes containing aerosolized crude oil—benzene and other volatile compounds, oil mist, and polycyclic aromatic hydrocarbons. While media and public attention focused on the thousands of oil-coated and dead seabirds, otters, and other wildlife, little attention was given to the harm done to the cleanup workers.

Our evidence suggests that thousands of workers may still be experiencing serious chronic and debilitating illnesses from Exxon's cleanup. We believe that there are more than 3,000 former cleanup workers who are suffering from spill-related illnesses, many now disabled or dead. Further, we have evidence to demonstrate that Exxon has known of this epidemic, but has used loopholes in the OSHA safety regulations and legal technicalities in court to cover it up. Further, since the regulatory deficiencies that emerged in the wake of the Exxon Valdez disaster have not been seriously addressed, workers responding to other disaster-related hazardous waste cleanups (including the 9/11, Katrina responders, as well as those called to respond to chemical or refinery facility explosions/leaks) have also been deprived of necessary measures to safeguard their health from chemical exposures.

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Over the past several years, two Alaska-based non-governmental organizations (Alaska Forum for Environmental Responsibility, and Alaska Community Action on Toxics) documented that EVOS workers were exposed to harmful levels of benzene, oil vapors, mists and aerosols that exceeded even the OSHA Permissible Exposure Limit (PEL) and the NIOSH Recommended Exposure Limit. (We say "even" because these exposure limits are vastly less protective than environmental exposure limits set for the same chemicals.) A pilot study conducted through the Yale School of Public Health found that fourteen years after the spill a statistically significant number of beach clean-up workers—one-third of the participants—had higher self-reported respiratory, central nervous system, and chemical sensitivities than workers who were not on the beaches. In addition to crude oil vapors, mists, and aerosols, a subset of workers applied chemical solvent-based cleanup products to "treat" beaches. Workers were required to dispense Exxon's experimental "bioremediation" product Inipol EAP22 from leaking backpack containers without requisite information about health hazards and without protective equipment. Anecdotal reports indicate that workers suffered headaches, nausea, and blood in their urine shortly after applying Inipol—symptoms indicative of acute exposure. Inipol and other industrial solvent-based products used on the spill were not screened for environmental or health effects.

During the first few days of the spill, it is likely that all responders—laborers, fishermen, Natives, scientists, volunteers, Coast Guard, Alaska State personnel, and Exxon employees--were excessively exposed while enveloped in the smog of vaporization from an estimated 70,000 gallons of benzene, a chemical associated with leukemia, anemia, and neurological damage. During the subsequent weeks and months of the cleanup, workers were exposed to "heavier" components of the oil, including the class of chemicals known as polycyclic aromatic hydrocarbons (PAHs)—a class of 100 different chemicals, many of them carcinogenic and highly persistent. The U.S. Environmental Protection Agency classifies 22 PAHs on the list of the most hazardous of chemicals—persistent bioaccumulative toxins, and requires companies to report these compounds under the Community Right-to-Know law. Neither regulatory standards for releases to air and water and nor worker exposure standards have yet caught up with the science that demonstrates the extreme toxicity of PAHs to fish, wildlife and people at exquisitely low concentration levels.

To this day, no one has conducted a comprehensive investigation of long-term health effects to the cleanup workers. State and federal agencies and Congress have failed in their responsibility to investigate this occupational health disaster. Regulatory agencies and Congress have also failed to ensure the health and well being of thousands of American workers who helped to clean up the largest and most devastating oil spill in U.S. history.

So-called 'no fault' workers compensation systems do not provide adequate service or justice for chemically injured workers. Several reasons stand out: first, the system was designed to address physical injuries where cause and effect are immediately apparent. The full impact of workplace chemical exposure may not appear for as much as forty years. Second, the paltry compensation available when a link between exposure and disease is made in no way makes up for what the worker has already lost. This same woeful inadequacy of compensation works as a disincentive to precaution—in the short-run it is cheaper for an employer not to practice precaution and to take chances on sick workers bringing "successful" claims for compensation than to prioritize and invest in worker health and protection. This so-called 'bottom line' approach is shortsighted for industry in the long-run of course, not to mention the lives and productivity destroyed in the process. But unless and until the real economic incentives are in place that preserve and protect the health and lives of all workers, and especially chemically-exposed, hazardous waste and emergency response workers, this ugly scenario will persist. We can do better and we must.

Worker right-to-know laws fail to provide workers with adequate information about the chemical exposures during an oil spill or other industrial or large-scale natural or human-induced disasters. Companies have a

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vested interest in using cleanup chemicals that may be expedient, but not account for chronic and long-term health consequences for workers.

We seek a Congressional investigation about the health of Exxon Valdez oil spill workers with the intent of reforming the law to protect all workers from harmful chemical exposures. The problems we identify for the EVOS cleanup workers are only symptomatic of a larger problem that affects workers in chemical manufacturing, refining, oil shipping and port facilities. Without Congressional action, workers will continue to suffer preventable health effects and injustice. We call upon you to exercise your leadership in Congress to remedy this through the following actions that would benefit workers who face on-the-job chemical exposures:

- ✓ Set health protective Permissible Exposure Limits at levels well below those known to cause either acute or chronic health effects, and bring these PELS in line with thresholds for community exposure established by other agencies. The long-standing and truly shocking disparity between workplace and environmental PELS for chemicals known to cause cancer and/or developmental harm is a disgrace. (see Office of Environmental Health Hazard Assessment report detailing the impact of the double standard between how workers are protected versus how the community at large is protected against toxics, for example).

- ✓ Establish and enforce health protective Permissible Exposure Limits for all chemicals to which workers are exposed, rather than enforcing limits for only 0.5% of exposures (500 out of 100,000).

- ✓ Require companies to implement the Hierarchy of Health and Safety Controls as described in the Louisville Charter (www.louisvillecharter.org).

Based on our investigation, we urge you to hold oversight hearings on the human health effects of the EVOS cleanup for the following purposes:

1. **Improve OSHA and NIOSH oversight in anticipation of, as well as during and after hazardous waste cleanups by taking measures to recognize and try to prevent chemical-induced illnesses.**

   a. Require reporting of illnesses diagnosed as colds and flu for hazardous waste cleanups (removes exemption), and screen for chemical exposures.

   b. Require that OSHA PELs and NIOSH RELs be based on the actual compound(s) of concern rather than surrogate compounds (*e.g.*, no substitutions of OSHA PEL for mineral oil, for crude oil mist, or particulate dust for PAH aerosols).

   c. Require release of medical, clinical, environmental monitoring data, and other health related records to OSHA for hazardous waste cleanups (removes need for subpoena).

   d. Require OSHA to establish a public repository of hazardous waste cleanup records.

   e. Revamp OSHA injury and illness coding system to include chemical-induced neurotoxicity and other illnesses associated with chemical exposures.

   f. Increase statute of limitation for filing toxic torts for chemical-induced illness from two to thirty years, the same time period required for responsible parties to retain hazardous waste cleanup records—retroactive to January 1, 1989.

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g. Establish stockpiles of hazardous waste cleanup personal protective equipment.

2. **Revamp the EPA procedures for testing and listing chemical cleanup products to include realistic tests and protection for humans.**

   a. Remove regulation that allows effectiveness tests to be averaged.

   b. Ban products that contain human health hazards.

   c. Establish de-listing procedures that include notification of the U.S. EPA, reason for de-listing, and product recall procedures.

   d. Establish procedures to test stockpiled product for effectiveness.

3. **Provide redress to injured EVOS cleanup workers, which cannot be readily obtained through the legal system.**

   a. Subpoena Exxon's medical records, clinical data, and environmental monitoring data from the Exxon Valdez cleanup (Exxon required to hold records for thirty years).

   b. Based on subpoenaed records, require NIOSH to conduct a new Health Hazard Evaluation for EVOS cleanup.

   c. Require and fund a community-based feasibility and epidemiology study through NIOSH of the former EVOS workers for the purpose of building a public database on human health effects of crude oil exposure, especially PAHs.

   d. Establish an EVOS Cleanup Workers Fund for former workers who have chronic illnesses stemming from cleanup to receive compensation for medical bills, including treatments that detoxify chemicals.

Thank you for your consideration of our requests. For more information, please contact: Riki Ott, PhD, (phone: 907-424-3915; email: info@soundtruth.info) or Pamela Miller, Executive Director, Alaska Community Action on Toxics, (phone 907-222-7714; email: pkmiller@akaction.net).

Sincerely,

Pamela K. Miller
Executive Director

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HEARING BEFORE THE
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY:
"COURTING BIG BUSINESS: THE SUPREME COURT'S RECENT DECISIONS ON CORPORATE MISCONDUCT AND LAWS REGULATING CORPORATIONS"
July 23, 2008

Testimony of Elizabeth Bartholet
Professor of Law, Harvard Law School

My name is Elizabeth Bartholet, and I am a professor of law at Harvard Law School. I appreciate the opportunity to testify on important issues about the problematic impact recent decisions by the U.S. Supreme Court have had on employees and consumers.

I will focus my comments on the Court's decisions related to mandatory pre-dispute arbitration, an issue that I am familiar with both through my professional work in the employment discrimination area, and through my experience serving as an Arbitrator for the National Arbitration Forum as well as other arbitration providers.

I have taught Employment Discrimination at Harvard Law School for the past three decades, and have worked as a civil rights and public interest lawyer in the employment discrimination area for a number of years prior to joining the HLS Faculty. I have worked as an Arbitrator on a part-time basis for almost three decades, doing mostly labor arbitration, and working through such arbitration providers as the American Arbitration Association (Labor and Commercial panels), the Federal Mediation and Conciliation Service, JAMS (formerly JAMS-Endispute), the Mediation Research & Education Project, and the National Arbitration Forum.

Arbitration is often thought of as a means of dispute resolution that might work better for regular people without significant means than the court system, because arbitration is designed to be simpler, more expeditious, and less costly. However the Supreme Court transformed the meaning of arbitration in our society when it upheld the legality of mandatory pre-dispute arbitration in the two key cases of *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). These cases constituted a stunning development for those familiar with the law in the area, contrary to the general understanding of the rights of civil rights plaintiffs and of other plaintiffs to access federal courts for the vindication of their legal rights, and contrary to the general understanding of the meaning of the Federal Arbitration Act. These cases meant that in the employment context employers could condition job offers on prospective employees' "agreements" that all disputes, including disputes involving alleged violations of federal civil rights law, be resolved by arbitration. They meant that in the consumer context, banks could condition credit card arrangements on consumers' similar agreements.

These decisions transformed the meaning of arbitration because they put the big corporate players – the employers and the banks – in the position of forcing arbitration on the people who simply want to get jobs and credit cards, and will not turn down the opportunity to get these things simply because of what seems at the time the abstract and unlikely possibility that they

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might later have an important dispute with the employer or bank. The big corporate players were then also free to select arbitration providers who would provide them a sympathetic forum, and to design an arbitration process that would serve their interests, since the employees and consumers would again not be in any position to bargain or even to think about these things at the point they were applying for jobs or credit cards. All this is very different from the situation in post-dispute arbitration. At this stage, employees or debtors with legal claims they could take to court are likely to agree to arbitration only if they have reason to believe that it will serve their interests as well or better than going to court, and they are in a position to take a careful look at the specific system of arbitration and the specific arbitration provider that the corporate player is suggesting before deciding whether to agree to arbitration.

There are two main problems with mandatory pre-dispute arbitration that I will address. One is the problem of bias in favor of the big corporate player and against the employee and consumer that is inherent in this form of arbitration. I will describe my experience as an arbitrator dealing with consumer credit card cases for the National Arbitration Forum to illustrate the bias problem. The second problem I will address is the way in which pre-dispute arbitration has undermined civil rights law in the employment area, changing what Congress designed and the courts used to enforce as an important public law protecting large classes of victims against systemic discriminatory practices and deterring employers from continuing such practices, to a private law that can do little more than occasionally correct obvious individual wrongs. This second problem exists independent of the first – even if the problem of bias is solved, arbitration is unlikely ever to serve as an appropriate forum for vindicating the important public law concepts central to our civil rights laws.

The Biased Forum Characteristic of Pre-Dispute Arbitration's Private Justice System

Arbitration is by definition a private justice system in the sense that the parties select and pay for the arbitrators who resolve their disputes. Arbitrators are of course supposed to be unbiased in their decision-making, but there is a risk in this system that one side will be in a position to purchase the justice that they want, because arbitrators and the organizations that serve as arbitration providers are under financial pressure to satisfy the corporate repeat player by systematically ruling in its favor. Arbitrators only get paid if they are selected to hear cases. Arbitration providers only make money and survive in the business if they succeed in attracting companies to hire them to provide arbitration services.

My own experience over the past two decades as an arbitrator has led me to conclude that in many instances corporate players are in fact benefitting from a system of purchased justice in both the employment and the consumer credit areas. My experience as an arbitrator for the National Arbitration Forum (NAF) is but one example, although it may be the most telling. NAF has locked up a huge part of the nation's credit card business. Others have documented how NAF sells its services as a corporate-friendly arbitration provider to banks and credit card companies, assuring them that their interests will be well-served by choosing arbitration over the court system as a way to resolve disputes with consumers, and by choosing NAF rather than another arbitration provider.

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I was solicited to join NAF's roster of arbitrators, although I had no prior consumer law experience, and I signed an "Assignment Agreement" with them late in 2001. I was then assigned starting in early 2003 to a succession of cases involving credit card company attempts to collect alleged debts, all of which I was to decide simply on the papers without any hearing unless one side asked for a hearing. In the period between early 2003 and February 2004 I decided 19 cases, and in 18 of these I decided for the one particular credit card company involved in each case. These cases seemed to involve no real dispute as to whether the alleged debtors owed the money claimed. (The 19th case I dismissed.) However I developed growing concern with the fairness of the underlying credit card agreements mandating arbitration with the NAF, which as I remember generally had provisions precluding class actions and providing attorney fees only for the credit card companies, and I was also concerned that there were no lawyers representing the consumers in a position to raise any such fairness issues, or otherwise protect the consumers against wrongful claims.

I then was assigned a case in which for the first time the consumer, who happened himself to be a lawyer, asked for a hearing, and filed a counterclaim against the credit card company alleging that it had wrongly charged him with penalty charges and interest and also had harmed his credit rating and accordingly caused him significant financial damage. After that hearing I issued an opinion for the first time in any of my NAF cases ruling for the consumer and against the credit card company on the merits on both the original credit card company claim and his counter claim, and I ordered the credit card company to pay the consumer $48,000 in damages.

After that March 2004 decision, I was allowed to decide only four more NAF cases, the four cases I had been assigned in the same timeframe as the case in which I ruled against the credit card company. In the two of these that involved that same credit card company, the 10-day time period for a party to move to request removal of the arbitrator without having to demonstrate any cause had passed; in the other two this credit card company was not involved, and I am unsure as to the timing and also do not believe that any credit card company was involved. After these four cases, I was prevented from deciding the next 11 cases to which I was assigned, all of which involved the same credit card company. In seven of these 11 cases I was notified by NAF that I had been removed as Arbitrator based on the credit card company's objection and request for removal pursuant to the NAF Rule providing for removal without cause, and in four the credit card company moved to dismiss in a way that would leave it free to file the claim again, with another arbitrator presumably to be assigned. At that point I terminated my Assignment Agreement with NAF and resigned from the NAF roster of arbitrators.

In the first three of the cases in which I was removed by virtue of the credit card company's request, I received copies of letters sent to the parties which stated that the reason I would not be hearing the case was that "due to a scheduling conflict, the Arbitrator previously appointed is not available to arbitrate the above case." This was of course not true. I called the NAF case administrator immediately after receiving these notices to discuss what I described as a problem in the fairness of the NAF process, saying that it seemed clear that I was being removed simply because I had once ruled on the merits against a credit card company, after having ruled for the company numerous times, and saying additionally that in sending out a misleading statement about my being unavailable because of a schedule conflict when actually I had been removed by

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the company, NAF was depriving any party that might want to investigate or challenge the system for bias of vital information. The NAF case administrator agreed that I was likely being removed simply because of my one ruling against the credit card company. She said that the misleading letter about my being unavailable was a form letter that was regularly sent out in all cases. I asked her to have a higher NAF authority call me back to discuss their process. Later I received a call from someone at NAF who described herself as legal counsel and in a supervisory capacity over the case administrators. I raised the same issues with her, and she did not deny that the likely reason for my removal as Arbitrator was because of the one case in which I ruled against the credit card company on the merits, but argued that the NAF process was fair since each side had what in court would be called a peremptory challenge. When I countered that in the NAF process it was only the credit card companies which as repeat players were in a position to exercise their peremptory challenges, and thus to stack the deck by ensuring that arbitrators would be favorable to their interests, and that the NAF knew that this was going on and was facilitating this process, this person had no satisfactory explanation as to how the process could nonetheless be understood as fair.

I concluded from this experience that the NAF process was systematically biased in favor of credit card companies and against debtors, since the process gave the companies a peremptory challenge right which they could use to systematically remove any arbitrator who ruled against a credit card company in a single case, since the companies were apparently using it in this way, since the alleged debtors were not in a position to know what was going on, and since NAF was fully aware of the practice and was either facilitating it or at a minimum tolerating it rather than doing anything to address it. Accordingly I wrote the NAF a letter dated February 8, 2005, terminating our Assignment Agreement, stating that "I have come to the decision to do this based on my concern about the ethics of the NAF system of providing ADR services, and its apparent systematic bias in favor of the financial services industry."

Some time later I was subpoenaed to testify in a case involving an individual who had a dispute with a corporation over the sale of a computer, and was concerned that he would not get a fair hearing in the NAF forum which the sales agreement mandated for any dispute resolution. This party's lawyer had heard of my experience with NAF, and wanted me to testify about it in a discovery deposition in order to help him prove that the NAF forum was biased. NAF went to great lengths to try to prevent me from testifying. NAF's Chief Operating Officer and General Counsel sent me a letter just before the scheduled deposition stating that NAF believed it would be "improper for the requested deposition to proceed," due to the confidentiality obligations allegedly imposed on me by the Assignment Agreement I signed when I first agreed to be an NAF arbitrator,[1] even though I made it clear that I would not testify about anything specific to parties or to case facts that could in any way identify parties. NAF subsequently moved to quash the deposition subpoena. I felt forced to retain a lawyer to protect me against NAF and to represent me in the court proceeding that the party who needed my testimony to prove NAF bias had to bring to get a court order clarifying that the confidentiality provisions in my Assignment Agreement did not prevent me from testifying in a general way about bias in the NAF system. NAF was represented by lawyers in that court proceeding who argued that I should be prevented

[1] Court Order issued 9/5/06, in *In re William Carr*, Mass. Superior Court, Civil 06-2032 (9/5/06), ordering me to testify.

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from testifying in order to "protect the integrity" of the arbitral process, although they knew my testimony would in fact challenge the integrity of their process. They argued that the Assignment Agreement I signed with NAF should prevent me from testifying about any bias in their system, despite the fact that I had long since terminated that Agreement and resigned as an NAF arbitrator, and despite the fact that I would be testifying only to the kinds of general facts regarding bias stated in my testimony here, and not to any specific party or case facts. The court ultimately concluded that my Assignment Agreement did not preclude me from testifying and ordered that I should testify regarding the general facts related to bias in the NAF system. My lawyer billed $25,808. for the time he felt was necessary to protect me given NAF's claims.

I was relatively free from the financial pressures to go along with the NAF system compared to most NAF arbitrators, since I have a full-time job serving on the Harvard Law School Faculty, and my income from NAF arbitration during those years I was working as an NAF arbitrator represented only a tiny fraction of my annual income (roughly 1% in the two years when I heard the largest number of NAF cases). Many and perhaps most arbitrators depend solely or very largely on their arbitration income which is based entirely on the cases that they actually hear. Accordingly there is a very real risk that the NAF pool of arbitrators is overwhelmingly stacked against the consumer, with arbitrators either being removed as I was because they have decided a case for the consumer, or arbitrators being pressured into always ruling for the repeat player companies out of fear of being removed from cases.

All this, together with my other experience as an arbitrator, and my reading of the literature, is what has led me to conclude that the Supreme Court's approval of pre-dispute arbitration has led to a private justice system in which banks and credit card companies are able to purchase the results they want, at the expense of the debtors forced into the system.

The Diminution of Civil Rights Characteristic of Pre-Dispute Arbitration's Private Law System

The Supreme Court's decisions upholding mandatory pre-dispute arbitration mean that employees can be coerced into surrendering their rights to go to court to vindicate any of their legal rights, including the rights guaranteed under both federal and state civil rights law. The Court justified its decisions by claiming that arbitration provided an equivalent forum in which to vindicate their legal rights. But this has proven patently untrue for two different kinds of reasons.

The first reason is the bias problem, which I discussed above in the context of NAF and consumer arbitration, and so will only briefly mention here since the essence of the problem is the same. Employers, like credit card companies, are in a position to shop for arbitration providers, to design the arbitration system they will use, and to force this system upon their employees by making agreement to it a condition of employment. Employers are in the same position as credit card companies to purchase the justice they want, by pressuring both arbitration providers and arbitrators to produce results that favor employers over employees. Arbitration providers and arbitrators are under the same financial pressure to produce the desired results if they want to continue getting paid.

The second problem, which I will focus on here, is the problem of what I will call privatization of the law. It would exist even if you were to solve the bias problem.

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The federal law of employment discrimination, embodied in significant part in Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, was designed by Congress as public law. The federal courts of the 1960s, 1970s and early 1980s made it clear that they understood the 1964 Civil Rights Act as important public law, designed to undo the effects of prior discrimination and to bring into existence a new era characterized by equal opportunity. For example, the Supreme Court held early in the history of interpreting the 1964 Civil Rights Act that plaintiffs who prevailed in court on their civil rights claims should be awarded attorneys fees by the courts, paid for by defendants, because civil rights plaintiffs should be understood to be acting as "private attorneys general" in enforcing this very important public law, and attorneys fee awards would encourage such law enforcement. Congress later enacted a law generalizing this principle by guaranteeing prevailing plaintiffs attorney fee awards in all federal civil rights cases. The federal courts in this early era were generous in granting class actions, in which a small number of individual named plaintiffs were able to represent huge classes of hundreds or thousands of employees, ensuring a day in court for many who by virtue of poverty or ignorance of their rights or fear of retribution would never otherwise have been able to get their legal rights vindicated. The federal courts granted generous discovery rights which together with class actions gave plaintiffs the opportunity to use statistics and other broad patterns of proof to get at subtle, hidden, and other forms of hard-to-prove discrimination which otherwise would go unchallenged. The federal courts developed over the years theories of discrimination like disparate impact which allowed for findings of discrimination in the absence of intent, and forced employers to reform or abandon a wide range of selection systems that had functioned to exclude minority race employees. The federal courts published decisions on all these and other matters in a form which was public and accessible, and this served to get the word out to all employers about the nature of the civil rights law regime and the liability that they risked if they operated in violation of the law, thus encouraging widespread reform of employment practices regardless of whether employers were actually sued in court.

The Supreme Court together with the lower federal courts have of course done much in the later 1980s, the 1990s, and the first decade of this 21st Century to weaken discrimination law in all these respects, limiting class actions, limiting the use of statistical proof, and undermining disparate impact doctrine. They have also weakened discrimination law in a range of other ways, with the *Ledbetter* case recently under consideration by Congress serving as but one relatively minor example. They have essentially gutted the Americans with Disabilities Act.

And Congress has occasionally struck back, as for example when it revived disparate impact doctrine and overruled numerous Supreme Court decisions with the Civil Rights Act of 1991.

However nothing the Court has done in the employment area is as potentially significant in destroying our civil rights regime as the mandatory pre-dispute arbitration decisions. This is because this form of arbitration simply removes a huge and growing group of cases from the federal courts altogether, and puts them into a system that is not designed for any public law purpose. Nothing that Congress does to "fix" Court decisions in the civil rights area, nothing that future courts might do to undo some of the last few decades' decisions, will succeed in re-creating civil rights law as important public law if civil rights cases are being decided in

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arbitration and not in the courts. What Congress needs to do therefore if it wants to revive our civil rights regime in any real way is to fix the mandatory pre-dispute arbitration decisions.

This is because of the nature of the traditional arbitration system, a system that employers will want to perpetuate through the arbitration rules they design and force on their employees in pre-dispute arbitration "agreements." Arbitration is not typically a system for vindicating important public law, but instead a system for quickly and quietly resolving small disputes so that they are finally settled with minimal expense. Arbitration has traditionally not involved class actions, and many pre-dispute arbitration agreements prohibit class actions. Arbitration has traditionally not involved any extensive discovery, and many pre-dispute arbitration agreements prohibit any such discovery. Arbitrators will thus not likely have the statistical and other proof before them that will allow for finding any form of subtle or hidden discrimination. Arbitrators are not likely to know anything about sophisticated theories of discrimination like disparate impact and systemic disparate treatment even if the proof could be made out. Arbitrators either rule without issuing any opinion or issue opinions which are not published in any generally accessible form. Decisions are designed to be final, with very limited appeal to court – simply being egregiously wrong on the facts and the law is not a basis for appeal.

For these many reasons, arbitration will not serve the public law function of defining and developing the law, vindicating and protecting large classes of employees, and educating employers about and deterring them from violating the law. It will at best, assuming that there are no biased forum problems, enable some limited numbers of employees who have identified and are able to prove obvious forms of relatively overt discrimination, because they have access to smoking-gun types of evidence, to win individual damages relief for the violation of their rights. Individual relief for people who recognize that their rights have been violated and are aggressive enough to push for vindication does nothing to help all those who are unaware that their rights have been violated, or unable because of poverty or fear to press forward to demand relief. And these kinds of smoking-gun cases are not representative of the nature of our modern discrimination problems, which consist instead of the kind of subtle, hidden, systemic forms of discrimination that can only be proved in the more complex process typical of the court system.

Conclusion

Congress needs to end mandatory pre-dispute arbitration. And it needs to act now. Creditors in these economic times are growing increasingly desperate, and they deserve at a minimum a fair forum for the resolution of their disputes with credit card companies and banks. Employers are racing forward in increasing numbers to embrace pre-dispute arbitration, recognizing the advantages it presents for them as compared to the court process, and they are accordingly removing an ever-increasing percentage of all employment discrimination cases from the judicial to the arbitral forum, changing in fundamental ways the nature of our civil rights regime.

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July 21, 2008

Dear Senator Leahy,

I want to know why a large corporation goes unpunished for destroying the livelihoods of tens of thousands of Alaskan fishermen. A large corporation should perform due diligence in preventing the sorts of horrific disasters, such as the Exxon Valdez Oils Spill. It is very clear that Exxon did not do this. The latest and final ruling by the Supreme Court on the Exxon Valdez Oil Spill Litigation is a farce and disgrace. We have chief justices admitting that they shouldn't have made a ruling on the punitive damages, but doing it anyway.

Why is the Supreme Court allowed to give deferential treatment to large corporations when they admittedly should not have made the ruling in the first place? Where is it written that the Supreme Court is allowed to come up with oblique equations for punitive damages that seem to come up with out of thin air? Where are the actuarial mathematic equations that the Supreme Court came up with for this decision and what is the science behind it? The 1:1 ratio of punitive to compensatory damages is completely arbitrary and several of the justices even admitted that this was something that Congress should have decided. The justices should have allowed Congress to define the parameters do so before the case was decided or just let the 9th circuit ruling stand.

In addition to addressing the gross mismanagement of the case, by the USSC, I believe that this hearing should also bring Exxon to heel in their attempt to refuse payment of interest on the settlement. Perhaps you were unaware of this caveat, but a decision should be made on this as well.

I hope that you will prove me wrong in my belief that nothing will come of these hearings. I would like to think that Congress would not cave to these interests. I would like you to correct the wrong that has been done to the plaintiffs of the Exxon Valdez Oil Spill Litigation in whatever way you can. In my opinion, and I know that I am not alone, the United States is no longer the bastion of democracy, it t has become a 3rd world republic , owned by corporate despots and warlords, ruled by a system defined by Dickensonian lawsuits with the highest court in the land making judgments that read like "Alice in Wonderland" . I would appreciate it if you had the courage to stand up for what is right in this situation.

Sincerely,
Gwen Cooper
Fort Collins, Colorado
970-221-9277 phone
cooperco@verinet.com

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Statement of Senator John Cornyn
***Hearing*: "Courting Big Business: Court Decisions that Ignore Corporate Misconduct"**
July 23, 2008

Thank you, Mr. Chairman.

The topic of today's hearing is "Court Decisions that Ignore Corporate Misconduct." I think that misdiagnoses the real problem plaguing our federal courts. The most serious scandal in our court system today is criminal behavior by plaintiffs' trial lawyers, most prominently Melvyn Weiss, William Lerach, and Dickie Scruggs. For over two months, I have been calling for hearings to investigate these scandals, but my calls have fallen on deaf ears. I submit that today's hearing should investigate "Congress's Decision to Ignore Trial Lawyer Misconduct."

Two of the wealthiest and most high-profile members of the securities class action plaintiffs bar, William Lerach and Melvyn Weiss, have recently plead guilty to federal crimes. Unrepentant, Mr. Lerach stated that the crimes that he committed were "industry practice" within the securities class action plaintiffs' bar. Despite this admitted criminal misconduct, alleged by Mr. Lerach to be industry-wide, there has been zero scrutiny from this Congress. Reasonable people can disagree about the substance of the Supreme Court decisions that spurred this hearing, but there can be no debate that crimes were committed by prominent members of the plaintiff's trial bar. This misconduct cannot be ignored.

The Lerach and Weiss cases shed light on a sad practice that Congress could—and should—address. Lerach and Weiss entered secret agreements with the lead plaintiffs in their securities class action lawsuits to keep an unfair amount of the lawsuit's proceeds between them, while shutting out the ordinary investors who made up the rest of the class. Essentially, the lead plaintiff agreed to an unreasonably high attorneys' fee, with the understanding that the lawyer would funnel a portion of that fee back to the lead plaintiff. Thus, the lawyers were overcompensated and the lead plaintiffs received a disproportionate share of the proceeds of the lawsuit. Ordinary investors were shut out of the secret arrangement, and so received less of the winnings of the lawsuit than they were entitled to. The sad irony is that the securities class action system, whatever its faults, is *designed to protect ordinary investors.*

While we would all like to believe that this is just the work of just a few bad apples, the evidence shows that this unjust, unethical, and illegal practice was widespread. As Mr. Lerach told the Wall Street Journal "believe me, it was industry practice." When there are industry-wide criminal practices that victimize ordinary investors, Congress should not look the other way.

There have been noteworthy calls in the media for Congress to investigate these criminal practices within the plaintiffs' bar. One of the leading newspapers in my home state of Texas, *The Dallas Morning News*, appropriately called the Weiss/Lerach scandal evidence of "one of the dirty little secrets of securities fraud cases – kickbacks and other secret arrangements that provide a pile of cash to lawyers and far less to the supposedly defrauded ordinary investors. . . It's awful enough that ordinary people are defrauded without greedy lawyers abusing them and the system." *The Washington Post* editorialized in response to the scandal that "What is needed now is a sober discussion about how best to achieve a fairer, more balanced legal system through

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comprehensive tort reform. . . . Smart and ethical businesspeople and lawyers—and, yes, there are many who fit the bill—would be wise to start working together to craft such a fix."

To open that discussion, I have introduced the Securities Litigation Attorney Accountability and Transparency Act. My bill will require full disclosure of any financial arrangements between the lead plaintiff and the class counsel. This will give smaller class action plaintiffs the information they need to ensure that they are fairly represented, and that the money they deserve isn't secreted into the pockets of lawyers or other litigants by backroom dealings. My bill will also give courts the power to institute a competitive bidding process to make sure that the fee arrangement between the lead plaintiff and the lead attorney gives every class member a fair value and equal justice. Finally, my bill would commission a study of the last 5 years of fee awards in securities class actions to determine the average hourly rate for lead counsel.

Introducing transparency and market discipline into the process of Attorney hiring is a reliable way of protecting the litigants from abuse, as well as ensuring quality, cost effective representation. Corruption can only grow in an environment that lacks the sunshine of transparency and the open space provided by market competition and accountability. A more open, competitive process, overseen by a judge with the class's best interest at heart, will prevent future scandals. Without openness and accountability, future scandals are inevitable.

But my legislation is not necessarily the only appropriate response to this scandal. I urge my colleagues to join me in answering *The Washington Post*'s call to "to start working together to craft" appropriate responses. We all know that if any industry other than the trial bar engaged in a predatory and illegal "industry practice," there would be widespread outrage and congressional hearings.

If this Congress wants to debate decisions that ignore misconduct, then I would encourage my colleagues to rethink their decision to ignore trial lawyer misconduct.

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Statement of Sen. Dick Durbin
Hearing of the Senate Judiciary Committee

"Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations"

July 23, 2008

I commend Chairman Leahy for calling this hearing today. In recent years, the Supreme Court has quietly issued a series of troubling decisions that have restricted access to the courts for private citizens and shielded corporations from liability for irresponsible or even fraudulent behavior. Congress has passed laws to protect workers and consumers against such abuse, but the Court consistently has sided against the interests of ordinary Americans. In a time when so many are struggling to afford health insurance, save for retirement, and avoid home foreclosure, the Court has thwarted the will of Congress and prevented citizens from enforcing their rights in court.

Setting an Artificial Punitive Damages Cap

When the Exxon Valdez supertanker ran aground off the Alaskan coast in 1989, the eleven million gallons of oil that spilled into Prince William Sound caused massive environmental and economic damage. Exxon's irresponsible decision to leave a relapsed alcoholic at the helm of the Valdez devastated communities and deprived fishers, sailors, and many others of their livelihoods. But the Supreme Court's recent decision in a case brought by a group of Alaskans against Exxon imposed a draconian and arbitrary cap on punitive damages and dramatically reduced a jury verdict for the plaintiffs—this despite the fact that Congress has never signaled its intent to cap punitive damages awards in this context. The decision blunts an important incentive for companies to prioritize safety. Unfortunately, the Court's approach in this case is emblematic of its recent jurisprudence.

Escaping Responsibility for Securities Fraud

Another recent Supreme Court decision shields corporations from liability for defrauding investors. When corporations commit fraud, as companies like Enron and Scientific-Atlanta did so brazenly, there should be a legal remedy. Indeed, Congress enacted the Securities Exchange Act to serve exactly that purpose. Yet the Supreme Court's misinterpretation of that law in *Stoneridge v. Scientific-Atlanta* (2008) deprives individuals of access to the courts so long as the defendant company did not attach its name to any fraudulent statements. The impact of this decision is that companies like Scientific-Atlanta, which was complicit in a scheme to defraud investors, escape liability. But investors—including our nation's seniors—should not have to watch helplessly as their retirement savings evaporate because of a corporation's misconduct.

Mandatory Pre-Dispute Arbitration

The Supreme Court's interpretation of the Federal Arbitration Act—in *Circuit City Stores, Inc. v. Adams* (2001) and *Gilmer v. Interstate Johnson Lane Corp.* (1991)—similarly stacks the deck against workers and consumers. Too often, Americans have no choice but to sign away their rights when applying for a job, signing up for a credit card, or engaging in other consumer transactions.

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This means that disputes between employers and employees and between businesses and consumers are resolved by a for-profit arbitration firm—not the traditional courts. It is estimated that 30 million American employees—25% of the non-union workforce—have lost the right to go to court to pursue discrimination claims due to mandatory pre-dispute arbitration clauses.

A high-level manager of one of these firms has called mandatory arbitration a "field of dreams." But as Harvard Law Professor and arbitration judge Elizabeth Bartholet has testified before this Committee, mandatory pre-dispute arbitration can be a nightmare for employees and consumers. Because companies are repeat players in the often unfair game of arbitration, they call the shots. As a result, it is exceedingly rare for an employee or a consumer to prevail in one of these arbitration hearings. Arbitration firms and their clients routinely reject arbitrators like Professor Bartholet, who are independent and on occasion rule for a consumer.

Gutting the Americans with Disabilities Act

I would like to highlight another important example of the Supreme Court's anti-worker decisions. It is not the focus of today's hearing but it is an issue Congress aims to address in the near future. The Americans with Disabilities Act of 1990—a landmark piece of legislation—has made it possible for people with disabilities to enter the social and economic mainstream of American life. As a Member of the House of Representatives, I was an original co-sponsor of this legislation, so I know first-hand that Congress enacted the ADA to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

Yet today, because the Court has misconstrued the will of Congress, the ADA no longer protects many categories of people with serious disabilities from employment discrimination. In a case called *Sutton v. United Airlines* (1999), the Supreme Court held that the ADA does not protect people who can mitigate the effects of their disability. For example, if a diabetic woman controls her glucose levels so well that she functions as if she were not diabetic at all, an employer can refuse to hire her simply because she is diabetic.

In *Toyota Motor Mfg. v. Williams* (2002), the Court again narrowed the scope of the ADA by refusing to require an employer to make a reasonable accommodation that would have allowed a woman suffering from a physical impairment to continue to work on a factory assembly line. The Court reasoned that because she could still perform certain daily tasks, such as brushing her teeth, she was not entitled to protection under the ADA. These results are fundamentally unfair, and they do not reflect Congress's intent when we passed the ADA.

Time for Considered Action

In light of recent Supreme Court decisions, it is once again incumbent upon Congress to enact laws that protect consumers from corporate fraud and workers from discrimination. I am a co-sponsor of the Arbitration Fairness Act, a bill introduced by Senator Feingold that would make arbitration truly fair and voluntary. Legislation is pending to restore the original meaning of the ADA and ensure that its positive legacy endures. It is important that Congress continues to consider these and other measures to help level the playing field for America's workers and consumers.

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I expect they will encourage it by taking away the one incentive that big corporations tend to understand – significant financial consequences.

I look forward to the testimony of our witnesses and thank them for traveling to be with us today. I also note that several others affected by the Exxon Valdez disaster have come here today. I welcome them as well.

# # # # #

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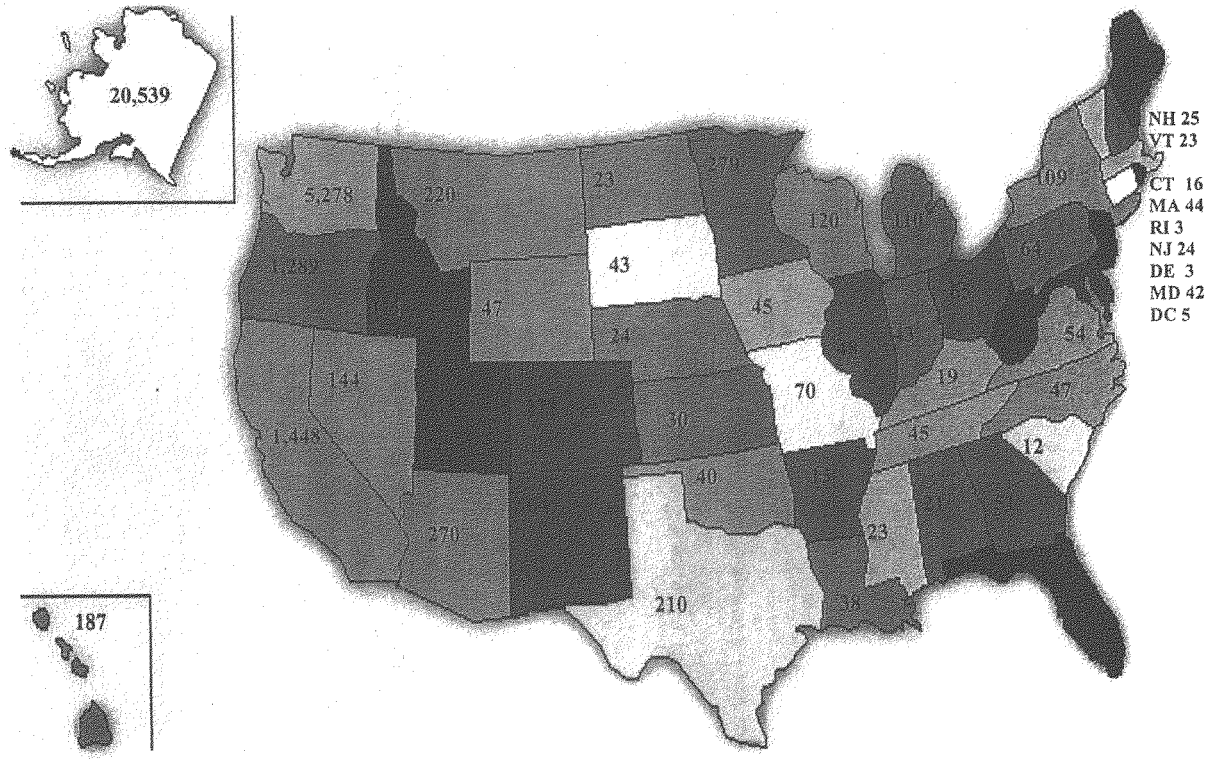
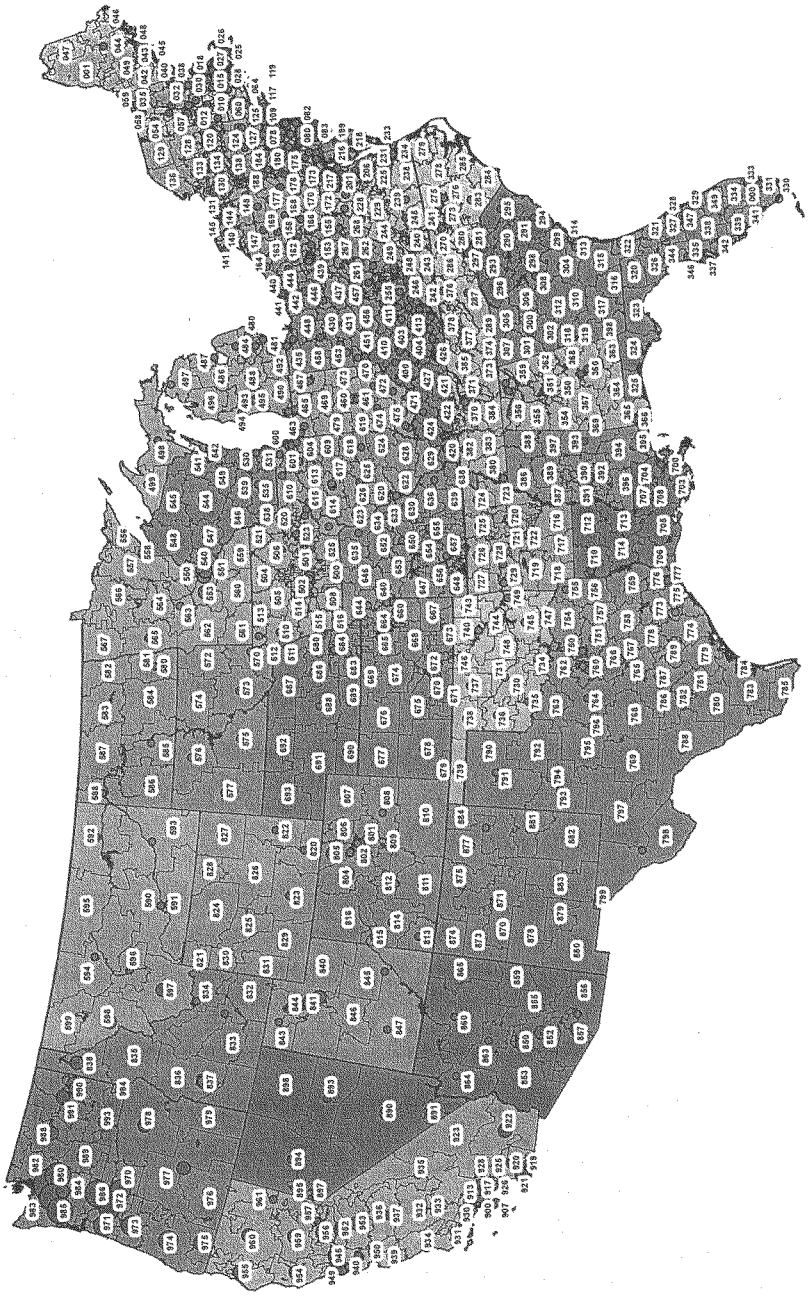
32,200 VICTIMS OF THE EXXON VALDEZ
live in all 50 States





FROM : GOLDMAN FAX NO. : 970 468-2809 Jul. 24 2008 10:05PM P1

July 24, 2008

TO: Committee on the Judiciary FAX (202) 224-9516

FROM: Alvin L. Goldman, Professor Emeritus
College of Law, University of Kentucky

RE: July 23rd hearing Testimony of Prof. Elizabeth Bartholet Concerning "Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations"

For the past 43 years I have studied, taught, and written about labor and employment law and am writing to the Committee in support of the critique offered by Prof. Bartholet respecting the adverse impact the Supreme Court's distortion of the National Arbitration Act has had upon fairness to employees who seek to vindicate statutory rights. Most particularly, I am writing to add some points of legal doctrine not mentioned in Prof. Bartholet's critique.

Historically, in the common law system arbitration served two functions. First, it offered a method of expert fact finding where courts or the litigating parties thought that the nature of the dispute required an efficient means of evaluating facts not readily understood by ordinary fact finders. Secondly, it offered parties in a contractual relationship a means of selecting their own mutually acceptable impartial expert interpreter of their private contractual arrangement and a shaper of any necessary remedy for its breach (a function most often served by notaries in the civil law system).

For these reasons, traditionally, arbitration was not available to resolve non contractual disputes affecting the public interests except when the dispute was referred to arbitration by a court of justice. In other words, the private process of arbitration was available at the parties' own choice only when it involved enforcement of their own private law—their own rules for regulating their contractual arrangements. That was the state of the law when Congress adopted the National Arbitration Act to facilitate resolution of commercial contractual disputes involved in interstate and foreign commerce.

There is nothing in the history or language of the National Arbitration Act suggesting that Congress intended the Act's assurance of access to arbitration to affect anything other than questions concerning the application and interpretation of contracts affecting commercial arrangements for the sale or transportation of goods in interstate commerce. Indeed, at the time of the Act's passage, Supreme Court decisions confined Congress' power to regulate commerce solely to those

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two categories of transactions and nothing in the legislative history indicated that Congress in that particular Act was attempting to regulate beyond the scope of its authority as then recognized by the Supreme Court.

Similarly, nothing in the Act's legislative history indicates that Congress intended to privatize the adjudication of tort (including issues of fraud or equitable protections from overreaching), domestic relations, or statutory claims. This is evident from the fact that statutory and non contract common law claims were beyond the scope of the types of disputes discussed in the hearings and accompanying public discourse respecting the Act.

Moreover, under the Clayton Act, adopted about a decade prior to the National Arbitration Act, employment was expressly declared to not constitute an article of commerce and, hence, was outside the scope of Congressional regulation of commerce as then understood by legal experts. (To avoid any possible misinterpretation of that intent, the Act expressly excluded those employment contracts over which Congress, under the then established Constitutional doctrine, could exercise commerce clause authority—those contracts directly affecting the carriage of goods in interstate and foreign transportation.)

Accordingly, the expansion of the National Arbitration Act by a closely divided Supreme Court illustrates judicial activism at its most dangerous. It has allowed those who wield disproportionate economic power to remove large bodies of law making and enforcement from the control of law makers and adjudicators who are responsible to the public. Thus, the Court's revision of the National Arbitration Act has become a tool for eliminating law as a shield that protects the weak from abusive or arbitrary conduct by the small elite who control market power.

I am writing to urge you to take action to reverse the recent Supreme Court decision regarding Exxon vs. Baker.

I am not unprejudiced in the decision made by the Supreme Court; I am a claimant, as are most of my family members, and most of our friends. My Father began commercial fishing in Alaska in the early 1940's. I was born in Cordova, Alaska, and grew up in one of the most beautiful, pristine areas on this planet, full of sea life that supported the livelihoods of all who lived in our community. Because of the oil spill, that is no longer true. This small fishing community has experienced suicides, divorces, bankruptcies, lost livelihoods, lost homes; two of my family members became so mentally ill afterward that their lives disintegrated to the point where they were both involuntarily committed for a time. Their lives and my entire family structure were decimated by the emotional affects of the oil spill.

In no account has Prince William Sound been "made whole". There is still oil right under the surface on many beaches and sea life has not been restored. In the early 1970's we paid extra money to our Fisherman's Union to help stop the oil terminus being put in Valdez because we knew it would only be a matter of time before an oil spill disaster took place. We were assured at that time that every precaution would be taken to make sure that didn't happen. Apparently allowing a known problem drinker to captain an oil tanker wasn't a precaution that Exxon was prepared to make. Exxon promised to "Make Us Whole". Their actions have only been to "Make Exxon Whole".

There are over 32,000 American citizens who have waited almost 20 years for Exxon to make good on their promise. We are still waiting. I urge you to work to overturn this Supreme Court decision. It is not good law. This decision was not made in the interests of the people of this country and the implication of this decision does not bode well for ordinary citizens of this country in their fight against the greed and insensitivity of large corporations. The Supreme Court seems to have forgotten the concept of "We the People", and their decisions are now based on "We the Corporations".

Congress has overturned over 100 Supreme Court decision in the past. This decision has not been finalized and it is now pending while Exxon attempts to add insult to injury by asking the Supreme Court to have the interest amount dismissed. I urge you to support the 32,000 by taking action to overturn the Supreme Court's decision on Exxon vs. Baker.

Sincerely,

Phyllis Henley

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The Honorable Senator Patrick Leahy
United States Senate
Committee on the Judiciary, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

I would like to thank the Committee for looking into the recent ruling of the Supreme Court in the case of Exxon Shipping v Baker.

I am a Tlingit Alaska Native, United States Veteran who served in Vietnam and commercial fisherman in Prince William Sound, Alaska.

It is difficult for me to understand how the United States Supreme Court ruled in favor of the Exxon Corporation. This is not what myself and other United States veterans who were protecting this country in the 1940's, 50's, 60's and still today expect. It makes you wonder what direction justice is taking.

There was an extensive and well documented trial by a jury of Unites States citizens, and numerous subsequent rulings by the lower court holding Exxon accountable for their actions. In my opinion the lower court followed the letter of the law. Regrettably, the recent decision by the high court only gives license to giant corporations to run rough shod over the people of this country.

It was always my understanding that punitive damages are the tool to punish the wrong doer and in this case wrong was done by Exxon Corporation which resulted in the *ExxonValdez* spill and its aftermath.

Exxon Corporation is responsible for adversely impacting the lives of tens of thousands of people across the United States and their families who continue to struggle to recover, most notably the Native population. Native people lost important access to their traditional subsistence resources, essential to our survival and culture. These include foods that we have utilized for many millenniums and the use of much of the shoreline and coastal areas that were oiled. Commercial and sports fishermen were also impacted. Thousands of people lost jobs and had to rely on the government to subsidize them to get through the hard times, putting added pressure on tax payers. The lives of many of the commercial users have been ruined. Bankruptcy, divorces and suicides went up. Many, many miles of pristine shoreline were ruined and are still, after nearly 20 years, trying to recover. Hundreds of thousands of sea animals were killed or diseased.

And what do we do to the company that caused all this and continues to cause these types of catastrophes all over the planet? We give them a slap on the hand. And to us people who live in and love our country a slap in the face. It makes me sad.

Respectfully,

Jack Hopkins
PO Box 343
Cordova, AK 99574

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Exxon Valdez Oil Spill July 2008

A fisherman's notes on the Exxon Valdez Oil Spill lingering legacy

A few days after the worst oil spill in history dumped more than 11 million gallons* of oil into Prince William Sound, Don Cornett from the giant Exxon Corporation came to my small town, Cordova Alaska. Mr. Cornett told the crowd gathered in our small Gym that we were lucky that Exxon Corporation was here. Just before Mr. Cornett's arrival my pregnant wife and I had chartered a small plane and flew over the spill area. My wife and I, and our fellow fishermen, did not feel we were very lucky.

It was early spring, the start of the Pacific Herring fishing season. Our season had been cancelled, and we were afraid that our way of life was about to end. Mr. Cornett assured us that Exxon was going to clean up their spill, and make the fishermen whole. "You are lucky. You have got Exxon. We take care of our problems."

It is now 19 years later and our wait is over. With their unlimited resources and cadre of aggressive lawyers EXXON has successfully fought the fair settlement of the fishermen's claims for losses they incurred, and continue to incur from the spill. Perhaps Mr. Cornett meant that they would put us in the hole.

Exxon asserts they have paid for damages and that Prince William Sound has been completely cleaned. Recent tests show at least 1,000 cubic meters of oil still remains under gravel on beaches in Prince William Sound. More would most likely be found where we haven't looked; Seward, Homer, Cook Inlet, Kodiak, and other bays and passages where Exxon oil hit the beach. This isn't the "weathered oil" with little smell and low toxicity expected after 19 years, this is highly aromatic, carcinogenic, gene mutating poison. Herring populations have not recovered from the oil spill, and after almost 20 years there is still no commercial fishery.

What happened to our herring? Each year during the early spring Pacific Herring move into shallow water and onto tidal beaches to spawn. In 1989, after gulping oil and toxic fumes from floating oil slicks, and after being bombarded by aerial applications of chemical dispersants when the schools of fish were mistaken for oil slicks, our herring spawned. They failed to produce viable offspring. Since Herring mature slowly, the damage to these populations did not become apparent for several years.

In 1993 and 1994, when the oil spill year class herring were expected in the commercial fishery, there were too few fish to harvest, and those that were examined showed signs of stress and disease. The herring population crashed and has *still* not recovered. Commercial fishermen continue to sit on the beach while managers, oil interests and scientists argued over cause and effect.

Exxon funded "biostitutes" would argue that Oil contamination was not the cause of the herring collapse. Many independent scientists funded by "non EXXON" money are convinced that the Exxon Oil Spill during the herring spawn was the trigger to the population collapse. Recent peer reviewed papers directly tie the population crash to the spill, and herring continue to be listed as "not recovering" by the Exxon Valdez Oil Spill Trustee Council. Some scientists continue to argue about cause, effect, and conflicting theories.

Fishermen look at the timing of the spill, the patterns of herring behavior, the millions of gallons of spilled oil, the application of poisonous dispersants to schools of herring, the still volatile and poisonous oil under beach rocks, and Sitka Sound in southeast Alaska. There was no oil spill in Sitka Sound where for

* If we adjust for the seawater Exxon counted as oil recovered from the tanker storage tanks the number is more like 30 million gallons spilled, but what's a few million gallons of spilled oil between friends.

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decades the herring population dynamics had been a mirror of Prince William Sound. Sitka Sound herring have continued to thrive.
Prior to 1989 we thought that fish embryos were affected by oil contaminants occurring in parts per million. We now know that embryo damage occurs at concentrations in parts per billion. There is a broadly accepted theory in science known as "Ocam's Razor". When scientists find two or more competing hypotheses, the simplest one is most often correct.

Herring are an important source of protein for many species. They convert almost microscopic plankton into a larger "protein-package" easily consumed by even larger fish and animals, including seals, sea lions, Humpback and Killer Whales, salmon, bottom fish, ducks, eagles, cormorants, and others. Herring provide food for other species damaged by and have yet to fully recover from the oil spill impacts. Pacific herring were also a vital component of our community based sustainable fisheries.

Feeding other fish, birds and animals, and contributing to vibrant sustainable commercial fisheries are "ecosystem services" that Pacific Herring historically provided in Prince William Sound.

The loss of these ecosystem services from the herring population crash was not addressed in the Exxon civil litigation, or in their negotiated criminal settlement with the state and federal governments. Exxon claims they have met their financial obligation to fishermen. This is a misstatement. Today there is no herring fishery, nor is there an indication that the herring population is recovering. There are also no legal avenues available for fishermen to recover their losses from the herring fishery collapse.

The loss of the spring herring fishery affected native villages and small coastal fishing communities. Historically over 1,100 people directly participated in the Herring fishery. Small and mid sized family fishing vessels, with between two and five crewmen harvested herring and herring egg covered kelp for special markets in Japan. Harvesting wild kelp covered with herring eggs by hand, and by diving, was open to anyone willing to work 20-hour days for a week or so. There were 24 small "Gillnet" boats, 107 somewhat larger "Seine" boats, 107 "jitneys" to assist the seine vessels, and 129-Pound Fishery Permits. On average, 263 Hand harvest and diving permits, 350 crewmembers, and about 40 spotter pilots also directly participated in the fishery, a total of 913 fishermen, their crew and pilots. In addition, processor boats and canneries employed another 200 or more.

The value of Herring fishing permits in 1989 exceeded $ 34 million. Today they are worth zero. Based on the historic value of the fishery as compared to the similar fishery in Sitka Sound, family fishermen lost over $ 111 million during the 12 closed seasons.

Exxon will claim they have paid the full amount of restitution and compensation ordered by the court, but this is somewhat misleading. The jury and the judge hearing the case knew full well that many damages caused by the spill would continue to linger and affect communities and families for years to come. They declared that Exxon could afford to pay, and should pay significant punitive damages to ameliorate the harm caused by their negligence.

The Supreme Court overturned the lower court decision on punitive damages. The award no longer covers the accumulated and continuing damages from the spill. Herring previously supported our sustainable fisheries and subsistence lifestyles.

Our family owns two herring fishing permits; they have gone from a value of $145,000 to zero. Herring equipment, once worth over $50,000, is today of no value, rotting and useless in the yards of the canneries. We had to pay the permit loans off during the years when there was no fishery, taking money that should have secured retirement investments for paying off the loans. As an "average" fisherman with two different herring permits our losses from harvest income amounts to about $28,700 a year. That adds up to over $375,000in lost seasons, and more losses accrue each year. All together over $500,000 in lost

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opportunity, income, equipment and permit value. Few families can sustain these levels of loss. It is very tough to make retirement contributions.

There is not a season on the horizon, so this loss in our fisheries revenue will simply continue. In addition to fishermen, our communities continue to feel this loss of economic activity. The dollar value of the continuing herring loss far exceeds the small compensatory payments made by Exxon. The decision by the Supreme Court makes any recovery of these losses impossible. The lesson for fishermen in areas exposed to the risk of marine transportation of pollutants is clear. You will not be paid for your losses.

Not paying fishermen's bills started early in the oil spill for Exxon. Immediately after the spill, and before Exxon began serious efforts to recover the spilled oil, members of the Copper River Fishermen's Cooperative collected over 6,000 gallons of spilled oil by hand filling 1,350 kelp buckets and 9 fish totes. The fishermen were volunteers, displaced from the herring fishery by the spill. The buckets and totes should have been filled with processed herring instead of hazardous waste. Exxon refused to pay our invoice for the buckets, over $9,000.

Exxon was not hesitant to send out bills. The state and federal government paid $30million to "reimburse" Exxon for money they spent on the oil spill clean up. The bill was paid using money from the criminal fines Exxon paid to settle state and federal charges; presenting an interesting circle for the accounting department.

Several years ago I was introduced to William Coleman, Jr. a civil rights activist during the 1950's and 60's, former U.S. Secretary of Transportation, recipient of the Presidential Medal of Freedom, and member of the Board of Directors of Exxon Corporation. During our brief conversation I told Mr. Coleman I was one of many family fishermen damaged by the Exxon oil spill, and hoped that one-day the damage settlement would help put my kids through college. Mr. Coleman informed me that I would never see the settlement, and that Exxon's money would be helping his great-grandchildren with their college.

Fishermen are gamblers, creatures born of hope and optimism. We have placed all of our bets on an unpolluted and robust natural environment, where, through careful management, commercial fishing has provided for our community for over 100 years. In ALASKA we manage our fisheries on a sustainable basis. Without sustainable fisheries maintaining vibrant local economies, our sense of community and family is fractured.

The lesson for the American people from the high court decision is also clear; Polluters will have low limits on their liability, and will take chances to save money, and we will all pay to clean up the mess when they move on.

Rj Kopchak, Commercial Herring Fisherman, P.O. Box 1126, Cordova, Alaska 907-424-7178

A 33-year Alaska Commercial Fisherman, I serve on the board of Cordova District Fishermen United and the Exxon Valdez Oil Spill Trustee Council Public Advisory Committee. I chair the Herring Recover Planning Team. In 1989, I was founding President and Director of the Prince William Sound Science Center and served for 14 years on the board of the Oil Spill Recovery Institute.

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EXXON VALDEZ Continuing Fisheries Impacts
Prince William Sound Lost Herring Production
Valuation-March 2007

This briefing document looks at Prince William Sound Pacific Herring biomass losses and the financial impact on commercial fishermen may provide insight into the impacts of the Supreme Court decision. The report helps quantify financial impacts on fishermen from the loss of this ecosystem service. The brief focuses on the impacts to the community of Cordova, fishermen who live there, and the fishing communities in general.

Background: A report [1] prepared for oil spill litigation tracks the relationship between herring biomass production in Sitka Sound and PWS, documenting historic production trends in both locations, and using this historic data to model lost herring production in PWS. The report was used as a basis for the values contained in the following document.

Who was affected by loss of herring?

The loss of the spring herring fishery affected native villages and small coastal fishing communities. **Over 1,100 people directly participated** in the Herring fishery. Small and mid sized family fishing vessels, with between two and five crewmen harvested herring and herring egg covered kelp for special markets in Japan. Harvesting wild kelp covered with herring eggs by hand, and by diving, was open to anyone willing to work 20-hour days for a week or so. There were 24 small "Gillnet" boats, 107 somewhat larger "Seine" boats, 107 "jitneys" to assist the seine vessels, and 129-Pound Fishery Permits. On average, 263 Hand harvest and diving permits, 350 crewmembers, and about 40 spotter pilots also directly participated in the fishery, a total of 913 fishermen, their crew and pilots. In addition, processor boats and canneries employed another 200 or more.

Based on the historic value of the fishery as compared to the similar fishery in Sitka Sound, **family fishermen lost at least $ 111 million during the preceding 12 closed seasons**. Values for lost harvests are based on average prices paid in the Sitka fisheries.

What community suffered the greatest financial impact from loss of Herring?

According to the Commercial Fisheries Entry Commission records, in 1989 local residents and fishing families in Cordova owned the following permits.

Cordova resident Herring Permit Ownership/ 1989	12 year lost revenue
Herring Gillnet: 20 of 24 permits = 83%	$ 3,720,000 for 20 permits
Food and Bait: 8 of 10 fishermen = 80%	2,914,000 for 8 permits
Herring Pound: 77 of 129 permits = 60%	18,713,000 for 77 permits
Herring Seine: 29 of 107 permits = 27 %	18,613,000 for 29 permits
Hand Harvest: 61 of 291 permits = 21%	803,000 for 61 permits
TOTAL CORDOVA FISHERMEN LOST REVENUES	$44,763,000

[1] Prevented Volumes of Pacific Herring in PWS Fisheries resulting from the Exxon Valdez Oil Spill", written by James Brady of North Cape Fisheries Consulting,

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Their income loss represented 40% of the impact from lost seasons to fishermen.
Other "Oiled Communities" fishing families were also affected by the loss of the herring fisheries, but not nearly to the extent of the Cordova fishermen and the community of Cordova. Fishermen in Homer owned 10 seine permits, Kodiak 9, and Seward 4. Valdez fishermen owned 3 gillnet permits. Homer families owned 12 pounding permits, Valdez 5, but none were held in Kodiak or Seward. For all fishermen combined, total herring losses exceed **$111,602,000**.

Other community impacts: Cordova receives 4% raw fish tax from locally landed and processed fish. On average, ½ of herring processed in Cordova, lost tax revenue is about **$2,232,000.** Cordova shares a portion of a 5% raw fish tax on fish processed on non-shore based floaters. Estimated lost tax revenue from "floater share" is **$ 697,000**

Cordova also lost the local tax revenues from sales to the fleet for goods and services. *Combined lost community tax revenue and lost fishing revenue for CORDOVA local permit holders to date is at least* ***$48,000,000, and each year there is no herring harvest the number goes up***. Other "Oiled Communities" and fishing families were affected by the loss of the herring, but not nearly to the extent of the Cordova fishermen, and the community of Cordova.

The value of Herring fishing permits in 1989 exceeded $ 34 million. Today they are worth zero. When adjusted for inflation, this lost value would equal almost $52 million in 2005 dollars.

The herring losses and permit devaluation to date are more than $145,000,000. This value does not include the other businesses impacted by the fisheries closures.

RJ Kopchak
Box 1126
Cordova, Alaska 99574

Herring Fisherman

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Herring Failure ~ EXXON VALDEZ lingering legacy

Financial Impacts from Lost Ecosystem Services on Cordova and Cordova Fishermen

According to the Commercial Fisheries Entry Commission records, in 1989 local residents and fishing families in Cordova owned the following permits.

Cordova resident Herring Permit Ownership in 1989	12 year lost revenue estimates
Herring Gillnet: 20 of 24 permits = 83%	$ 3,720,000 for 20 permits
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Food and Bait: 8 of 10 fishermen = 80%	2,914,000 for 8 permits
Hand Harvest: 61 of 291 permits = 21%	803,000 for 61 permits

In 12 lost seasons ***CORDOVA FISHERMEN LOST*** **$44,763,000**

Cordova receives 4% raw fish tax from locally landed and processed fish
Average of ½ of herring processed in Cordova, lost tax revenue = $2,232,000

Cordova shares a portion of a 5% raw fish tax on fish processed on non-shore based floaters. Estimated lost tax revenue from "floater share" = $ 697,000

For 12 lost seasons, Cordova has lost an estimated **$ 2,929,000 in lost raw fish tax** revenues, and continues to loose this revenue source each year without a herring fishery.

Cordova also lost the local tax revenues from sales to the fleet for goods and services.
Combined lost tax revenue and lost fishing revenue for local permit holders to date:

$45,460,000

Other "Oiled Communities" fishing families were also affected by the loss of the herring, but not nearly to the extent of the Cordova fishermen, and the community of Cordova.

Kodiak fishermen ~ 9 seine permits, Homer 10, and Seward 4.
Valdez fishermen ~ 3 gillnet permits.
Homer fishermen ~ 12 pounding permits, Valdez 5, but none in Kodiak or Seward.

For all fishermen combined, total herring losses exceed $111,602,000.
The value of Herring fishing permits in 1989 exceeded $ 34 million.
Today they are worth zero.

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Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
"Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations"
July 23, 2008

This is our second hearing in as many months to highlight how the Supreme Court's decisions affect Americans' everyday lives. As the economy continues to worsen, many Americans are struggling to put food on the table, gas in their cars, and money in their retirement funds. Few of them are aware that recent decisions handed down by the Supreme Court have not protected them from financial injuries.

At last month's hearing, I noted the tragic decision in Lilly Ledbetter's pay discrimination case. This Supreme Court overturned her jury verdict and created a bizarre interpretation of our civil rights laws. Her employer will never be held accountable for its illegal actions and the Court's ruling tells other corporations that they can discriminate with impunity, so long as they keep their illegal actions hidden long enough.

The Supreme Court has demonstrated its increasing willingness to overturn juries who received the factual evidence and weighed the arguments. Nothing is more fundamental to the American justice system than our trust in the wisdom and judgment of ordinary Americans who serve on juries. Life and death decisions are made by American juries. The function of juries is at the core of the Constitution, the fundamental charter of our freedoms. Most Americans know the Sixth Amendment's guarantee to a speedy, public trial in criminal matters before "an impartial jury." Juries are also a fundamental guarantee of justice in civil cases through the Seventh Amendment's guarantee that in civil action, "the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States."

Today, we will consider a few recent Supreme Court cases that have rewarded big business. In the Stoneridge case, the Supreme Court held that pension funds and other investors in companies ruined by fraudulent managers, like Enron, cannot recoup the money they lost from those who knowingly facilitated the fraud. Justice Stevens' dissent criticized the majority for thwarting the intent of Congress because we passed the law "with the understanding that federal courts respected the principle that every wrong would have a remedy." With this ruling, the Supreme Court has left everyday Americans with no where to go for redress.

More than a decade ago, the Exxon Valdez was run aground by a drunk captain, leading to one of the worst – and preventable – environmental disasters to reach American shores. A jury determined that Exxon Mobil knowingly and repeatedly allowed a relapsed alcoholic to operate a ship filled with oil through Prince William Sound. The jury found that for destroying the livelihood of thousands of Americans, Exxon should be punished by paying at least a small fraction of its annual profits.
For more than a decade, Exxon Mobil paid its cadre of well-trained lawyers to appeal the decision, stalling and fighting against having to pay for the injuries it caused. This term, the Supreme Court provided Exxon Mobil the reward it was seeking. The Supreme Court did so by relying on its cases that read into the Constitution a protection for corporations that simply does not exist in its text or intent.

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In his powerful dissent, Justice Stevens concluded "that Congress, rather than this Court, should make the empirical judgments" contained in the Court's decision that slashed the jury award by $2 billion—that is just one-tenth of one percent of Exxon Mobil's revenue in one year. It is the equivalent to an ordinary American paying the cost of a parking ticket, but this for an egregious environmental disaster. If Congress had wanted to cap punitive damages for disasters that impact thousands of Americans, it could have, but it did not. Justice Stevens is correct when he observes that by not limiting the remedy of punitive damages for such blatant corporate misconduct, Congress has, in fact, made that judgment on remedies.

This ruling is yet another in a line of cases where this Supreme Court has misconstrued congressional intent to shield large corporations from accountability. This Supreme Court decision, like those in Ledbetter and in Stoneridge, has real world consequences on the livelihoods and lives of thousands of Americans. Unfortunately, it will not have any impact on the corporation that should be punished. Sadly, I fear it will also lead to future misconduct since the consequences of reckless conduct has been reduced merely to a small cost of doing business.

For all the talk about judges who purport to be "strict constructionists," a majority of the Supreme Court has repeatedly failed to credit the fact that the right to a civil jury trial is enshrined in our Constitution. One would expect that, in particular, those justices who claim to be "originalists" would uphold the Framers' emphasis on the role of the jury. Ironically, there is no mention of corporations anywhere in the Constitution.

Another way the Supreme Court has eroded the role of civil juries and shielded corporations from accountability is through arbitration decisions. When Congress passed the Federal Arbitration Act, it was thought to provide sophisticated business interests an alternative venue to resolve their disputes. It was not intended to preempt state law or become a hammer for corporations to use against its individual customers, but that is what has happened. It certainly was not intended to apply to employment cases. In Circuit City v. Adams, the Supreme Court expanded the law to this setting. The Supreme Court has gone so far in its blind devotion to corporation arbitration schemes that it has upheld the enforcement of arbitration as the exclusive remedy even when the purpose of the contract was criminal. (Buckeye v. Check Cashing)

Large corporations have benefitted from these expansive rulings and have inserted binding mandatory arbitration clauses in nearly every contract they draft. As a result, millions of Americans are being found to have "waived" their constitutionally guaranteed Seventh Amendment right to a jury trial—many without a choice or without even knowing it.

Business Week magazine did a cover story on how arbitration is one-sided in the credit card industry entitled "Banks vs. Consumers – Guess Who Wins?" There are no juries of one's peers in the arbitration industry. There is no appellate review. There is no transparency and some would argue, therefore, there is no justice.

A jury found for the victims of the Exxon Valdez disaster. A jury found for Lilly Ledbetter. But the Supreme Court displaced those judgments with its own. In doing so, it has removed the compensation initially awarded to those victims and it prevents other victims from redress.

These recent Supreme Court decisions will do nothing to deter future corporate misconduct. In fact,

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July 22, 2008

Senator Patrick Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Arlen Specter
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

We write to thank the Committee for holding a hearing to address the important issues raised by recent Supreme Court decisions that favor corporate rights and interests over the fundamental rights and liberties of individuals. The Court's recent trend toward constraining the right of the people to hold corporations accountable for misconduct deserves attention by the Committee and the Nation because the direction the Court has been taking runs opposite to the text, history, and structure of our Constitution and the ideals upon which our country was founded. Specifically, several of the Court's recent decisions are troubling because they evidence a disdain for the voice of the people as expressed through the powerful body of the civil jury, which, since the Nation's Founding, has served as a critical tool for checking government and private abuses of power. Corporations, on the other hand, receive no special status under the U.S. Constitution—indeed, they are not even mentioned—and the Court's apparent concern for "fairness"[1] to corporations at the expense of justice to everyday Americans is unwarranted and wrongheaded.

Corporations are clearly different from persons under the Constitution. As Chief Justice Marshall explained early in our history, "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence."[2] Accordingly, unlike natural persons who are endowed with the "unalienable rights" of "Life, Liberty, and the Pursuit of Happiness"[3] merely by virtue of their humanity, corporations attain rights in our legal system only as creatures of law. While corporations and their allies may try to obscure this fact by seizing upon the Supreme Court's ruling that corporations count as "persons"

[1] *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008) (contending that assessing high punitive damages awards against corporate wrongdoers is in tension with the legal system's "sense of fairness in dealing with one another").
[2] *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).
[3] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

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under the Fourteenth Amendment's Equal Protection and Due Process clauses,[4] it nonetheless is a fact that the Constitution does not protect corporations' rights and liberties in the same way that it safeguards those of the people.[5]

The Supreme Court's decisions this Term on arbitration and corporate misconduct distort this constitutional design. In both *Exxon Shipping Co. v. Baker*[6] and *Preston v. Ferrer*,[7] the Court on its own initiative reached out to protect business interests by taking away the right of a jury of the people to judge and punish business misconduct. In contrast to the results reached by the Court, the text and history of the Constitution demonstrate that, instead of brushing aside the civil jury, the Court should respect not only the jury's judgment, but also the value and role of the jury in our constitutional structure.

In the *Exxon* case, the Court disregarded the considered judgment of the jury in that case, substituting its own view as to the appropriate level of punitive damages for the worst oil spill in U.S. history. As is now well-known, on March 24, 1989, the supertanker *Exxon Valdez* ran aground on the Bligh Reef off the Alaskan coast, rupturing its hull and spilling millions of gallons of crude oil into the Prince William Sound. The supertanker's captain, Joseph Hazelwood, was intoxicated at the time of the oil spill, with expert evidence showing his blood-alcohol level to have been around three-times the legal limit for driving in most States.[8] While employed at Exxon (and with the knowledge of his superiors), Hazelwood had completed a 28-day alcohol treatment program, but had stopped prescribed follow-up treatment and failed to attend Alcohol Anonymous meetings. The jury heard evidence that after leaving the residential treatment center, Hazelwood drank "in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers."[9] The jury also heard testimony that Hazelwood drank with Exxon officials and that management knew of his relapse.[10] Evidence was presented regarding how the spill disrupted the lives and destroyed the livelihood and culture of thousands of people in the region.

After hearing this evidence, the jury found that both Hazelwood and Exxon had been reckless and awarded $5,000 in punitive damages against Hazelwood and $5 billion in punitive damages against Exxon. On appellate review, the U.S. Court of Appeals for the Ninth Circuit reduced the award to

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[4] *See, e.g., Smyth v. Ames*, 169 U.S. 466, 522-26 (1898) (finding corporations entitled as "persons" to the protection of the Equal Protection and Due Process clauses); *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886) (finding corporations entitled as "persons" to the protection of the Equal Protection clause).

[5] *See generally First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (Rehnquist, C.J., dissenting) (noting that it is "beyond dispute" that "the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons" and citing *United States v. White*, 322 U.S. 694 (1944) (holding that corporations do not enjoy the privilege against self-incrimination)).

[6] 128 S. Ct. 2605 (2008).

[7] 128 S. Ct. 978 (2008).

[8] *Exxon*, 128 S. Ct. at 2613.

[9] *Id.* at 2612.

[10] *Id.*

$2.5 billion. Citing Exxon Mobil's 2006 Annual Report, the victims of the Spill estimate that this punitive damages award amounts to about three weeks of Exxon's net profits.[11]

In sum, the jury weighed the evidence presented and determined that a fraction of Exxon's annual profits was the correct punishment for destroying the livelihood of thousands of Alaskans—and sufficient to act as a deterrent for other corporations who must take care to protect against similar environmental disasters. The Supreme Court, however, felt otherwise. Relying on statistics and "anecdotal evidence" suggesting that juries sometimes award "unpredictable" high punitive damage awards in certain cases,[12] the majority swept aside the Exxon jury's deliberations and decision and instituted a 1:1 ratio between compensatory and punitive damages, thereby reducing the $5 billion initial award here to a maximum of $507.5 million.

Simply put, the Supreme Court erred. The role of the jury in our constitutional system is so central as to be nearly sacrosanct. The Framers of the Constitution placed significant emphasis on the role of the jury in the text of the Constitution and in the Bill of Rights. The jury right is guaranteed in Article III, which expressly provided for the right to a jury in federal criminal cases, and no fewer than three amendments—the Fifth Amendment right to Grand Jury presentments or indictments, the Sixth Amendment right to a criminal trial by a local, impartial jury, and the Seventh Amendment right to a civil trial by jury in certain cases at common law.

While the right to a trial by jury in criminal cases has been generally well-respected, civil juries featured prominently in the design of the Constitution. Indeed, the entire debate over whether to add the Bill of Rights was sparked by a concern that no provision had yet been made for juries in civil cases.[13] According to Professor Akhil Amar's exhaustive study of the text, history and meaning of the Bill of Rights, "the jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."[14] Studying the American political system in 1831, Alexis de Tocqueville observed that: "The institution of the jury . . . places the real direction of society in the hands of the governed, . . . and not in that of the government. . . . [The jury] invests the people, or that class of citizens, with the direction of society. . . . The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority."[15] In light of the centrality of juries in our constitutional system, anecdotes, standard deviations, and a fear of a few "eccentric" punitive damage awards should have been inadequate to overcome the Exxon jury's decision to "give[] expression to its 'moral condemnation' of Exxon's conduct in the form of this award."[16]

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[11] Brief for Respondents at 3 n.2, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (No. 07-219) (2008).
[12] 128 S. Ct. at 2624-2627.
[13] AKHIL REED AMAR, THE BILL OF RIGHTS 83 (1998) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587-88 (Max Farand ed., 1937)).
[14] AMAR, *supra*, at 97.
[15] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94.
[16] 128 S. Ct. at 2638 (Stevens, J., concurring in part and dissenting in part). The partial dissents by Justices Stevens, Ginsburg, and Breyer would have correctly upheld the jury's decision that this was more than a "run of the mill" recklessness case, which warranted a higher than average punitive damages award.

The Supreme Court's willingness to cast aside the jury's decision that Exxon's egregious misconduct warranted substantial punitive damages is even more troubling in light of Congress's express intent to hold oil companies transporting crude oil in the Prince William Sound to a higher standard of care. When Congress authorized the construction of the Trans-Alaska Pipeline in 1973,[17] it was acutely aware that the risk of an oil spill was especially high and that a spill in the region would carry particularly disastrous environmental and economic consequences.[18] Over 3,500 pages of legislative record demonstrate that Congress, the State of Alaska, the oil companies, and other relevant constituencies were all aware of the need for a special degree of care in constructing the Trans-Alaska Pipeline and transporting the oil from that pipeline.[19] In light of these risks, Congress created a strict liability regime for Alaskan oil spills while expressly preserving other federal and state remedies.[20] Nowhere did Congress limit or cap punitive damages for oil spills. Instead, Congress explicitly required the oil companies transporting Alaskan oil to act with a higher degree of care and left unrestricted the ability of a civil jury to award punitive damages when a company failed to abide by that duty of care.

When the Exxon jury found that knowingly allowing a relapsed alcoholic to captain a supertanker full of millions of gallons of crude oil through the treacherous waters of the Prince William Sound rendered Exxon reckless and deserving of a substantial punitive damages award, it acted in accordance with congressional intent. When the Supreme Court majority ventured to impose its own view of the facts and hold Exxon liable for its misconduct as if this were a "run of the mill" case of recklessness, it did not. The Supreme Court's decision in *Exxon v. Baker* thus represents a blatant disregard not only for the considered judgment of a jury of the people but also the express intent of Congress.

Similarly, the Supreme Court's decades-long trend—manifest this past Term in *Preston v. Ferrer*—to force litigants into business-friendly arbitration ignores the intent of Congress in passing the Federal Arbitration Act and improperly sacrifices the right of access to the courts to the goals of economic efficiency and expediency.

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[17] Trans-Alaska Pipeline Authorization Act of 1973 ("TAPAA"), Pub. L. 93-153, 87 Stat. 584, *codified in part at* 43 U.S.C. § 1651-55.

[18] *See, e.g.*, 119 Cong. Rec. 36,606 (Nov. 12, 1973) (statement of TAPAA Conference Committee member Rep. Morris Talila) ("[TAPAA] is admittedly forcing a tougher liability standard on Alaskan oil than exists for other oil, but the House has consistently maintained that the environmental risks of transporting this oil were significantly greater.").

[19] For an in-depth discussion of the legislative history of TAPAA, see Brief for *Amici Curiae* Alaska Legislative Council et al., *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (No. 07-219).

[20] *E.g.*, 43 U.S.C. § 1653(c)(1) (providing that "[n]otwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) ... shall be strictly liable without regard to fault in accordance with this subsection for all damages, including clean-up costs, sustained by any person or entity ... as the result of discharges of oil from such vessel"); § 1653(c)(3) (establishing a liability fund for up to $14 million in damages from a spill and further providing that "[t]he unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.").

In *Preston*, the majority held that even where a State agency has expressly assumed exclusive jurisdiction over a matter suited to its expertise and oversight—in this case, a California agency overseeing the practices of talent agents—any questions related to a contract with an arbitration clause must be decided by an arbitrator, not a court of law or State agency. This is so even where one of the parties asserts that the contract is void or challenges the propriety of arbitration, as seen in *Preston* (as well as many other cases). It is even true where one party alleges that the contract requiring arbitration is void for illegality.[21]

The Court's decisions compelling arbitration across a variety of legal and factual circumstances fly not only in the face of the Framers' affection for juries, but it also thwarts principles of federalism evident in the Constitution as a whole and the Seventh Amendment in particular. According to Professor Amar, the Seventh Amendment[22] provision that the right to a civil jury shall be "preserved" was intended to provide at the federal level a right to a civil jury at least where State law provided such a right.[23] The amendment thereby set a state-law floor for the provision of civil jury trials—the federal government could add to the instances where jury trials would be available in civil cases, but could not remove that right where it would be provided by the states.[24] In this way, the Seventh Amendment served to respect both States' rights and individual rights to serve on a jury and be adjudged by one.

Despite the Constitution's demonstrated respect for state-law civil trial juries, the Supreme Court has repeatedly preempted State law in favor of arbitration under the Federal Arbitration Act (FAA),[25] extending the FAA's preemptive force to the full reach of Congress' Commerce Clause power.[26] There is no evidence that this was Congress' intent,[27] and there is, in fact, significant evidence to the contrary. In Justice O'Connor's dissent to the Supreme Court's opinion in

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[21] *Buckeye Cash Checking, Inc. v. Cardegna*, 546 U.S. 440 (2006) (requiring arbitration despite party's claim that purportedly usurious contract was void for illegality).

[22] The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[23] AMAR, *supra*, at 89-91.

[24] *Id.*

[25] *See, e.g.*, *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996) (holding that the FAA preempted Montana statute which conditioned enforceability of arbitration clause on compliance with special notice requirements); *Perry v. Thomas*, 482 U.S. 483 (1987) (preempting provision of California Labor Law which stated that wage collection actions may be maintained without regard to existence of any private agreement to arbitrate); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (finding jurisdiction to determine whether the FAA preempted State law voiding arbitration clause, and preempting the State law).

[26] *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).

[27] *See id.* at 286-87 (Thomas, J., dissenting) (explaining that Congress could not have intended to apply the FAA to state proceedings because "[a]t the time of the FAA's passage in 1925, laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanisms for resolving the underlying disputes" and that it "would have been extraordinary for Congress to attempt to prescribe procedural rules for *state* courts").

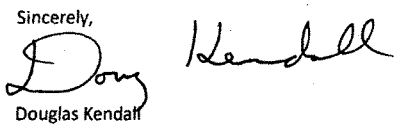
Southland, she noted that "[o]ne rarely finds a legislative history as unambiguous as the FAA's,"[28] and carefully established that Congress truly never intended the FAA to apply to state court proceedings.

The Supreme Court has strayed too far from the Constitution and the intent of Congress in forcing litigants into arbitration for the sake of "streamlined proceedings and expeditious results."[29] Forcing arbitration thwarts the democratic and "watchdog" features of the jury contemplated by the framers of the Constitution. The "jury trial brings with it an open and public discussion of all causes . . . [and this is] the mean by which the people are let into the knowledge of public affairs."[30]

In both *Preston* and the *Exxon* decision, the Court erroneously views the jury more as a threat to a well-oiled economic machine and less as a bulwark of our system of justice and democracy. However, it is the jury—and the People—that enjoy a privileged place in our constitutional system, not corporate interests. The Constitution and its amendments were intended to provide individual rights and structural safeguards to ensure the health of a government of the "We the People," not "We the Corporations of the United States of America."

We thank the Committee for providing a forum to discuss these significant issues, which are of great consequence to every American and particularly to those of us who work to secure the promise and premise of the Constitution.

Sincerely,



Douglas Kendall
Founder and President

Elizabeth Wydra
Chief Counsel

Constitutional Accountability Center

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[28] *Southland*, 465 U.S. at 25-29 (O'Connor, J., dissenting).
[29] *Preston*, 128 S. Ct. at 986 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).
[30] AMAR, *supra*, at 93.

Mary B. Lynch
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July 20, 2008

Senate Judiciary Committee
July 23 Hearing: Corporate Misconduct and Laws Governing Corporations

Most Honorable Senators:

Before this committee is a grave, concern of possible Misconduct of Corporations, and the possible misuse of corporate law. That you most Honorable Senators are willing to explore many current corporate and judicial actions that may not be for the betterment of the citizen of this country is humbling. The concerns before this committee are hopefully to be able to discern whether there is reason to believe that there has been possible Corporate Misconduct, that the Laws Governing Corporations may be flawed, and injurious to the American public has a whole. I can only hope that my simple testimony may assist you in this grave matter.

I was present in Cordova when the Exxon Valdez grounded the night of March 28, 1989. I have been an Alaskan commercial fisherman since 1985, mostly based out of Cordova. I currently own a Kodiak Sac Roe Herring permit. In 1990, I worked with the head of the University of Alaska's Sociology department conducting a survey of the PTSD resulting from the oil spill on contact communities affected by the spill. As a result of this sociology work I was made privy to many first hand accounts of Exxon's misconduct and the repercussions of their actions in regards to communities and individuals. My written testimony has long been withheld until now, due to restriction of the Exxon Valdez civil suit. Hopefully I will be able to provide you with a different view of the situation then you have been exposed to before. My purpose for doing this is I believe Corporate Law, as it stands now, is able to bypass Congress effecting regulatory action through the use of the appointed Judiciary system. By bypassing legislative scrutiny, corporate constituencies are able to further their economic interests above, and beyond that of the citizens of the United States.

To begin with when Congress passed in 1971 the Native Claims Act allowing the oil industry access to Valdez's port, making it the terminus for the pipeline that runs from the north slope. Along with this privilege, there were established contingencies for the use of this location. One of many of these contingencies was that a pilot boat would escort tankers from the entrance of Prince William Sound, Hinchenbrook Entrance, to the Valdez terminus. Another contingency was that there would always be two barges ready for response to an oil spill. The contingencies provided for not "if" a spill should happen, but "when," and that Alyeska's headquarters, at the pipeline terminus in Valdez, would respond to this responsibility within a day. These were Congressional contingencies for operating oil tankers within the closed waters of Prince William Sound, a sound

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surrounded by public, and private lands therefore requiring Congressional attention. These legal matters were further complicated by the complexities of Maritime law issues that also needed to be upheld for the waters of Prince William Sound. These contingencies were not something that was beyond reason.

In Maritime law if a ship take less then approximately 18 minutes to navigate a turn, a local pilot is to be on board controlling the navigation of that vessel through those waters. The Exxon Valdez was a supertanker, which took far less time to make the turn for Bly reef falling far below these standards, at approximately 8 minutes. By 1989, through efficient bookkeeping by industrious oil industry accountants, the pilot boats were budgeted back from Hinchenbrook Entrance to Pilots Cove, the first cove from Valdez Arm, which is well before the famous Bly Reef.

As for the barges that were supposed to be in constant readiness for "when" a spill happened, one barge had been sold years before, and the other was in dry dock for an overhaul. The oil spill boom that was supposed to be in constant readiness was nowhere to be found having long before become outdated and never replaced. Where were the regulatory agencies that are supposed to safeguard against the breach of these contingencies?

These breeches of Congressional contingencies were not just the responsibility of Exxon, but also with the Alyeska Corporation, based out of Valdez for the purpose of regulating the Valdez Terminus. Alyeska is a corporation made up of all the oil companies producing oil from the North Slope. A joint responsibility lay with all companies involved with Alyeska and they all responded to the March 28th oil spill by that day with each making a $250,000 deposit into a bank account for purposes of immediately dealing with the oil spill. This was a responsible response but how those monies were spent is my question. It seems the focus was wrong instead of responsible action it began to take on a defensive panic.

Most of the focus has been on Captain Hazelwood after the grounding of his ship the Exxon Valdez the morning of March 28, 1989. The first thing he did was relieve his first mate that had been at the helm of the ship at the time of the grounding. After that, he followed proto call by informing appropriate parties of the grounding of his ship, and then tried to maneuver his ship off the reef. From that point on all radio traffic from ship to shore was scrambled; the safety of any other vessels in the area were considered irrelevant. Here seems to be where the corporate organizational umbrella opened the law machine to prioritize the shielding of corporate employees from civil and criminal consequences rather than dealing constructively with the issues at hand. Why was nothing in place that could force an accurate assessment of the kind of responses needed? Why wasn't there an inventory of the local resources that were immediately available in the region?

An example of Exxon's faulty assessments for response, and lack of information on local resources was that every Herring pump on the West Coast was either in Prince William Sound or on it's way as the Sac Roe Herring openers in South East were over, and PWS's

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Sac Roe Herring was getting ready to be harvested. Each of these pumps can pump over 250 tons of herring an hour plus the water they are in. That is a lot of fluid. There were empty tankers waiting for their turn at the terminus that could have immediately assisted with their own pumps plus possibly the herring pumps to catch the spilling oil. In addition, at the docks of Prince William Sound were numerous boats with herring ponding enclosures stacked on their decks ready to start the Herring Ponding season. These herring pond enclosures could have been improvised to contain the oil around the tanker as boom. For further frustration, the sound was flat calm for almost nine days after the grounding, unheard of. I am not stating that this idea would have worked, we will never know, but if Exxon had done anything, it would have been better. The fishermen of the region were barely respected in the first few days of the spill. What a lost resource on knowledge and fortitude.

The moment that the scrambling of radio transmitions to and from the ground tanker began, the attitude was set that all decisions were to be kept in house. Why were the regulator agencies not equipped to assess input from stakeholders of Prince William Sound, other than Exxon? Did regulator agencies give undue deference to Exxon's assessments? If so, why? Is there some kind of institutional regulatory bias that favors large corporations over citizens of this country?

When Cordova's District Fisherman's Union offered the assistance of Cordova's fishing fleet for help the morning of the oil spill the response was imposing of a $10,000 fine if any vessel came within 10 miles of the grounded ship. Not even a "what do you have you think we could use." At 10:15, the morning of the spill Exxon released a press statement saying only 10 or so barrels of oil had spilled, when in actuality a geyser of oil that far cleared the deck of the ground tanker was occurring.

Why such a lie? Did the national regulatory structure function to provide Exxon judicial protection at the expense of citizens of United States? The dishonest minimizing protective panic of Exxon's press release indicates that the initial overriding concerns were not for the citizens, or the natural resources of Alaska but the corporate, and financial interests of Exxon.

By Saturday afternoon, all the planes coming into Cordova were filled with lawyer baring contracts for Exxon stating that Exxon would not be held accountable, and cash. If you signed the contract, you were given up to $35,000 in cash immediately. This began the dividing of families and the town. This tack was maintained for a many months, if you were out on the Prince William Sound trying to prevent oil from getting to the hatcheries, people in boats would pull up to these helping boats telling them they could not be there unless they signed the contract relieving Exxon of all liability. These boats were not even trying to keep oil; away they were just there to get those contracts signed. Are the expenses of these people part of the 3.4 billion dollars that the Supreme Court, in Exxon vs. Baker, says Exxon incurred and therefore can be deducted from the settlement?

In the mean time, Exxon's research team discovered that the Government of Norway had used an oil-eating microbe on a spill they had 10 years previously. Norway's people told

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Exxon not to use it as it had "killed" their waters. They used it anyway, for years on oiled beaches. That summer a barrel broke open on a beach exposing nine people to the concentrated oil eating microbe substance; all those people were dead within a year or so, of some sort of ailment or another. Can't say this is directly related, but I have to wonder were the regulatory agencies such as the EPA were?

By the Monday after the grounding there were wonderful television advertisement shown on Alaskan television stations. These TV spots were showing an Alaskan Seiner fishing salmon, and how the Alaskan Oil industry fully supported the fisheries of Alaska. Were these expenses that the Supreme Court gifted in the Exxon vs. Baker decision?

Fortunately, they had vetoed the idea of napalming the oil as the village of Tatilik was to close to the grounded tanker and they did not want to loose the tanker. It was a pathetic display of responsible management and healthy problem solving. Not an Alaskan mentality of resourcefulness among the bunch of them.

The general attitude was taken that it was just a bunch of fisherman affected, and therefore "Exxon could have carte blanche" on how they chose to respond. This carte blanch attitude went to the highest office in the country.

So Exxon began to use chemicals, many not regulated, on the oil, that they new would kill the waters, leaving long term permanent affects on the region. The untreated oil that escaped Prince William Sound, before the chemicals were used, spread as far as False Pass beyond the Shumigan Islands. The untreated oil saturated most of Kodiak Island, and they now have one of the largest biomasses of Herring on the coast of Alaska. To date PWS's herring mass is almost nonexistent. Where was the regulator commissions to protect from such blatant disregard for human, and natural habitat damage?

Exxon started one of the largest staged clean up circuses ever seen. Exxon brought in the Teamsters who vetted the employment for the clean up on Prince Williams Sound. Sending people out on the sound running here and there with paper towels, and oil eating microbes. Exxon handed out money left and right to all of the employees who mostly came from elsewhere. What a show for the press, but not for the long-term health, and well being of the local communities especially on a long term economic scale. Were these massive amounts of monies handed out, are they part of the Supreme Courts gift to Exxon?

The actions of Exxon to sustain and suppress at all costs their righteous bias behaviors in regards to their response to the oil spill did not stop the summer of 1989 with just a circus show for the public but continued covertly, and overtly till now. The Exxon trials were another staged circus; they hired higher degreed experts to over ride any testimony that was used by the plaintiffs. Exxon used the US court system as a means to suppress people's rights to honesty and truth. They further used the judicial system to drag out the settlement process for almost two decades, which could be considered a misuse of tax dollars. Where is the accountability?

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The cover up of Exxon's irresponsible decisions, and their consequences began the night of the oil spill, and is still going on today with another opportunity for this congressional hearing to support such tactics. So, Honorable Senators, when you deliberate on the Supreme Courts decision, Exxon vs. Baker, whether the people of this country have been served by this decision, or whether this decision further strengthens the position of the corporations to have Carte Blanche in regards to injuries sustained as a result of corporate self concern. I can only hope you consider how Exxon has cost the taxpayers more than it's share of good tax dollars.

Because there was no overview agency to maintain the contingencies, that Congress put in place to protect Prince William Sound's citizens, or natural resources. How can we begin to expect that any enterprise or corporation will be accessed appropriately for its expenses in regards to any future settlements awarded by the courts in any future case were there are civil damages? Does 3.4 billion dollars that Exxon has been awarded in the settlement as having already been paid out for the clean up include the oil-eating microbes? Does it include the lobbyists pay for getting a bill through the house to breach the confidentiality laws so they could subpoena sociology surveys of PTSD on contact communities of the oil spill that were until then protected under that law. Does it pay for all those lawyers who arrived in Cordova shortly after the spill with their contracts and pay offs? I could go on but it is up to you as Honorable Senators of the United States to deliberate on all these things and more.

As for my own personal testimony I witnessed the abuse of my community of Cordova, the abuse of my countries legal system, my own family's disregard to the abuses of Exxon that I was subjected to personally, the lose of healthy thriving fisheries of Prince William Sound, and witnessed the irreversible psychological, and economic damages imposed upon the contact communities of the oil spill as a whole. I lost a fishing season, I lost my freedom of speech when I signed onto the civil suit, and I lost many friends through the creation of offense of a fiscal and moral nature, created by Exxon that never existed before, like the lawyers who got all those initial contracts signed for cash dollars, and split family principles, much less a way of life. Most of all with the decision of the Supreme Court on Exxon vs. Baker I was informed that monies that might have been settled in the plaintiffs favor were already spent by Exxon for the good of all the plaintiffs. This is a great gift given by the Supreme Court that does nothing for the American citizens, and hardly affects this corporation.

The idea that a damaging enterprise or corporation can spend monies as it sees fit, and these monies will be considered a credit towards damaging parties debt owed to the damaged parties is the removing of a an American citizens right to act for themselves.

Thank you for your time, and consideration of this sensitive moment in the history of our country. If our Supreme Court has been biased in favor of corporations, then you, as Honorable Senators have the opportunity to right this wrong, and many other wrongs. I also thank you for even considering that there has been corporate misconduct much less

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that the laws governing corporations may be flawed at the expense of the United States as a country.

My best regards,

Mary B. Lynch

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To: Honorable Sen.Patrick Leahy
United States Senate,Committee on the Judiciary,Chair.
224 Dirksen,Senate Office Bldg.
Washington,DC 20510

From: Leander Merritt

Dear Sir,

While I believe in justice I also think it meant for all, not just major corporations. The latest decisions by the Supreme Court showed a complete bias towards corporate America. If that is equal and fair justice it wasn't for everyone. When companies like Exxon Mobil can drag lawsuits on for years it is a slap in the face to average Americans without their resources. They did cause harm and long lasting damages and some how blamed it on everyone but their own carelessness. It is long past time for a change in our corporate laws.

Thank you,
Leander Merritt

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Mr. Chairman and Members of the Committee: Thank you for inviting me to testify today on the Supreme Court's recent decisions concerning corporate regulation and corporate misconduct. I should note at the outset that, while the law firm of which I am a partner represents a number of clients interested in this topic, I was invited to appear and am appearing in my personal capacity and not on behalf of my law firm or any client. Indeed, I have only been in private practice for less than a year. The vast majority of my experience as an observer of Supreme Court decisionmaking occurred while I worked in the Office of the Solicitor General under both the Clinton and Bush administrations.

My understanding is that the Committee is most interested in the Supreme Court's recent decisions in the areas of arbitration and punitive damages, and I am happy to address those issues. But, just as Congress's focus cannot be accurately measured by looking at just one or two laws passed in a Session, likewise the Supreme Court's approach to issues of corporate regulation cannot be accurately measured by looking at only a few cases in isolation. With that in mind, I would like to begin with an overview of the Supreme Court's business decisions in its latest Term.

A. Overview

Whether viewed from the corporate or non-corporate vantage point, this Term was a decidedly mixed bag. The Supreme Court decided 24 cases involving business concerns, which represented approximately one-third of the Court's docket. In those decisions, the Court split almost evenly, ruling in ways that could be described as pro-business in thirteen of the cases, and ruling against business interests in eleven cases.

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Overall, a comprehensive survey of the Court's business decisions from this Term reveals two themes. First, the Court's decisions have reflected broad deference to the Congress. The Court hewed to *stare decisis* principles that have long-recognized the primacy of Congress in correcting the Court's misconstruction of congressional intent in a statute and that reflect a judicially deferential practice of staying the course in the absence of congressional direction. The Court also continued its practice of focusing on the enacted statutory text as the most accurate embodiment of what the full Congress intended.

Second, the Court exhibited broad consensus in its business cases, issuing only two 5 to 4 decisions in cases of fairly limited impact. One involved the Article III standing of assignees of claims for collection, *Sprint v. APCC Services*, 128 S. Ct. 2531 (2008), and the second involved tribal court jurisdiction over a non-Indian bank's sale of land that it holds in fee simple, *Plains Commerce Bank v. Long Island Family Land & Cattle*, 128 S. Ct. 2709 (2008). The Court also issued a 5 to 3 decision in *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), in which Justice Breyer was recused. That case addressed the availability of so-called "scheme liability" under the private right of action in Section 10(b) of the Securities Exchange Act, and rejected the existence of such liability in the absence of reliance by the investors, based in large part on Congress's express limitation of aiding and abetting liability in the 1995 Private Securities Litigation Reform Act.

In short, the Supreme Court's decisionmaking in business cases reflects broad consensus – a consensus that crosses traditional liberal/conservative lines – on deference to the laws that Congress writes and the policy judgments that the statutory text and Congress's actions and inaction reflect.

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B. Employment Cases

In a series of employment rights cases, the Supreme Court consistently came down in favor of the employee or on middle ground between employers and employees. In *CBOCS v. Humphries*, 128 S. Ct. 1951 (2008), the Court held by a vote of 7 to 2 that 42 U.S.C. § 1981 – an important and longstanding civil rights statute protecting against racial discrimination in contracting – prohibits not only direct racial discrimination, but also retaliation against those who assert their rights under the law.[1] Importantly, for Congress's perspective, in so holding, the Court relied heavily on principles of *stare decisis*, explaining that a series of earlier decisions under other civil rights laws had recognized that retaliation is an aspect of prohibited discrimination.[2] The Court hewed to that principle of *stare decisis*, which recognizes that, in statutory cases, the Court should be loathe to reverse precedent because the Congress can better speak to whether the Court's decision departed from congressional intent.[3] The Court, in other words, reaffirmed that it will follow Congress's lead in establishing and maintaining the scope and coverage of employment discrimination laws.

In *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008), the Court likewise held, by a 6 to 3 vote, that the Age Discrimination in Employment Act protects government employees against

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[1] Justice Breyer delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito. Justices Scalia and Thomas dissented.

[2] *See, e.g.*, *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167 (2005) (Title IX); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (42 U.S.C. § 1982).

[3] *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989) ("We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

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retaliation.[4] Even though that statute already included an express protection against retaliation for private sector employees, the Court held – again based on *stare decisis* principles – that public sector employees enjoy similar protection. The decision, like the *Humphries* case, was a strong reaffirmation of protection for employees who assert their statutory rights against workplace discrimination.

In *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008), a combination of *stare decisis* principles and close adherence to Congress's statutory design of the Age Discrimination in Employment Act led the Court to rule almost unanimously in favor of age discrimination plaintiffs by relieving them of the obligation to prove that discrimination was not based on a "reasonable factor other than age," 29 U.S.C. § 623(f)(1), and putting that burden squarely on employers.[5]

In *Federal Express Corporation v. Holowecki*, 128 S. Ct. 1147 (2008), the Court ruled – again by a 7 to 2 vote – in favor of an employee asserting age discrimination, adopting a generous interpretation of the steps needed to file a charge triggering that statute's procedural protections. In so holding, the Court gave substantial weight to the Equal Employment Opportunity Commission's position on the flexibility needed for employees in such matters.[6]

Finally, in *Sprint/United Management Company v. Mendelsohn*, 128 S. Ct. 1140 (2008), the Court ruled unanimously that the admission of so-called "me too" evidence in discrimination cases – evidence that other employees had been subjected to discriminatory treatment by other

[4] Justice Alito delivered the opinion of the Court, which was joined by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Roberts, and Justices Scalia and Thomas dissented.

[5] Justice Thomas dissented only in part. Justice Breyer was recused from the case.

[6] Justice Kennedy delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, Breyer, and Alito. Justices Scalia and Thomas dissented.

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supervisors who were not involved in the plaintiff's claim – should be treated like any ordinary evidentiary issue, without a categorical rule either in favor or against such evidence.

Those cases are notable not only for their consistently employee-favorable outcomes, but more importantly for (i) the respect they demonstrate for Congress's leadership role in making the difficult yet critically important policy choices and balances that inhere in the regulation of workplace relationships, and (ii) the broad consensus on the Court in these cases. Those decisions provide an important counter-balance to any claim that the Roberts Court is somehow innately hostile to employees or supportive of business at the expense of workers. Instead, this Term reflects, in my view, the Court's substantial deference to Congress and its greater expertise in understanding and regulating the dynamics of employment discrimination.

C. Preemption

The Court's other area of emphasis in the business arena this Term was preemption. The Court heard three central preemption cases and one case implicating both preemption and arbitration, which I will address below.[7] Two of the three cases were resolved in favor of preemption, while the third was resolved without opinion due to an even division on the Court (and the recusal of Chief Justice Roberts).

In *Riegel v. Medtronic*, 128 S. Ct. 999 (2008), the Court ruled by a vote of 8 to 1 that the preemption clause of the Medical Device Amendments of 1976, 21 U.S.C. § 360k(a), preempts common-law claims challenging the safety or effectiveness of medical devices that received pre-

[7] A preemption question was also presented in the Exxon punitive damages case, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), which is discussed separately below.

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market approval by the Food and Drug Administration.[8] I understand that decision has already been the subject of a hearing before this Committee, so I will not elaborate further other than to note that the Court's decision relied heavily on the broad language enacted by Congress, was consistent with the view provided to the Court by the Food and Drug Administration, over which the Senate has oversight authority, and left open alternative channels for state regulation that comports with federal standards.

In *Rowe v. New Hampshire Motor Transport Association*, 128 S. Ct. 989 (2008), the Supreme Court ruled unanimously that a state-law regulation of tobacco shipments was preempted by the Federal Aviation Authorization Act's broad preemption of laws "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). The Court followed earlier precedent that had broadly construed the statute's preemption provision and, at bottom, concluded that its provisions apply even if the state law is animated more by social policy – here, combating underage smoking – than pure economic policy.

Finally, as noted earlier, the Court found itself evenly divided (due to the recusal of Chief Justice Roberts) on the question whether state laws pertaining to fraud in the approval of drugs by the Food and Drug Administration are preempted. The Court thus left standing a ruling against preemption by the Vermont Supreme Court. The Court will revisit the preemption issue in the context of FDA-approved drugs next Term in *Wyeth v. Levine*, No. 06-1249.

[8] Justice Scalia delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Breyer, Alito, and Stevens. Justice Ginsburg dissented.

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Like the employment cases, the preemption cases are telling both for their reliance on textual direction from Congress and for the even broader consensus among the Justices that the decisions reflected.

D. Arbitration

I understand that the Committee has a particular interest in the Supreme Court's arbitration decisions. This Term, the Court decided two arbitration cases, neither of which reflected any surprising development in the law. Rather, both of them built on a longstanding body of precedent enforcing the terms of the Federal Arbitration Act and both of which reflected broad consensus among the Justices.

In *Preston v. Ferrer*, 128 S. Ct. 978 (2008), the Court held by a vote of 8 to 1 that, when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act preempts a state law that lodges primary jurisdiction in a state administrative agency.[9] In so holding, the Court followed earlier decisions that had already recognized the preemptive force of the Federal Arbitration Act generally,[10] and that had held, more specifically, that the validity of a contract as a whole is to be decided by the arbitrator in the first instance.[11] In *Preston*, the Court held that state administrative (just like state judicial) procedures could not be interposed as a pre-arbitration hurdle to or substitute for the arbitration of a contract's validity. The Court thus

[9] Justice Ginsburg delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, Breyer, and Alito. Justice Thomas dissented. Justice Thomas has long taken the view that the Federal Arbitration Act should have no application to state court proceedings. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285-297 (1995) (Thomas, J., dissenting).

[10] Section 2 of the Act provides quite unqualifiedly that contracts to arbitrate are "valid, irrevocable, and enforceable."

[11] *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (state court); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (federal court). Claims concerning the validity of just the arbitration clause, by contrast, can be adjudicated by a court in the first instance.

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simply held that its prior preemption decisions controlled and found no basis for adopting a different rule for state administrative rather than judicial proceedings. In so holding, the Court underscored that its decision did not affect any of Ferrer's substantive rights. Preemption only affected which forum would resolve those rights. The Court also rejected Ferrer's argument that precedent should be overruled, hewing once again to *stare decisis* principles, leaving the decisions about statutory change and statutory redirection to Congress.

In the second case, *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), the Court held by a vote of 6 to 3 that the Federal Arbitration Act's standards governing expedited judicial review of arbitral awards cannot be contractually expanded.[12] The Federal Arbitration Act provides that a party can seek prompt judicial review of an arbitral award through a motion in federal court. Upon receiving such a motion, the Act directs that a court "must" confirm the award unless one of the specific statutory grounds for vacatur or modification listed in Sections 10 and 11 of the Act is established. In *Hall Street*, the Supreme Court held that Congress meant what it said when it limited the grounds for judicial invalidation or modification of an award, and held that parties cannot contract around those statutory limitations. The Court's decision rested heavily on what it described as "textual features" at odds with the malleable judicial review approach advanced by Hall Street, noting in particular the statutory emphasis on egregious misconduct (rather than routine error) to invalidate an award and the statutory directive that enforcement "must" be granted unless a listed exemption is established. The Court noted that the parties presented competing policy arguments for their positions, but concluded that the Court was bound by statutory text, and thereby left those policy arguments for the Legislative Branch.

[12] Justice Souter delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, and Alito. Justices Stevens, Kennedy, and Breyer dissented.

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The Court also noted that it was addressing only the meaning of the Federal Arbitration Act and expressly left open whether other sources of authority might permit enhanced judicial review of such awards.

The arbitration cases this Term thus exhibited broad consensus and incremental decisionmaking that simply built on longstanding precedent and established principles of statutory construction in this area of the law, with the Court once again applying interpretive rules that allow Congress to lead and the courts to follow.

E. Punitive Damages

The Court decided just one case this Term involving punitive damages. And, while the issue arose in the volatile context of the Exxon *Valdez* shipping accident, the issues decided by the Court were discrete and narrow. The issues before the Court in *Exxon Shipping Company v. Baker*, 128 S. Ct. 2605 (2008), did not concern constitutional limitations on punitive damages – which is an area in which the Court has been active in recent years.[13] Instead, the Court confronted the common-law question of the extent to which admiralty law permits punitive damages for non-intentional conduct.

At the outset, the Court (with Justice Alito recused) unanimously agreed with the Alaskan plaintiffs that punitive damages were available and were not preempted by the Clean Water Act. The Court was equally divided on the separate question of whether maritime law allows

[13] *See Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

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corporate liability for punitive damages based on the acts of managerial agents and, on that basis, left the Ninth Circuit's ruling in favor of the plaintiffs intact.

Then, in a 5 to 3 ruling, the Court held that, as matter of maritime common law, the amount of punitive damages should be limited in a one-to-one ratio to compensatory damages.[14] There are three aspects of that decision that are important to keep in mind.

First, the rule that the Court formulated was entirely the product of judge-made common law and, accordingly, is subject to legislative alteration. Indeed, the Supreme Court expressly and repeatedly noted that its decision was "subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." *Exxon Shipping Company v. Baker*, No.07-219, slip op. at 16; *see id. at* 34, 35 n.21 (2008).

Second, that decision is unlikely to translate into a general rule under the Constitution that would limit punitive damages in an equivalent manner. That is because two of the five votes came from Justices Scalia and Thomas, who have traditionally resisted constitutional limitations on state-law punitive damages awards.[15] The voting alignment in this case thus was quite unique for punitive damages cases and it is unlikely that it would be reproduced in support of any general rule of constitutional law.[16]

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[14] Justice Souter delivered the opinion of the Court, which, in this aspect, was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justices Stevens, Ginsburg, and Breyer dissented from that portion of the ruling capping punitive damages in the case. Justice Alito was recused.

[15] *See, e.g., Philip Morris*, 127 S. Ct. at 1067-1068 (Thomas, J., dissenting); *id.* at 1068 (Ginsburg, J., Scalia, J., and Thomas, J., dissenting); *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* at 429-430 (Thomas, J., dissenting); *Gore*, 517 U.S. at 598 (Scalia, J., and Thomas, J., dissenting).

[16] The Court did suggest, but did not decide, that the constitutional limit in this case might be a one-to-one ratio, particularly in light of the enormous compensatory award. *See Exxon*, slip op. at 42 n.28.

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Third, the decision was limited to the peculiarities of the case before the Court. The Court explained that its decision involved a case of reckless, non-intentional conduct. The Court thus did not determine whether a similar or different cap would be warranted in a case where the tortfeasor acted willfully or the harm was the calculated result of unchecked profit motivation. The Court also explained that its one-to-one ratio applied, in part, because there were additional tools of deterrence available, such as the imposition of criminal fines, and because the compensatory damages were so high.

In short, the Court's punitive damages decision in the *Exxon* case arose in a narrow and distinctive context that may well limit the impact of the decision on a forward-going basis and that is fully susceptible to legislative redirection.

F. Conclusion

While the focus of the Committee's hearing is on business cases, I would like to close by noting that the pattern of broad consensus supporting narrow decisionmaking this Term went beyond the business area. In two areas that are traditionally wrought with controversy and partisanship – the death penalty and voter identification requirements – the Court this Term issued decisions that bridged the usual divide and showed the conservative and liberal members of the Court coming together to restrain challenges to the constitutionality of duly enacted legislation. In both of those cases, the Court reached levels of consensus that defied the predictions of Court watchers. In *Baze v. Rees*, 128 S. Ct. 1520 (2008), the Court held by a vote of 7 to 2 that the plaintiffs in that case had failed to demonstrate the unconstitutionality of the

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specific drug protocol used in lethal injection cases.[17] Likewise, in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), the Court upheld voter identification laws by a vote of 6 to 3, in a decision authored by Justice Stevens.[18]

Taken together, the Supreme Court's decisions this Term highlight that, in the business area as well as elsewhere, there has not been a seismic shift in the Court's decisionmaking. The decisions this Term also reveal broader consensus among the Justices in support of narrow decisionmaking, strict adherence to *stare decisis* principles in statutory cases, and increased deference to the legislative process.

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[17] Only Justices Ginsburg and Souter dissented.

[18] Justices Souter, Ginsburg, and Breyer dissented.

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To: Senator Leahy, U.S. Senate, Committee on the Judiciary, Chair, WA, D.C.

From: Sheelagh Mullins, Cordova Fisherwoman since 1963, PO Box 416, Cordova AK, 99574.
Winter Address:1344 McGee Avenue, Berkeley, CA, 94703

RE: Senate Committee on the Judiciary, July 23rd Hearing: Corporate Misconduct.

Dear Senator Leahy,

Thank you for your help with the continuing Exxon Valdez tragedy in Prince William Sound. My name is Sheelagh Mullins and I started fishing in 1963 in P.W.Sound, and returned in 1969 and lived full time in Cordova for 31 years, now returning for a part of each year since I had to leave in 2001 due to the continuing financial impact of the oil spill. I was 52 years old at the time of the spill, and had raised four children in Cordova, three of whom graduated from universities, including Stanford, U. of Washington and the University of Oregon. My fourth child still lives and works in Cordova. I am now 71 and am having to work full time in order to be able to keep up a reasonable standard of living. I don't see that I can ever retire and I have to say that I have worked since I was 13 and I am tired and need to retire now.

My fishing business (set-netting salmon in P.W.Sound) decreased more than 50% in value after the spill. Our family salmon seine boat and related nets and other equipment plus the permit, decreased about 80%. The herring did not return in numbers that could be caught commercially. We had a healthy and lucrative and well managed fishery before the spill.

The oil was present at the most important time in the Sound, just as the phytoplankton and the zooplankton were starting to develop in the Sound. The worst time for such an event to occur. The herring eggs that were spawned under the spilled oil were so adversely affected so that when it came time for those fish to return and spawn, many of them were diseased and their numbers were so reduced that there has not been a herring fishery since the early 1990s. The full impact of the failure of the herring numbers needs to be considered because as a species they are a crucial part the total food chain of the Sound, with humans being at the very top. Herring eggs, fry, and all of the stages of the herring are important in the balance of all life in Prince William Sound. Exxon has not certainly not addressed the impact on all of the other life forms of the area.

Yes, Exxon did reimburse us for the fish we were not able to fish for in 1989, but the rest of the financial payments, for as they say, the compensatory damages they caused us, have been pennies on the dollar. I just received today, after over 19 years, three checks for a total of about $850.00 for my set net salmon fishing business. AFTER OVER 19 YEARS - what is all that about? In addition it is a total travesty that a company which makes the profits that they do now can be fighting a small number of fishermen and their families and the businesses that rely on the fishing industry, plus the length of time this

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has all taken, can be quibbling about paying the interest they owe us. How can that even be a consideration?

They also renamed the Exxon Valdez ("Sea River Mediterranean", I believe) and tried to bring it back into Alaska but Alaskans did stop them on that unbelievable plan. With their alcoholic captain being the cause of the worst oil spill accident, one would think that they would try to improve the safety of their tankers but I cannot find any evidence of them having any double hulled vessels. I did read about a year ago that they had made offers on some of British Petroleum's aging double hulled vessels but on examination, it was discovered that there were serious problems with those vessels.....I believe that there were cracks in the rudders of the B.P. tankers but that information needs to be checked to be absolutely sure of the facts.

Again, thank you for your help.

Yours sincerely,

Sheelagh Mullins
Phone#(510)528-9876

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Dear Senator Leahy,

Thank you for holding this hearing.

My family and I make our living commercial fishing in Alaska and we have been directly affected by this Supreme Court Decision.

For 19 years it has been in the background of our lives and has altered the course of our lives in ways it is had to understand. I have seen lives ruined as a result of this.

To allow the largest corporation in the history of mankind not to be held accountable sickens me. A corporation by definition has no accountability. It is impersonal and beholden only to its shareholders and the bottom line. There needs to be some check of this power.

I have watched Corporations and Monopolies
growing in the recent decade and I fear this.

If the highest court in the land is permitted to act as a protector of the profit of corporations at the expense of the common population.....
I fear for my children.

Please take the necessary steps to restore reason and curtail this slippery slope that seems to be leading to a darker time.

Regards,

Mark Munro
Box 1971
Homer Alaska.
99603

48144.070

National Senior Citizens Law Center

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July 22, 2008

Honorable Patrick Leahy, Chair
Honorable Arlen Specter, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy and Senator Specter:

On behalf of the National Senior Citizens Law Center, I am writing to commend you and the members of the Committee for holding the hearing scheduled for tomorrow, July 23, on "Courting Big Business: The Supreme Court's Recent Decisions On Corporate Misconduct and Laws Regulating Corporations," as well as the Committee's June 11 hearing on "Short-Change for Consumers and Short Shrift for Congress: the Supreme Court's Treatment of Laws that Protect Americans' Health, Safety, Jobs, and Retirement." These hearings spotlight a long-neglected but important trend: Supreme Court decisions that undermine laws designed to protect the basic needs of ordinary Americans. As Chairman Leahy noted at the June 11 hearing, these decisions have ignored the intent of Congress and often turned the laws upside down, "making them protections for big business rather than for ordinary citizens."

Older Americans have a great stake in upholding these laws. We urge the Committee and Congress to correct judicial missteps such as those identified in these hearings, and to take steps to ensure that the Court construes the laws in accord with Congress's broad goals of protecting Americans health, safety and financial security.

Across the spectrum of the laws addressed by the Committee's hearings, the Supreme Court's decisions show consistent patterns that, as Chairman Leahy observed, distort and weaken laws. Among these are:

- Expressly disavowing the relevance of the overall goals of a law when construing its specific provisions, and then imposing technical, obscure interpretations of such provisions that defeat or reverse Congress' goals.
- Moving the goal-posts on Congress by replacing the rules lawmakers understood the Court to use in interpreting laws with different rules that operate to defeat Congress's intent.
- Eliminating access to courts to enforce these laws, so that the very people Congress intended to protect are without recourse when those laws are violated.

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- Construing federal laws to require preemption of long-standing state law protections, even though Congress never actually contemplated nor intended such radical consequences.

We wish to note a few of the areas touched on by the Committee's hearings that dramatically illustrate these misguided judicial approaches and their harmful impact on America's seniors.

No Remedies for Bad-Faith Denial of Health Care and Retirement Benefits

Enacted to protect workers' pensions, in the Supreme Court's hands the Employee Retirement Income Security Act of 1974 (ERISA) has become a perverse grant of virtual immunity to the administrators of health and pension plans. As Justice Byron White acknowledged several years ago, the Court's decisions afford workers and their families "less protection...than they enjoyed before ERISA was enacted."[1] This is especially true for older workers, who depend on ERISA for the protection of their retirement benefits, and the protection of life insurance benefits for their families.

In a series of decisions, the high court has stripped ERISA of meaningful remedies for the wrongful denial of medical coverage, life insurance and retirement benefits. At the same time, the Court has wielded this now-toothless law to achieve sweeping invalidation of long-standing state remedies. These decisions have enabled some employers to save money by illegally cutting or cutting off retirement benefits across their workforce. And in a case the Supreme Court recently refused to hear, despite the urging of the Bush Administration, these decisions provided immunity for the wrongful denial of life insurance benefits.[2]

In its June 11 hearing, this Committee heard the story of Maureen Kurtek, who suffered amputations and multiple organ failure after her HMO would not approve timely treatment for her Lupus. The Court's ERISA decisions meant that when Ms. Kurtek sought compensation for what had happened to her she was simply thrown out of court. Congress never intended this result, and leading lawmakers called it flat wrong in a 2004 brief to the Court, which the Court ignored.[3] In its June 11 hearing on the Supreme Court, the Chairman aptly called what the Court has done to workers through ERISA "preposterous, unjust, and incompatible with Congress' true intent."

No Remedies for the Defrauding of Pension Plans and Small Investors

A major Supreme Court decision this year cut off relief for victims of securities fraud, which has seriously threatened the retirement savings of older Americans. As AARP told the Court, "Older Americans are frequent targets of fraud because they often have significant assets and look for investment opportunities that will supplement Social Security and other sources of

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[1] *Mertens v. Hewitt Associates*, 508 U.S. 248, 264 (1993) (White, J. dissenting).
[2] *Amschwand v. Spherion Corp.*, *certiorari denied* Jun. 27, 2008 (Case No. 07-841).
[3] Brief of Amicus Curiae Senators Edward M. Kennedy, John McCain, Bob Graham and Representatives John D. Dingell, Charlie Norwood, George Miller, and Charles B. Rangel in Support of Respondents, *Aetna Health Inc. v. Davila* (Jan. 22 2004) (Case Nos. 02-1845, 03-83).

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retirement income."[4] Additionally, pension funds are also seriously threatened by securities fraud. For example, the University of California's pension fund, containing the retirement savings of nearly 500,000 present and former employees, lost more than $140 million in the collapse of Enron's stock.

Despite these dangers, the Supreme Court held in *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*[5] that pension funds and small investors can't seek compensation from third-parties who participated in securities fraud. The Court rejected the arguments of state governments and the Securities and Exchange Commission, who noted that in many cases this means no compensation at all, because the principal fraudster goes bankrupt when the fraud is uncovered. The narrow interpretation of the Securities Act to cut off relief in this way undermines the retirement security of millions of Americans.

No Remedies for Harmful Medical Devices

This year the Court also stripped people injured by defective medical devices of remedies that have been available for decades. The Court held in *Riegel v. Medtronic, Inc.*[6] that if a device has received premarket approval from the FDA, its manufacturer enjoys immunity for any defect in design or labeling that harms consumers. This decision involved the most complex, life-sustaining devices on which many senior citizens depend. Defects in these crucial devices can have devastating effects on patients who are already facing serious health problems. State law remedies have provided an increased incentive for safety and help bring information about dangerous defects to light.

An additional concern is that medical device immunity will shift the cost of injuries caused by defective devices from manufacturers to Medicare and Medicaid. These programs are the largest payers for these devices, and stand to pay millions to treat those who now cannot seek compensation through the legal system. This cost shift, from negligent manufacturers to public health care programs, will unfairly burden taxpayers and exacerbate the fiscal challenges facing Medicare and Medicaid.

Congress never intended to overturn state common law, which coexisted with federal regulation for thirty years before the Court's decision. Many dangerous problems come to light after FDA approval, when devices are already on the market. Bridget Robb, who testified at the June 11 hearing, was horrifically injured by a faulty lead in a cardiac defibrillator that caused the device to deliver random shocks to her heart. The device had been recalled months before, but Ms. Robb was never warned of the risk. The high court's decision leaves Bridget Robb and the many seniors who depend on similar devices without any recourse.

Replacing Americans' Day in Court with an Unfair Private Legal System

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[4] Brief of AARP, Consumer Federation of America, and U.S. PIRG as Amici Curiae in Support of Petitioner, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, (Jun. 11, 2007) (Case No. 06-43).
[5] 128 S.Ct. 761 (Jan. 15, 2008).
[6] 128 S.Ct. 999 (Feb. 20, 2008).

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The Supreme Court's distortion of the Federal Arbitration Act has turned a century-old law, meant to allow expeditious resolution of disputes between businesses, into a parallel legal system controlled by corporations and forced upon unwitting and unwilling consumers and workers. The law was passed in 1925 to bolster the arbitration process in its infancy, but Congress never anticipated its use in employment or consumer contracts, where businesses leverage their vastly superior bargaining power against individuals. As a result of the Court's decisions, Americans today have no real choice but to accept mandatory binding arbitration, in advance of any dispute, in order to get anything from a credit card to health insurance.

The effects of the Court's misguided decisions have been particularly pernicious in the area of nursing home care. A June 10 hearing by this Committee highlighted some of the horrific instances of nursing home neglect, which are frequently shielded from the public eye and judicial review through binding arbitration clauses tucked into nursing home admission agreements. David William Kurth described how his father had suffered such severe neglect in a nursing home that he died of infections caused by bedsores. When Kurth's father was rushed from one home into another due to a change in health coverage, his mother hurriedly signed an agreement with a binding arbitration clause, which the company that owned the home then used to keep the Kurth family out of court.

Experiences like the Kurths' have become all too common in nursing homes across the country. The binding arbitration clauses require confidentiality, and are tucked into admission agreements that are often signed under unconscionable circumstances when families are highly stressed. In many instances, such arbitration clauses make substandard nursing care more profitable than providing patients with the appropriate level of care, while allowing the practices to remain unknown to the public.

Enabling Deceptive and Predatory Lending and Credit Practices

Perhaps most perversely in light of the ongoing mortgage crisis, the Supreme Court has been for years been engaged in broad judicial deregulation of the financial industry, where seniors have been disproportionately victimized by unfair and illegal practices. The Court's decisions have swept aside state laws designed to protect consumers from predatory lending practices, exorbitant interest rates, and deceptive and outrageous fees. And last year in *Watters v. Wachovia Bank*,[7] the Court greatly cut back the ability of state attorneys general to even investigate not just national banks, but state-chartered subsidiaries as well.

These decisions by the Court, along with aggressive assertions of preemption by the Bush Administration, have contributed to the crises in mortgage lending and consumer credit. As Professor Robert Lawless told the Committee at the June 11 hearing, the average mortgage and consumer debt is more than $53,000 for every person in the United States – and that figure includes those who do not even own homes or credit cards. Just this Sunday, the *New York Times* reported how the aggressive marketing and equally aggressive interest rates and fees of credit card issuers have contributed to millions of Americans being on the brink of financial ruin.[8] Seniors are targeted by these companies, and are much more likely than younger

[7] 127 S.Ct. 1559 (Apr. 17, 2007).
[8] Gretchen Morgenson, *Given a Shovel, Americans Dig Deeper into Debt*, N. Y. TIMES (Jul. 20, 2008).

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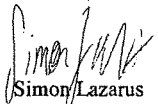
homeowners to have gotten a subprime mortgage. Once again, this is a serious threat to the retirement security of many Americans, and one that has been exacerbated by the decisions of the Supreme Court.

Conclusion

The above are just some of the areas in which the Supreme Court has undermined Americans' health, safety and economic security, weakening and distorting the work of Congress, as well as that of state legislatures. As we have described, the harmful effects of these decisions fall especially hard on America's seniors. We strongly support proposals to fix these problems, such as the Fairness in Nursing Home Arbitration Act and the Medical Device Safety Act.

But as important as these bills are, Congress must do more than pass piecemeal solutions to particular destructive court decisions. These decisions constitute a broad pattern of disregard for the work of this body, and for its goals of providing real protections and remedies for ordinary Americans, including America's seniors. We commend the Committee for the holding these hearings, which are a much-needed step toward reversing these trends, and hopefully nudging the Court toward a path more faithful to Congress's intentions.

Sincerely,



Simon Lazarus
Public Policy Counsel
National Senior Citizens Law Center

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Senator Patrick Leahy, Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

July 19, 2008

Fax: 202-224-7703

Re: Hearing on "Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations"

Dear Senator Leahy,

Thank you for holding this hearing. I am writing to share my opinions on the effects of the Supreme Court's recent decision on the *Exxon Valdez* case: how it affects the community where I live and how it also creates dangerous precedent for all communities in America by giving big business too much leeway for carelessness. These opinions serve as background to support my request that this decision be overturned—retro to all maritime cases involving punitive damage awards that have come before the Supreme Court in 2008.

Effects of Decision on Cordova, Alaska

The Supreme Court's decision to slash punitive will make bankruptcy inevitable for many Cordova fishermen and ex-fishermen.[1] Spill-related loss of fish stocks, lost income, and staggering debt from devalued commercial fishing permits are the primary reasons for the financial problems in town.

The problems started with the spill in 1989, but were not fully realized until the fish populations collapsed in 1992 (pink salmon) and 1993 (pink salmon and herring) when young fish oiled by the spill either failed to produce offspring as adults (pink salmon) or failed to show up as adults (herring). Pink salmon have since recovered; herring have not and the fisheries are closed indefinitely. For herring seine fishermen, this means about $60,000 in annual lost income.

At the time of the trial in 1994, the science did not yet exist to support the effects of long-term harm from oil. Consequently, fishermen and other plaintiffs were only compensated for short-term harm, mostly from fisheries closures in 1989 and lost market value. By 2003, nearly a decade after the trial, scientists had confirmed long-term harm from the oil spill to pink salmon, herring, and a variety of other fish, birds, marine mammals, and beach sea life.[2]

[1] John Platt, "Exxon's Deadly Legacy Lives on for Fishermen," *AlterNet*, 3/24/08, www.alternet.org/water/80476; The Whole Truth Campaign, www.wholetruth.net/.

[2] Charles Peterson and others, "Long-Term Ecosystem Response to the *Exxon Valdez* Oil Spill," *Science*, 12/19/03, 2082–2086; Richard Thorne and Gary Thomas, "Herring and the Exxon Valdez Oil Spill: An Investigation into Historical Data Conflicts," International Council for the Exploration of the Sea (ICES) Journal of Marine Science 65 (1): 44–50, 2008; Riki Ott, *Sound Truth and Corporate Myth$: The Legacy of the* Exxon Valdez *Oil Spill* (Cordova, AK: Dragonfly Sisters Press, 2005). Based on these studies, on August 31, 2006 the U.S. Justice Dept. and the State

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Since the spill, the highly prized Prince William Sound salmon and herring seine permits have plunged from their pre-spill value of $300,000 to less than $30,000—or about 10 percent of the former value. Fishermen who held these permits since the spill faced ballooning debt from permit loans that could not be supported by the fisheries. Other collateral, like homes and other fishing permits, was used to secure annual loan payments. In the most desperate situations, for example, where fishermen owned both herring and salmon seine permits, fishermen signed over shares of or their entire their punitive damage award to the state, based on an award of $2.5 billion plus interest. If the Supreme Court decision stands, many will be financially ruined.

The spill with its secondary disasters from the cleanup and litigation was a precipitating crisis that created stress and financial hardships, which in turn are major causes of individual and family problems.[3] Cordova is the longest-running case study of disaster trauma, including litigation stress, in the world. Literally thousands of legitimate claims for economic damages across the entire spill region were lost on the legal battleground that tips to advantage big corporations.[4] Also lost were claims for "non-economic damages"—stress, disaster trauma, and quality of life issues such as fishing lifestyles and Native culture—that were as real to survivors as financial losses.[5]

In sum, the claims dismissed or not recognized in court for boat and permit devaluation, long-term harm to fisheries, fishing industry support businesses, and non-economic damages were realized by many people in Cordova.[6] Survivors had counted on punitive damages, even at half the amount awarded by a jury of peers, to compensate us for *some* of these true spill losses. The reduced award will not get any us back to where we were financially in 1989, much less to where we would have been without the spill.

But the Supreme Court decision, if it stands, has ramifications well beyond Prince William Sound and Cordova.

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of Alaska reopened the civil settlement for "unanticipated injury" to natural resources and demanded that Exxon pay an additional $92 million to attempt to mitigate this harm. Exxon has yet to pay this debt.

[3] Riki Ott, *Not One Drop: Promises, Betrayal & Courage in the Wake of the* Exxon Valdez (Chelsea Green, 2008). See also select publications at http://stevenpicou.com/selected_publications.html.

[4] Brent Marshall, Steven Picou, and Jan Schlichtmann, "Technological Disasters, Litigation Stress and the Use of Alternative Dispute Resolution Mechanisms," *Law and Policy* 26(2) (2004): 289–307.

[5] Riki Ott, "Of Wishermen, Justice, and Democracy," *Huffington Post* blog, July 10, 2008, http://www.huffingtonpost.com/js-mcdougall/alaskan-fisherwoman-dr-ri_b_111878.html.

[6] Federal district court Judge Russel Holland also recognized that many harms were not compensated: "There is no question but that the *Exxon Valdez* grounding impacted, in one fashion or another, far more people than will ever recover anything in these proceedings. There is an understandable public perception that if one suffers harm, which is perceived to be a result of the conduct of another, the harmed person should be compensated. That perception does not always square up with the . . . case law under which the court must operate. . . . Legal liability does not always extend to all of the foreseeable consequences of an accident." *Exxon Valdez Case,* A89-0595-CV (HRH), Order No. 189, 13, 1994.

Anticipated Effects of Decision on American People

As you are well aware, in its ruling on the *Exxon Valdez* case, the Supreme Court made law—it legislated a cap on punitive damages in maritime cases from the bench. It is just a matter of time before this precedent in maritime law is extended to other fields of law.

This ruling makes an absolute mockery of "punitive" damages as punishment. Some corporations have grown far too large to be punished sufficiently under this ruling to deter behavior that puts the public and environment at risk.

By minimizing financial liability—a powerful incentive for corporations to abide by the law, the Supreme Court's ruling practically guarantees that there will be many more such industrial disasters. Further, the Supreme Court's decision to low-ball predictability of punitive awards allows industries to externalize the cost of risks to the public and environment, thus ensuring that citizens and communities will bear the full brunt of industrial accidents. No one in America should have to go through what our community has been through.

Request to Overturn This Decision

Several Supreme Court judges wrote in their opinions, in effect, if Congress doesn't like what the high court did, than Congress should set guidelines for punitive awards. Congress can, and should, overturn this decision for three reasons.

1. Legislating from the bench undermines the power of people to govern and sets bad precedent.
2. Setting a cap of 1:1 punitive to compensatory damages sets dangerous precedent.
3. Linking punitive damages to compensatory damages instead of profits is wrong-headed.

The jury in the *Exxon Valdez* case realized that to punish a giant corporation like Exxon, the punitive award needed to be linked to *corporate profits,* not compensatory damages. Linking punitive damages to profits creates a tool for ordinary people to dispense meaningful punishment to all sizes of corporations.

In the *Exxon Valdez* case, the jury decided one year of net profits was punishment. The beauty of this decision is that it can justly be applied to all corporations, whether giants like ExxonMobil or smaller businesses. It also gives big business the predictability it desires—and that the Supreme Court sought to achieve.

By tying punitive damages to net profits, not a fixed amount, then the award rises if profits rise as long as the case is appealed. This would have a secondary desirable effect of hastening case closure by removing a powerful incentive to profit by stalling. Further, Congress should also mandate that punitive awards be escrowed when entered to further remove financial incentives for corporations to stall payment through appeals.

Obviously, given the size of some corporations, capping punitive damages in a 1:1 ratio of punitive to annual net profits could result in some obscenely high awards—in keeping with obscenely high profits posted by ExxonMobil and some other corporations. In anticipation of

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this, Congress could mandate guidelines to share such large awards. For example, if the punitive award exceeds compensatory awards by more than, say, ten-fold, then Congress could mandate that the excess must be distributed to community foundations within the affected region.

In Alaska, we were prepared to do just that in anticipation of a large punitive award from the *Exxon Valdez* case. In 2001, plaintiffs and others harmed by the spill formed a community foundation, the Oiled Regions of Alaska Foundation, as way to share the taxable portion of the award with local communities through charitable giving. If ordinary people can figure out an equitable way to share large punitive awards, then Congress ought to be able to do the same.

Request to Make Us Whole

There is a fourth reason to overturn this Supreme Court ruling—retro to the *Exxon Valdez* case.

In 1973, Congress authorized the trans-Alaska pipeline project, overturning a Supreme Court case brought by the Cordova fishermen to block the trans-Alaska pipeline terminus from being sited in Port Valdez. Congress authorized the massive pipeline project based almost entirely on promises and assurances made by oilmen. Very few promises were codified into law.[7]

Many in Cordova believe that when the government took the pipeline project out of the venue where citizens could influence it and just arbitrarily went ahead with it, the government assumed a moral obligation to oversee the pipeline and tankers and to protect the people from oil spills.[8]

Please do not be dissuaded from taking action by ExxonMobil's arguments that it paid $2.5 billion (or whatever amount) for this spill in fines and cleanup and that this is sufficient for punishment. If it was, then Exxon should have been the first corporation to double hull its tankers rather than the last.

In sum, I urge you to take action by overturning the Supreme Court decision in the *Exxon Valdez* case and restoring people's primary tool to hold corporations accountable to the law: financial liability in the form of large punitive damage awards. Further, I urge you to make spill survivors whole by overturning this decision retro to January 1, 2008.[9] So doing would partially fulfill moral obligations made by Congress to the people of Alaska 35 years ago.

Sincerely,

Riki Ott, PhD

cc: Alaska delegation & governor

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[7] Promises to Congress in trade for the authorizing legislation: double-hull tankers, state-of-the-art navigational equipment, the best expertise and equipment for cleaning up spills, among others. See www.alaskaforum.org, report archives, "The Promises Issue," 2 vols.

[8] Ott, *Not One Drop.*

[9] There is precedent for taking remedial action retro to the damaging event. For example, the Oil Pollution Act of 1990 bans any tanker that spills over one million gallons from entering Prince William Sound, retro to March 23, 1989, the day before the *Exxon Valdez* oil spill.

To whom it may concern:

In recent light of the Supreme Courts recent decision on the Exxon Valdez case, I am writing you this letter.
It seems, when Exxon was awarded the decision and was given back the interest on the $450 billion, that interest would have paid for the whole oil spill "we believe the punitive damages aren't warranted, given the work we did to clean up the spill, the fact we spent 3.5 billion on payments and cleanups and settlements and fines." This is a quote from Tony Cudmore. Why is Exxon choosing to let the plaintiffs pay for the oil spill?
There are 32, 000 plaintiffs in this case and we all have stories to tell, all of our lives have been changed and not for the better. **We need to have the decision in this case over turned**. The people of the fishing communities of Alaska and the surrounding states urge the congress to take action and overturn the supreme courts ruling. This case has been going on for an absurd amount of time, many plaintiffs have passed away, and may others are still waiting for justices to be served and our livelihoods to return to some sense of normalcy. Why is it that when a couple divorces they make sure that the spouse is able to live the life they are accustomed to? In this case Exxon and the attorneys have let us live in poor conditions and ripped our livelihoods away from us so we were not allowed to continue the lives we were accustomed to. How is that a fair trial?
Show us that there is justice in our courts. After 20 years of waiting, and thinking about how different our lives would be now if this had not transpired, we are slapped in the face by our own Supreme Court system. This decision left all of us involved in a position of doubt and mistrust concerning our government. Those actions and decisions of the Supreme Court lead people to believe that only "big businesses" matters in the world and we, the working class citizens whom make up the United States don't matter. Thank you for coming forward and helping us, having you on our side does restore some of my faith in our system, just maybe justice will prevail.
The people whose livelihoods' were dramatically devastated by the Exxon Valdez oil spill were counting on court system to be there and support the people not the large corporations who were impacted very little.
Please over turn the rulings and show the world that large corporations do not always prevail due to big money and high powered attorneys. Show the people that when it comes to justice, the difference between right and wrong does matter and everyday, hard working citizens have rights and will be protected by our government.
Do you sincerely believe that any of the employees of Exxon or their attorneys would not fight for their own livelihoods and their families in order to survive if it was ripped from them in a senseless, preventable manner? I doubt they would stand back and do nothing!

Thank you

Janda Pacheco

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The Honorable Senator Patrick Leahy
United States Senate
Committee on the Judiciary, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

FROM:Davis C. Rackley

RE:
Senate Committee on the Judiciary
July 23 Hearing: Corporate Misconduct and Laws Governing Corporations
Please find attached a written statement for submission to the committee for inclusion in its July 23 hearing regarding Corporate Misconduct and Laws Governing Corporations.

The Corporate misconduct of EXXON has devastated my family and way of life. The following is a thumbnail sketch of our life since the EXXON Valdez oil spill. I owned and operated a large Fish Tender the F/V Mary Lou, my family wife and kids were my crew. We were asked by our cannery to not work on the oil spill as they might need us if by chance their was a fishery in 1989,we bought and transported 22,000lbs of Salmon that year as we had only one day of fishing for the 1989 season in the Prince William Sound. During a normal fishing season I would pack in excess of 1 million lbs of fish.

From that point in time things got worse as time went on the Cannery we had worked many years for went bankrupt. We then had to haul fish in other waters for other canneries that we had no relationship with we ended up working for another cannery that went bankrupt in 1990 so with 2 years of little or no income we were broke. In 1991 we went to work in Bristol Bay with no insurance on the boat. We got caught aground in a storm and the boat flooded and sank as a total uninsured loss. This was the financial domino effect of the EXXON Oil spill. Now bankrupt we held out hope that our attorneys would win a judgment against EXXON which they did in 1994. Wow it appeared that our justice system would prevail and my service and loyalty to this country was validated.

Here we are almost 15 years after a verdict. The justice system that I was so proud of and felt that my Vietnam service was served for. Has been trashed by the same judicial system. Our supreme Court , which I understood was to insure and assure that the constitutionality of our judicial judgments were to be adhered to. This Supreme Court not only gutted the Jury System but based it opinion on their own agenda not even the arguments of the case before them. I find it a total disgrace to the congress that affirmed the Justices that the (5) Justices that wrote the new law none of them ever litigated a case in there entire legal life. How does this happen?? Justice Ginsberg noted that this SCOTUS was gong down the wrong path by writing law.

I beg and plead with you to overturn this action of the SCOTUS and let congress write the laws. I lost my son this year he was 18 and working on the F/V Mary Lou with me. He was so hopeful that this would all come to a good ending. If we were grated our original judgment we would be made whole again not withstanding the hardships that this has brought on so many people.
Thank you,

Davis C. Rackley
PO Box2864
Silverdale, WA 98383
360-451-1410

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Written Testimony Submitted by Amy Rosier

To the

The Committee on the Judiciary

Hearing

Washington, DC

July 23, 2008

In the Matter of:

Courting Big Business - The Beginning of The End
(of Consumer Protection)

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Courting Big Business - The Beginning of The End (of Consumer Protection)

In the beginning, there was **the greatest nation on Earth**, but then big businesses discovered that they can buy favor from our government officials. [I hope this testimony provides a unique prospective, exposing some scandalous ways big businesses are winning, while Americans are losing.]

For some reason, the Federal Trade Commission hasn't filed a lawsuit against a homebuilder for defective construction in more than a decade. This, while home improvement fraud continues to be a most-common complaint in the country, according to the National Association of Consumer Agency Administrators (NACAA) and Consumer Federation of America (CFA). The FTC did sue several big builders in the late 1970s.

In 1979 the FTC sued Kaufman and Broad, the corporate predecessor to KB Home. The penalty was minimal. They had to fix some of the homes; and sign a FTC Consent Order. The order stipulated that KB's warranties must provide for arbitration of warranty repair disputes, without charging the homeowners any fee or deposit for those proceedings. Decisions from these tribunals would be binding **only** upon KB Home.

Well, KB Home continued to thumb their noses at the FTC **for 26 years**, repeatedly violating the 1979 FTC consent order, and mercilessly inserting clauses into its contracts, which mandated homeowners use **binding arbitration** to solve disputes.

Alice Oliver-Parrott, Retired Chief Justice of the First Court of Appeals in Texas, recaps a history of continual defiance of FTC consent orders in the Pruitt vs KB Home petition:

> "For twenty-four years, KB Home has used subterfuge and lies to avoid public scrutiny and accountability for its wrongdoing. They have entered into agreements with the Federal Trade Commission, violated those agreements, and misrepresented their violations to the Commission. As a result, they have been allowed to continue to profit from their wrongdoings. When, in 1991, the FTC discovered KB Home's violations of the 1979 consent order and filed an enforcement proceeding in the federal district court, KB Home paid a monetary civil penalty of $595,000 and agreed to a federal court injunction, forever prohibiting them from any violation of the FTC consent order in 1979. They have now admitted in correspondence to this court that they have intentionally and willfully violated that federal court injunction insofar as the arbitration provisions contained in their home warranties. They have also admitted consistent misrepresentations to the Federal Trade Commission, to this court and to other courts concerning their violations. Only when confronted with irrefutable facts, do they admit their lies and offer apologies if any offense has been taken."

After realizing that the government was looking the other way, KB was on its way to becoming a "Goliath" of the home construction industry. Being allowed to lock consumers into unfair contracts, with no way to seek justice, gave KB Home free-reign to use many ruthless business practices; and flagrant treachery has proven to be very profitable for KB Home.

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Today KB Home is an undisputed leader in the industry. The company reported net earnings of $480 million as of November 2004. Just how did KB Home become such a multi-billion-dollar corporation giant when they build what many critics refer to as "disposable housing"?

Well, when it comes to **defying** all good business principles of producing a durable and lasting product, KB has truly excelled. While most companies fail due to a bad product, negative press, and their infamous reputations, KB Home has thrived on the idea that if you make it easy for customers, they will come, regardless of quality.

KB Home also knows the secret to success in the building industry: ***government (taxpayer) support***. To assure success, the building industry coined the new political buzzwords 'Affordable Housing' to replace the old, more restrictive 'low income housing' phrase. Subsequently, the government endorsed 'Affordable Housing' program has become anything but low income for the giants of the homebuilding industry; and has in fact made them billionaires on the backs of taxpayers.

The tragedy of it all is only now being felt and reported. Corporate giants begin to pay token fines, while taxpayers pick up the tab for many decades to come; and the victimized homebuyers suffer.

"Today financial experts talk about the housing bubble, the highest foreclosure rates in history, epidemic proportions of mortgage fraud, and the defective home construction that has taken place. However, little attention has been given to the link between federal housing programs, foreclosures, and to outrageous profits of homebuilding giants like KB Home."[1]

With government financial incentives and influence, the finest attorneys money could buy, and some great luck, they have become the leader in how to gain outrageous profits while selling defective products. Experts have remarked that 1-year-old homes built by KB Home "were so bad that expensive repairs and high long-term maintenance would cost more than simply tearing them down and starting over."[2]

Formula for KB Home's profits and overall success:

1. Go where no one else would dare to go – swampland, bombing ranges, and landfills.
2. Target first-time homebuyers, specifically young families, generally in medium-sized developments close to major metropolitan areas.
3. Use government incentives (money) and innovative financing techniques to qualify the buyer.
4. Cut building costs whenever possible, including site preparation and foundations.
5. Purchase the cheapest materials in volume, and use the cheapest possible unskilled labor.
6. After the home has been sold, ignore all complaints, warranty claims, and bad press.

Finally, in August 2005, the FTC announced that KB Home would pay a paltry $2 million civil penalty to settle charges that it violated the terms of a 1979 consent order by inserting mandatory binding arbitration clauses in its contracts and warranties. Then in 2006, KB Home agreed to modify the existing warranties of **tens of thousands of homeowners**, including Texas owners who

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[1] Janet Ahmad, *Are fines disproportionate to the bad behavior and profitability?* http://www.hobb.org/index.php?option=com_content&task=view&id=778&Itemid=45

[2] *HUD & FTC Quietly Investigates KB Home* http://www.hobb.org/index.php?option=com_content&task=view&id=450&Itemid=142

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bought a house from KB Home after January 1996 (about 60,000 homeowners in San Antonio, the Rio Grande Valley, Austin, Houston, Dallas, and Fort Worth). With the settlement of this class-action suit, KB Home and its subsidiaries' binding arbitration clauses are invalid.

So now after decades of building defective structures, and deceiving authorities, multiple federal orders, a 2-year-long class-action lawsuit, and lastly a district court order, KB Home finally has to answer to thousands of homeowners spending untold time, money, and energy in litigation in the next years to come.

How many thousands of people had to suffer at their hands? How many marriages / families were destroyed all because our government didn't take swift, definitive action to punish these deceptive acts and protect the taxpaying citizens, the constituents of our "mighty" officials.

Guess what, despite these agreements and fines, HomeOwners for Better Building (HOBB) says it has obtained information that confirms KB Home has once again disregarded the FTC consent order and the terms of the new class action settlement even before the ink was dry. "Documents show that at the same time KB Home negotiated the settlement and was under the provisional certification of the class action, the company referred at least one homeowner with major foundation problems to its third party warranty provider, Home of Texas, who denied the claim and notified the homeowner to submit to Binding Arbitration conducted by Construction Arbitration Services (CAS)."[3] Maybe, KB Home's bottom line wasn't injured enough!

I don't understand; the FTC has been directed to work for the consumer, and administer a wide variety of other consumer protection laws. How could it allow such blatant contempt of federal laws and federal orders to continue for so long, knowing that so many consumers were being burned, each and every day? If Binding Arbitration is so **fair**, why did KB Home insist on defying the Federal Government and include these clauses in their contracts?

KB Home is just one builder who affected tens of thousands of homebuyers. Here is the story of another builder, Bob Perry, who is one of the top underwriters of Texans For Lawsuit Reform. He has affected the lives of hundreds of thousands of people, well beyond his own customers. He is one of the Texas' champion political contributors for Republicans in Texas - together with his wife, giving millions of dollars per election cycle to state officials. The $4.6 million that Bob Perry gave to Texas candidates and Texas PACs (including Texans for Lawsuit Reform) in the 2004 election cycle alone, makes him the state's chief kingmaker. Bob Perry's political handouts have also gone directly to many state judges including **all** of the Texas Supreme Court's sitting justices.

Bob Perry has used his power and influence in the following, infamous case:

Robert and Jane Cull paid Perry Homes $233,730 in 1996 for a new home in Mansfield, outside Fort Worth. This house, which the Culls bought for their retirement, came with two significant features: a warranty against major structural defects, and a **seriously defective foundation**. The resulting lawsuit that the Culls filed in state court in 2000 alleged that the house "shifted and cracked to such a degree that it materially affects the physical safety of the occupants."

Just days before their trial was scheduled to start, the Culls suddenly asked the court to force their own lawsuit into arbitration. In late 2001, the couple testified that they now opted for arbitration in

[3] Consumer Affairs, *Texas Court Invalidates KB Home's Forced Arbitration* http://www.consumeraffairs.com/news04/2006/05/tx_kb_homes.html

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order to resolve their legal odyssey as soon as possible. The Culls attributed this urgency to their advancing ages and the economic hardships caused by owning a lemon home that plummeted in value once its defects surfaced – to $41,000 by 2001. The judge agreed to submit the case to arbitration.

On Christmas Eve 2002, Arbitrator Robert Prather's award directed the Culls to collect more than $800,255 from the Warranty Company and Perry Homes. This award included $242,759 in home costs, $157,496 in attorney and other legal costs, $200,000 for mental anguish and $200,000 more in punitive and statutory damages for "knowing, unconscionable, intentional and / or willful and malicious conduct."[4] Perry Homes challenged the award. Texas State appellate judges in Fort Worth considered the appeal filed by Perry Homes and the warranty company. This appeal asked the court to void the damages the arbitrator awarded in the case – a case that never would have gone to arbitration but for the arbitration clause of the homebuilding industry's own making.

Perry Homes argued in its appeal that it became the victim of a bastardized system after this case proceeded for one year in state court and then got bumped into private arbitration. As a result, the appeal contended, plaintiffs used the advantages that public courts offer to gather documents and testimony that clinched their case that Perry Homes negligently saddled them with a lemon home. The plaintiffs then presented this evidence to the arbitrator, who threw the book at the defendants.

In early May 2008, the Perry Home vs. Robert and Jane Cull long awaited decision was handed down in favor of Perry Homes, overturning two lower courts' rulings. The Texas Supreme Court "threw out an $800,000 arbitration award against the company owned by wealthy campaign contributor Bob Perry, despite abundant evidence of the company's culpability."[5]

Since 2000, no one in Texas has contributed more money to political campaigns than Bob Perry, founder and CEO of Perry Homes. According to published reports, Perry and members of his family have contributed $263,000 to members of the Supreme Court since 2000. The money was given to the justices directly and through a political action committee.

Janet Ahmad, President of Home Owners for Better Building, released the following statement: "Today's Supreme Court decision confirms that a Texas new home warranty is worthless. The very rich Bob Perry has demonstrated in brazen fashion the lengths at which builders will seek relief from all warranty liability. As for Robert and Jane Cull's 11-year ordeal, no amount of Bob Perry's money will ever compensate them for their years of being deprived of the full enjoyment their home they so valiantly fought to preserve."

Clearly there is a double standard. When hundreds of thousands of homeowners consistently lost in binding arbitration, the courts upheld that the arbiters' decision was binding and final. However, today the court said if it is builder Bob Perry, the decision is not binding.

Sadly, when consumers see a Binding Arbitration clause in their contracts, they don't know the true implications of that innocent-looking clause. "Congress, the courts, and the public have been victims of a disinformation campaign, portraying arbitration as an inexpensive and impartial alternative to the public courts."[6]

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[4] The Texas Observer, *A Homeowner Nails Bob Perry* http://www.texasobserver.org/article.php?aid=1953
[5] Houston Chronicle Editorial: *Shoddy workmanship* http://www.hobb.org/content/view/2564/110/
[6] Joan Claybrook, Public Citizen president, *Arbitration More Expensive Than Court* http://www.citizen.org/pressroom/release.cfm?ID=1098

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Binding Arbitration is labeled by the National Consumer Law Center as "astonishingly unfair and undemocratic" and **virtually every major consumer group in America opposes Binding Mandatory Arbitration** including the AARP supported, Give Me Back My Rights coalition, at http://www.givemebackmyrights.com. I urge you to pass legislation, which would make pre-dispute binding arbitration clauses in employment, consumer, franchise, or civil rights disputes unenforceable. Binding Arbitration forces consumers to give up their right to sue in court, thrusting them (in legal handcuffs) into an astronomically expensive, "kangaroo court" held behind closed doors where the rules of law (time-tested court procedures and processes designed to produce impartial and fair justice) no longer apply. There is a symbiotic relationship between the company and the arbitration provider; the secretive proceedings are not public record; and there is **no appeal**.

Most victims of arbitration come out in shock; many are under gag orders, referred to as secrecy agreements, so they cannot tell what has been done to them. Consumers are lambs to the slaughter and clueless when they meet this big bad wolf.

Nowhere will you find an accurate tally of people being financially and emotionally quashed by binding arbitration. Figures cannot possibly include the people who have never actually made it **through** the arbitration proceedings; and therefore, couldn't substantiate any injustices. Quoting Public Citizen, " ...arbitration costs are so high that many people drop their complaints because they can't afford to pursue them" {Public Citizen's study revealed **fees** can be up to five thousand percent higher in arbitration than in court litigation.}

Moreover, because the numerous components / materials used to build a home often come from other states, the Federal Arbitration Act could feasibly overshadow every new home built in the USA by confirming the enforceability of even an inconspicuous Binding Arbitration clause. The FAA is **currently** applicable to any dispute involving interstate commerce, "interstate consultations" or possibly even if designs were intended to meet national building codes. "**State laws restricting the application of arbitration, which had been one of the last major restrictions of the use of commercial arbitration, have been, for the most part, eliminated**."

When congress passed the "Federal Arbitration Act" in the early 1900's, it was intended to apply to businesses (parties of equal bargaining strength). Its intent was not for the corporations to punish consumers, multimillion-dollar companies going up against one individual.

Binding Arbitration started in Texas with outrageous legislation that threatens to spread to every state in the nation. The National Association of Home Builders (NAHB) got this practice started in Texas. More specifically, they were instrumental in writing the National Construction Industry Arbitration Rules of the American Arbitration Association (AAA). These rules were adopted in 1996, and have become the industry standard for arbitration hearings. Simultaneously, NAHB canvassed for an industry-wide contract, which stipulated that arbitration be conducted under the Construction Industry Arbitration Rules; and specified AAA as the arbitrator. Now, virtually every major builder in **Texas** uses the 'Residential Construction Contract', which was promoted by the Texas Association of Builders and contains these clauses.

Standardized contracts are presented to the consumer in a take-it-or-leave-it fashion. Customers are not informed of the alliance *between* the Builder and the American Arbitration Association prior to signing a contract to purchase a home; and often believe, erroneously, that the American Arbitration Association is unbiased.

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Since the rules were written by the construction industry, it is not surprising that the rules give the advantage to the homebuilding industry. In literature published in 1996 by AAA, it indicates that: AAA aims to be more responsive to the needs of the **construction industry**.

So, in summary, NAHB has made a pact with American Arbitration Association (AAA). They helped AAA write their arbitration rules, and then promoted a standardized contract that named AAA as the arbitrator. These contracts are used so universally in Texas that consumers have practically no choice except to sign one of AAA's construction contracts. This secures favorable decisions for the Texas home-building industry. The builders in turn, create arbitration business and even serve as arbitrators in construction disputes. That sounds like a monopoly to me; I thought those were illegal in the US.

Binding Mandatory Arbitration is a private, for-profit system that strips tax-paying Americans of their rights to use the American court system to solve a disagreement, even if the house in uninhabitable. The arbitrators, do not have to make a determination based on our country's laws, or even justify their decisions.

Arbitration normally costs much more than using the courts, favors contractors rather than you, and can prevent you from being part of most class action lawsuits;

- Generally speaking, legal discovery (the right to obtain information from each other about the case, in preparation for arbitration) is not permitted in arbitration proceedings;
- The outcomes may be sealed, meaning the public can't learn about serious issues; and
- Some arbitration clauses even strip consumers of their freedom of speech, basically placing a 'gag order' on anyone who has a complaint.

If the National Association of Home Builders (NAHB) has its way, they will not stop with Texas. Their master plan threatens to spread their policies to every state in the nation. The National Association of Home Builders wants to:

* Establish laws providing for the right to repair, or the right to cure construction defect claims in each state;
* Include binding arbitration clauses in **all** builder / trade contractor contracts, and
* Provide written warranty that waives implied warranty **laws** (where allowed).

All of these objectives negate consumer protection! This is of national interest to all. We must stop this madness in its tracks.

Builders' groups continue to push hard for the passage of new laws in our states and nationally. We are up against a powerful industry that has already successfully lobbied at least 31 states to pass "Right to Cure" laws. They are intent on aggressively tilting the political / legal arenas in favor of builders and contractors, uncaring if that campaign eradicates innumerable consumer rights in the process.

Unfortunately, builders' groups are among the most influential political constituencies; and are often, heavy campaign contributors. Thus far, it has been the consensus of our elected officials to punish Americans further by supporting building industry legislation that harms homeowners under the guise of consumer protection and affordable housing. There is nothing affordable about a defective home. Builder-sponsored legislation will enable bad builders to continue to build substandard homes and breach the warranty without fear of consequences.

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Tort Reform also started in Texas. Texans for Lawsuit Reform (TLR), a **pro-arbitration business** group, runs Texas' largest, most powerful PAC. It spent $3.1 million in 2004 to make it harder for consumers to hold businesses accountable in court. **Bob Perry** is one of its top benefactors; and Perry Homes' top in-house lawyer, John Krugh, helped draft 2003 legislation that created the nine-member Texas Residential Construction Commission, a state agency dominated by building-industry representatives – including Commissioner John Krugh. This special-interest coup prompted Rep. Garnet Coleman (D-Houston), to tell the Austin American-Statesman, "**In Texas you can buy your own state agency, then regulate yourself**."

TLR spearheaded the "Tort Reform" movement, which is strategically designed to immunize corporations from civil lawsuits, limit corporate liability, establish caps on punitive damages, and generally ratchet-down citizens' ability to seek justice in the courts. In order to get their tort reform ideals made into laws, the group discovered that they needed to break up the coalition of Democratic state senators; or their legislation would never get to the floor for a vote. So in 1994, TLR launched their tactical maneuvers by investing $300,000 in three contests in which novice Republicans were trying to unseat veteran Democrats – and won them all. With these three new senators, Republicans now had their first majority in the state Senate in more than a century. The GOP Majority dutifully and actively responded to the homebuilders' bidding, and began spouting a "tort reform" disinformation campaign to sell the public a distorted view of our legal system. Special-interest groups were on their way to gaining unprecedented control of the Legislature, an "imbalanced legislative process" in which homebuilders "are heard very well. The constituents of the legislators, they aren't heard."[7] **An interesting tidbit:** On occasion, TLR "received 80 percent of its money from the families of just 24 tycoons."

During the tort reform frenzy of 2003 that TLR helped stir up, the Legislature, after intense lobbying and millions of dollars in contributions from homebuilder Bob Perry, created the Texas Residential Construction Commission (TRCC). Disgruntled homeowners were not allowed to go directly to court; first, they had to go to the TRCC, an agency heavily influenced by homebuilders, for a determination of whether their case had merit, a finding that would then be admissible in court. (TLR did not endorse or lobby for this bill.)

The Texas Residential Construction Commission Act (TRCCA) strips crucial consumers' rights, allows too many ways for the builders to circumvent their responsibility, and ensures that home-owning constituents have little leverage to get shoddy construction fixed. The state-mandated warranty eradicates the "implied warranty of good and workman-like construction" afforded by common law; and is enforced by that [very complex] mandatory dispute resolution process.

"TRCCA, in short, abolishes the common law discovery rule (which allowed homeowners to discover defects even after the warranty period). Today hidden defects undetected within the warranty period are not the builder's responsibility. If the homebuilder, for instance, installs the plumbing, electrical wiring, or air-conditioning poorly (of which the homeowner has no knowledge) and these essential components fail after 2 years, the homeowner is left with a long mortgage, poor construction, and no recourse. Similarly, if the foundation crumbles completely after ten years, no matter how poorly the homebuilders' work and no matter how worthless the house, the homeowner has no recourse."

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[7] San Antonio Express-News, *Homebuilders' Campaign Donations Rapped*
http://www.hobb.org/index.php?option=com_content&task=view&id=222&Itemid=110

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Texas Monthly: "**It was one of the most blatant power plays in recent years.**" The TRCCA is special-interest legislation that is designed to shield the powerful homebuilder industry from legal retribution, and places sizeable hurdles before homeowners seeking to live in homes with the level of quality that they paid for.

Texas builders can build homes that do not comply with minimum building codes, misappropriate money, abandon construction, and can build defective multimillion dollar condominiums with no fear of state action.

The Texas Residential Construction Commission (TRCC pronounced trick), headed by nine gubernatorial appointees, is a **worthless bureaucracy** that regulates **homebuyers** by forcing them to follow the commission's rules for resolving disputes with builders.

Alex Winslow, executive director of Texas Watch said, "The TRCC was created by the builders and for the builders." Firstly, the man who composed much of HB 730's language was John R. Krugh, top in-house lawyer for Houston-based, **Perry Homes**. Secondly, Gov. Rick Perry who received $3.2 million from members of Texans for Lawsuit Reform, his single largest contributor bloc, and another $260,000 directly from **Bob Perry**, was to name the nine commissioners of the TRCC.

This Hornet's nest of a bureaucracy only makes it harder for consumers to hold contractors accountable. Even if they want to, homeowners can't sidestep this new Texas Commission, because HB 730 amends state law to require that aggrieved homeowners complete TRCC's process prior to pursuing their claim in court or arbitration proceedings.

Before an owner of a defective home can do **anything**, he / she must give their builder 30-days notice. This first leg of the journey only delays any repairs that need to be made; and allows additional damage to occur such as water damage, wood rot, mold, and structural weakening. By the by, their home may or may not be fit for human habitation during this period. The homeowner may then need additional time to compile and prepare all of their evidence against the builder, including photos, engineering reports, etc. The process is so involved that homeowners need an attorney, and should also hire their own expert because they will need expert testimony to contest any inaccuracies in the state inspector's report. However, the builder is not required to give up any documentation that may hurt the builder's case in any subsequent legal proceedings.

At long last, they get to pay hundreds of dollars for the honor of filing a protest with the TRCC. Homeowners must then tackle the agency's arduous "dispute resolution process" with its long, statutory delays before the commission will make a determination of whether their case has merit.

"Nowhere has special interest money been more powerful and evident as Texas where builders freely build substandard homes, confident they will not be held accountable."

"The truth is the agency's dismal record continues to worsen as its agenda to limit builder's responsibility becomes more successful. TRCC is accomplishing exactly what Bob Perry and his immoral friends designed it to do – protect the homebuilding industry from liability. The fact is most homeowners refuse to get suckered into Bob Perry's TRCC, instead opting to walk away when they weigh the cost and burdens that TRCC imposes. Again Perry's' TRCC is doing exactly what he designed it to do – limit responsibility. Since TRCC was created, attorneys will no longer take a home defects case on a contingency basis, openly stating they can only represent the wealthy. On average it costs the homeowner $20,000 just to hire an attorney to go through TRCC and one year

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of wasted time to complete the process before being forced into costly, builder-biased Binding Mandatory Arbitration (BMA)."

Additionally, **restitution orders** mean nothing; judgment debtors can simply refuse to pay. Stats show about 22 percent of judgments are ever fully or partially satisfied. They can file bankruptcy or appeal in the courts for 20 years.

So because of all of these factors [lack of regulation, courts and government on their side, ease of hiding defects, and cost of arbitration, and lack of collection efforts] big businesses (and many smaller ones) have learned that they can do almost anything and get away with it.

My research (from a consumer's prospective) has been extensive, and I have created a website to educate consumers about the dangers of arbitration. I would like to direct you to two of my webpages, (http://home.rochester.rr.com/cauc/hazards2_002.htm) 'Binding Arbitration' and 'Corrupt Establishment' (http://home.rochester.rr.com/cauc/hazards2_005.htm) for an in-depth exposé. Although my pages specifically target the home-building industry, it is not my intent to imply that this immoral practice doesn't take place in other industries as well. It is only that homeowner losses can be (and most often are) devastating, demoralizing, and ruinous. My website, and those of HOBB.org and HADD.com, can give our Senators much more info (horror stories).

Currently, so much is against the consumer (homeowners in particular) that it equates to **no protection**. It can mean **complete ruination, loss of everything**, and even the possibility that the family will be **living on the streets** before justice can catch up and save the day. Once defrauded, it is near impossible for a homeowner to be made "whole" again. Corruption and lack of consumer protection hurts our economy. Insurance companies and banks suffer because of the increase number of foreclosures and reduction of property values. Naturally, banks won't suffer the losses alone; they will pass it on to consumers with increased fees, higher interest, and default interest rates. Neither will insurance companies accept a loss; they will increase premiums and create new "exclusions" to protect themselves. These "exclusions" are dual purpose; they also harm the victimized consumers.

It is **ULTRA IMPORTANT** that S. 1782, The Arbitration Fairness Act of 2007 and companion legislation of H.R. 3010 get enacted, YESTERDAY if not sooner. Every day that passes, financially and emotionally crushes thousands of people! Please see Senator Feingold's press release introducing the legislation, which would preserve consumer justice, at http://feingold.senate.gov/~feingold/releases/07/07/20070712.html. You can also review the testimony submitted to the June 12, 2007 hearing held by the House's Committee on the Judiciary, "Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?" from:

F. Paul Bland, Jr. (http://judiciary.house.gov/hearings/June2007/Bland070612.pdf)
and Jordan Fogal (http://judiciary.house.gov/hearings/June2007/061207fogal.pdf).

Please do everything in your power to protect consumers from the abuse of Binding Arbitration, before victims reach the proportions of an economic tsunami, like this country has never seen. Otherwise, Binding Arbitration will continue to wreak havoc on our nation's economy, just as it has crushed so many individuals' economic lives.

Patrick Leahy inserted in his statement to the Judiciary Committee "These recent Supreme Court decisions will do nothing to deter future corporate misconduct. In fact, I expect they will encourage

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it by taking away the one incentive that big corporations tend to understand – significant financial consequences."

- The Supreme Court's increasing willingness to overturn juries has become reprehensible! **Now**, Congress MUST pass laws, spelling it out for the Supreme Court, so that consumers continue to have the rights that our forefathers intended.

There are also two lesser bills: HR1443 would "treat arbitration clauses which are unilaterally imposed on consumers as an unfair and deceptive trade practice and prohibit their use in consumer transactions, and for other purposes." HR 1519 (American Homebuyers Protection Act) would protect homebuyers and quell the oppression of Binding Mandatory Arbitration.

I think that I have shown a few examples of a system that's fraught with improper checks and balances, inadequacies, and corruption.

There are so-o-o-o many horror stories, so many victims of these "TERRORISTS FROM WITHIN". Many people with brand-new homes have been forced into foreclosure because they budgeted for the mortgage payments, but had no inkling that the costs to repair their brand-new home could be over $150,000. Jordan Fogal had the mold in her home tested by an accredited laboratory, and they said they had never seen toxic readings that high in an inhabited dwelling. Her builder had patched it so well that without destructive testing, they could not have known. Their new home did not last even two years. What is a person to do, other than to let the house (money trap) go? Oh, and the medical bills can add to a person's troubles. I know of one person who needs a lung transplant because mold spores infiltrated her lungs. {Their house is condemned, they've filed for bankruptcy, and now they're on public assistance.} These unscrupulous contractors and homebuilders have, without a doubt, contributed to the 'mortgage crisis'.

Now use your imagination and visualize an un-level foundation. I know of one house that has a variation of 14 inches over 95 feet of slab. The standard for a level slab is plus or minus ¾ of one inch. Walking from one room to another is like walking through a funhouse; visitors can feel the floor drop beneath their feet. The Winquists put more than $300,000 into their new home. Yet, one year after construction, the Hood County Tax Appraiser valued it at minus $20,000. That's minus $20,000 because that's what it would cost to tear down the home.

These are just a few of the stories that I have learned about.

This is where "Courting Big Business" has gotten us: The Housing Crisis, irresponsible behaviors, unscrupulous executives, poor lending practices. We need rigid penalties, federal licensing of home-builders and home-improvement contractors, A process for Collections, a Home Lemon Law, and bills like **S.243 MCAP Act & S.244 Healthy Mothers and Healthy Babies Access to Care Act**, which limit Corporate liability **must be struck down**.

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TESTIMONY OF JOCELYN SAMUELS
VICE PRESIDENT FOR EDUCATION & EMPLOYMENT
NATIONAL WOMEN'S LAW CENTER

BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING: COURTING BIG BUSINESS: THE SUPREME COURT'S RECENT DECISIONS ON CORPORATE MISCONDUCT AND LAWS REGULATING CORPORATIONS

JULY 23, 2008

My name is Jocelyn Samuels, and I am Vice President for Education and Employment at the National Women's Law Center, which since 1972 has been involved in virtually every major effort to secure and defend women's legal rights. I appreciate the opportunity to submit this written testimony for this Committee's hearing on the Supreme Court's recent decisions on corporate misconduct and laws regulating corporations.

My testimony will focus on the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007), a pay discrimination case. This 5-4 decision, authored by Justice Alito, severely limits employees' ability to vindicate their rights and distorts Congress' intent to eliminate sex and other forms of discrimination in the workplace. In a broader sense, moreover, the *Ledbetter* decision creates incentives for employers to conceal unlawful discrimination.

Lilly Ledbetter was one of the few female supervisors at the Goodyear plant in Gadsden, Alabama, and worked there for close to two decades. She faced sexual harassment at the plant and was told by her boss that he didn't think a woman should be working there. Her co-workers bragged about their overtime pay, but Goodyear did not allow its employees to discuss their wages, and Ms. Ledbetter did not know she was the subject of discrimination until she received an anonymous note revealing the salaries of three of the male managers. Shortly thereafter, she filed a complaint with the EEOC. Her case ultimately went to trial, and the jury awarded her back-pay and approximately $3.3 million in compensatory and punitive damages for the extreme nature of the pay discrimination she had endured.

The Court of Appeals for the Eleventh Circuit reversed the jury verdict, holding that her case was filed too late – even though Ms. Ledbetter continued to receive discriminatory pay – because the company's original decision on her pay had been made years earlier. In its closely divided ruling, the Supreme Court upheld the Eleventh Circuit decision and ruled that employees cannot challenge ongoing pay discrimination if the employer's original discriminatory pay decision occurred more than 180 days earlier, even when the employee continues to receive paychecks that have been discriminatorily reduced.

The consequences of the *Ledbetter* decision are serious and damaging. As an initial

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matter, the *Ledbetter* decision upset longstanding precedent. Under Title VII, an employee has 180 days after a discriminatory act, such as a firing or a demotion, to file a discrimination claim. Before the *Ledbetter* decision, if an employee brought a claim for pay discrimination on the basis of race, color, religion, sex, national origin, age, or disability, both the EEOC and nine of the ten Courts of Appeals to consider the issue had applied what is known as the "paycheck accrual rule." Under this longstanding rule, each new paycheck was treated as a separate discriminatory act that started a new 180-day clock. By holding instead that all charges of pay discrimination must be filed within 180 days of the employer's original discriminatory decision, the Supreme Court reversed this accepted practice.

Moreover, the *Ledbetter* decision left victims of pay discrimination with no recourse against continuing pay discrimination they don't immediately challenge. By allowing discrimination to continue without a remedy, the Court forced employees like Lilly Ledbetter to bear the brunt of being paid lower wages for doing the same work as their male colleagues. The economic impact of this discrimination is tremendous: for example, the jury in Ms. Ledbetter's case found that she had lost approximately $224,000 in salary over time.[1] And a lifetime of pay discrimination follows women into retirement, since raises, pension contributions and the like are based on a lower level of wages. Lilly Ledbetter will likely receive thousands of dollars fewer in pension benefits over the course of her retirement because of the salary she lost due to discrimination.

Additionally, the *Ledbetter* decision bears directly on the subject of this hearing because it facilitates – indeed, encourages – corporate misconduct. This is because the *Ledbetter* decision creates incentives for employers to conceal their discriminatory conduct until 180 days have passed from the initial decision. As Justice Ginsburg noted in her strongly worded dissent, after that time the *Ledbetter* rule renders employers' discriminatory pay decisions "grandfathered, a *fait accompli* beyond the province of Title VII ever to repair."[2] This is hardly in keeping with Title VII's intent to encourage voluntary compliance by employers.[3]

In fact, the *Ledbetter* opinion provides employers whose compensation decisions are not challenged within 180 days a financial windfall from continuing this discrimination. With each discriminatorily reduced paycheck, employers continue to reap financial benefits. And in many cases, employers get to keep extra pension benefits that would have been paid if employees' wages had not been reduced by

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[1] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 2003 WL 25507253 at *1 (N.D. Ala. Sept. 24, 2003), *rev'd on other grounds*, 421 F.3d 1169 (11th Cir. 2005), *aff'd*, 127 S.Ct. 2162 (2007). Note that Title VII limits the recovery of backpay to the amount owed for the two years preceding the date a charge is filed. In Ledbetter's case, that amount was $60,000. *See* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 2003 WL 25507253 at *2.

[2] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S.Ct. 2162, 2178 (2007) (Ginsburg, J., dissenting).

[3] *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (noting "Congress' intention to promote conciliation rather than litigation in the Title VII context"); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1979) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal.").

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discriminatory actions, as a reward for breaking the law.

In sum, the Supreme Court's 2007 *Ledbetter* decision rewards employers who unlawfully discriminate and manage to conceal that fact for about six months. And the consequences of the decision are not limited to the context of employment. Although *Ledbetter* was a Title VII case that addressed employment discrimination, in the 14 months since the decision was issued, federal courts around the country have applied the decision to foreclose not only numerous employment discrimination claims,[4] but also Fair Housing Act claims,[5] Title IX claims,[6] and even Eighth Amendment claims.[7] Thus, the *Ledbetter* decision has been applied to relieve corporations from liability not only for their actions as employers, but also for a broad swath of other activities.

Fortunately, there is a fix for the egregious harm done to victims of pay discrimination – the Lilly Ledbetter Fair Pay Act, passed by the House of Representatives on July 31, 2007 and currently pending in the Senate. The bill would reinstate prior law and help to ensure that individuals subjected to unlawful pay discrimination are able to effectively assert their rights under federal anti-discrimination laws. But even though Congress can reverse the Supreme Court's decision in *Ledbetter*, the decision aptly illustrates the pernicious effect that Supreme Court decisions can have on all Americans.

The National Women's Law Center deeply appreciates this Committee's consideration of this important issue, as well as the opportunity to submit written testimony for this hearing.

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[4] *See, e.g.*, Grant v. Teacher's Ret. Sys., 2007 U.S. Dist. LEXIS 79462 (S.D.N.Y. Oct. 25, 2007, *revised* Oct. 29, 2007) (ADEA claim dismissed as time-barred); Groesch v. City of Springfield, 2007 U.S. Dist. LEXIS 50009 (C.D. Ill. July 11, 2007) (granting summary judgment based, in part, on finding that Title VII discrimination claims time-barred).

[5] Garcia v. Brockway, 526 F.3d 456, 2008 U.S. App. LEXIS 10258 (9th Cir. Idaho May 13, 2008) (dismissing FHA actions as untimely).

[6] Mansourian v. Bd. of Regents, 2007 U.S. Dist. LEXIS 77534 (E.D. Cal. Oct. 18, 2007) (granting judgment on the pleadings with regard to Title IX unequal treatment claims on the grounds that claims were time-barred).

[7] Barbaro v. Fed. Bureau of Prisons, 521 F.Supp.2d 276 (S.D.N.Y. 2007) (dismissing Eighth Amendment claims as untimely and citing *Ledbetter*).

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Senate Committee on the Judiciary
July 23, 2008

Hearing on Corporate Misconduct and Laws Governing Corporate Misconduct

Oral Statement by Osa Schultz , Plaintiff in Exxon Shipping v Baker

OSA SCHULTZ

Thank you for inviting me here today to tell my story.

Given the many critical and consuming issues that you are already faced with resolving at this time, I can barely express how much I, the people of Prince William Sound and the more than 30,000 plaintiffs appreciate your serious review of this case and the US Supreme Court's decision.

It would be easy to assume that surely after 19-1/2 years that justice has taken its course, the facts have been weighed, its time to move on. But, nothing could be further from the truth.

Exxon would have everyone believe that they cleaned up their mess and paid their dues for their wanton disregard of safe shipping practices. When you look at the true and verifiable facts, again, nothing could be further from the truth. The spill has never been fully cleaned up and its victims have not been fully compensated for their losses.

Exxon's vast power and influence has tipped the scales of justice. Now the largest corporation in the world with their inexhaustible resources has managed to draw out this case with appeal after appeal for over 15 years. For nearly a generation our community has been the David to their Goliath.

I grew up in Portland, Oregon and went to college in Eugene at the state University. In the fall of 1979, I took a quarter off to visit a friend who had recently moved to Alaska. I was captivated by the town of Cordova and the incredible wilderness surrounding it. It was on this trip that I met my future husband Ric. Ric took me out gillnetting on his boat the HYPNOTIC, I was hooked – on fishing & the skipper! The excitement, the beauty, and the satisfaction of catching the big, bright, lively and often elusive salmon was addicting. Ric and I fished together over the next 10 years and continued to invest in our equipment to improve our fishing operation.

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In 1982, we joined a group of over 75 fisher men and women who to had recently established The Copper River Fisherman's Cooperative. The Co-op encouraged improved fish handling. Vessels started to carry ice to chill the fish in advance of delivery and using the practice of 'bleeding' – cutting the gills to reduce bruising; both now standard methods in today's fishery. We invested in significant advertising strategies for our high quality product and became the vanguard for fresh salmon provided to a domestic market. By 1989, over 1/3 of the gillnet fleet was supporting the Copper River Co-op.

The Exxon Valdez spill tore that investment to shreds. With the Sound unfishable and so many fishing boats working on the clean up, the Co-op was forced into Chapter 11 and still has a substantial outstanding loan. If the current ruling stands and the interest is paid, each investor will stand to receive at most only 45% of their original investment – for money 'invested' as much as 20 years ago.

The devastation caused by the Valdez spill continues to this day. Without fish to send to the market we lost our niche, other salmon replaced it; it has taken years of marketing strategy to get back to where we were in 1988. In addition, one of the 4 local processors, Chugach, went bankrupt as well; a facility that had the capacity to process more than all of the other canneries combined. As a result in the following years when the fish were being caught in high numbers again we lacked the processing facilities to handle them and dollars that would have been generated in Cordova were taken to other ports. Our lives, the fishing community and the economy of Cordova have been devastated, and because compensatory damages were calculated based on only a few years of damages, Exxon stands to pay pennies on the dollar.

I'm not a lawyer, but I have read some of the briefs filed in the Exxon v. Baker case. I urge the Committee members to read a brief filed by four former Alaska governors, because it lays out in painful detail the promises the oil industry made in order to win approval for drilling in the Arctic and building the Trans-Alaska Pipeline and the provisions made by Congress to ensure that oil companies acted with the highest degree of care.

Well Exxon did not act with the highest degree of care. Far from it, they acted recklessly. They knowingly put a relapsed alcoholic behind the helm of a tanker navigating the treacherous waters of Prince William Sound. That recklessness ruined the economic livelihood of thousands of hard working fisher men and women. It caused the loss of traditional subsistence resources that are the cultural backbone of the Native people of Prince William Sound. It resulted in the total loss of our herring fishery, once a vital keystone species to the regions economy.

Exxon has delayed justice for nearly 20 years and it seems likely now to end up paying just a fraction of the damages they actually caused. If our highest court in America fails to hold them accountable, how will they ever be forced to take responsibility for their destructive actions?

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I am just one person, but there are countless self-employed people and small business owners like myself that struggle to provide for our customers and support the infrastructure that keeps America the incredible country that it is. The influence of corporate power has become corrupt and divisive. No where is this more true than in the oil industry today. And no other corporation is more accomplished at this corruption than Exxon. The only way to get their attention is to significantly affect their bottom line – PROFIT.

In setting a 1:1 ratio between compensatory and punitive damages, the high court sends the wrong message. Punitive damages are the only means by which citizens can punish a corporation for wrong doing. In its ruling the court has said that the punishment should be equal to the losses of the victims. As great as our losses are, and they are significant, equating punishment to a multi-billion dollar corporation with the losses of self employed fishermen such as my husband and me, is in no way punishment or deterrent, much less justice.

I call upon this committee to lead the way in ensuring that no corporation can ever do again what Exxon has done to Prince William Sound. In America, bottom line corporate interests should never trump the rights of individual citizens.

Thank you for your time and attention and I would be happy to answer your questions.

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No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ALASKA LEGISLATIVE COUNCIL, ON BEHALF OF THE ALASKA STATE LEGISLATURE, AND FORMER ALASKA GOVERNORS WALTER HICKEL, ANTHONY KNOWLES, STEVE COWPER, AND WILLIAM SHEFFIELD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Alaska Legislative Council is a permanent committee of the Alaska State Legislature, composed of the President of the Senate, the Speaker of the House of Representatives, and twelve other Representatives and Senators. The Alaska Legislative Council has authority to act on behalf of the Alaska State Legislature when the legislature is not in session. *See* Alaska Stat. § 24.20.010. It submits this brief on behalf of the Alaska State Legislature.

Amici include all the living former Governors of the State of Alaska. The Honorable Walter Hickel served as Governor of Alaska from 1966 to 1969 and from 1990 to 1994, and from 1969 to 1970 served as Secretary of the United States Department of the Interior. The Honorable William Sheffield served as Governor of Alaska from 1982 to 1986. The Honorable Steve Cowper served as Governor of Alaska from 1986 to 1990. The Honorable Anthony Knowles served as Alaska Governor from 1994 to 2002.

Amici have a vital interest in this case because it addresses the availability of damages to thousands of Alaska residents as a result of the EXXON VALDEZ oil spill, an unprecedented disaster that occurred in Alaskan waters and greatly disrupted the Alaskan economy. The State of Alaska encouraged the

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and their letters of consent have been filed with this Court.

construction of the Trans-Alaska Pipeline based on repeated assurances by the oil industry that the pipeline would be constructed and operated with the highest possible standards of care in order to protect Alaska's natural resources, which form the backbone of the regional economy. In essence, the Trans-Alaska Pipeline resulted from a broad agreement between Alaska and the oil industry, under which Alaska agreed to allow the development of its North Slope oil reserves in return for the oil industry's adherence to the highest possible standards of care to protect Alaska's resources, most especially its marine resources.

INTRODUCTION AND SUMMARY

The validity of the punitive damages award against Exxon for the EXXON VALDEZ oil spill cannot be resolved without carefully examining the history of the Trans-Alaska Pipeline System (TAPS) and the Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. 93-153, 87 Stat. 584, codified in part at 43 U.S.C. §§ 1651-55 (TAPAA).[2] TAPAA specifically addresses the liability of ship owners for spills of oil transported through the Trans-Alaska Pipeline and thereby represents the federal law that specifically governs the EXXON VALDEZ oil spill. Until its partial repeal in 1990, TAPAA imposed strict liability on ship owners for any spills of TAPS oil, while expressly preserving existing remedies under state

[2] In 1990, portions of TAPAA, including the provision addressing ship owners' liability for oil spills, were repealed by the Oil Pollution Act, Pub. L. No. 101-380, 104 Stat. 484, § 8102 (OPA). *See* historical notes following 43 U.S.C. § 1653. This brief cites TAPAA as it existed at the time of the EXXON VALDEZ oil spill. The relevant provisions of TAPAA are set forth in the Appendix.

and federal law. At the time that TAPAA was enacted, punitive damages were a well-recognized remedy under federal maritime law. As a result, TAPAA expressly preserves the availability of punitive damages for spills of TAPS oil.

In its opening brief, Exxon fails to come to terms with the fact that TAPAA establishes the federal law governing the EXXON VALDEZ oil spill. Exxon's entire discussion of TAPAA is contained in two misleading sentences:

> In 1973 Congress passed the Trans-Alaska Pipeline Authorization Act, directing the construction of the Pipeline, 43 U.S.C. §1653(a), and, to deal with the well-known risk of a spill, establishing a special liability regime, the Trans-Alaska Pipeline Liability Fund, to pay prompt and adequate compensation, *id.* § 1653(c). With the firm support of the State of Alaska, Congress thus made the political judgment that the risks of tanker traffic through Prince William Sound were worth taking, for reasons of national security and national energy policy.

Exxon Br. at 2. Exxon makes no attempt to explain why TAPAA, which specifically addresses spills of oil transported through the Trans-Alaska Pipeline and which preserves existing federal and state remedies, does not control the availability of punitive damages. Indeed, the district court in this case held that TAPAA "expressly preserves other remedies," including punitive damages claims. JA 103 (emphasis supplied by the district court). Exxon did not appeal that ruling and cannot challenge it here.

Not only does Exxon neglect to discuss the role that TAPAA should play in resolving the questions it asks this Court to address, Exxon's meager description of TAPAA is deeply flawed. The State of Alaska and Congress did not support construction of the Trans-Alaska Pipeline simply because they concluded that the risks of tanker traffic were worth taking. On the contrary, the State of Alaska and Congress authorized construction of the pipeline because the oil industry had repeatedly vowed to employ the highest possible standards of care to reduce the risk of oil spills, and the oil companies were willing to be subjected to increased damages if a spill occurred. Indeed, TAPAA effectuated a basic agreement, a social compact as it were, between the State of Alaska and the oil industry. Under this social compact, the oil companies were encouraged to develop North Slope oil reserves and construct the Trans-Alaska Pipeline in exchange for their agreement to adhere to heightened standards of care, the imposition of strict liability, and the preservation of existing state and federal remedies.

The basic terms of the social compact underlying TAPAA were aptly described by Representative Morris Udall, a member of the TAPAA Conference Committee:

> [TAPAA] is admittedly forcing a tougher liability standard on Alaskan oil than exists for other oil, but the House has consistently maintained that the environmental risks of transporting this oil were significantly greater. The oil companies have, in turn, consistently promised that both the pipeline and the sea

> leg were safe. We are doing no more than holding them to this promise.

119 Cong. Rec. 36,606 (Nov. 12, 1973).

By knowingly allowing a relapsed alcoholic to serve as ship master on the EXXON VALDEZ, Exxon violated the social compact it had entered into with the State of Alaska. The catastrophic harm that resulted from Exxon's recklessness was as bad as expected.[3] TAPAA preserves existing state and federal remedies precisely to ensure that damages would be adequate and available for oil spills. Punitive damages are appropriate here because Exxon acted recklessly and violated its solemn vow to the people of Alaska to protect Alaska's marine ecology and marine-based economy. Exxon should not now be heard to challenge the basic terms of the deal under which it and other oil companies were authorized to construct and operate the Trans-Alaska Pipeline and deliver the oil by tankers.

ARGUMENT

I. TAPAA Authorized Construction of the Trans-Alaska Pipeline While Imposing Strict Standards of Care and Liability to Prevent Oil Spills

The decision to authorize construction of a 789-mile pipeline running from Prudhoe Bay to Valdez involved two competing sets of interests—the interest in developing Alaska's oil reserves and the interest in protecting Alaska's natural resources, most prominently its marine resources and the

[3] *See, e.g.,* Plaintiffs Exhibit 2 (to be lodged with the Court) (statement of Exxon U.S.A. President Stevens) (stating that the magnitude of harm from the EXXON VALDEZ spill was "pretty well as much as envisioned").

marine-based economy. In the years following the discovery of major oil reserves in Alaska's North Slope, the State of Alaska and the oil industry supported construction of the Trans-Alaska Pipeline precisely because they agreed that these competing concerns could best be addressed by allowing the oil companies to extract and deliver the oil while imposing strict standards of care to protect the environment to the maximum extent possible. Based on the oil companies' repeated assurances that they would abide by strict controls in the management of oil and would be subject to heightened liability and increased damages, the people of Alaska, through their elected representatives, agreed to support the pipeline. In enacting TAPAA, Congress blessed this basic agreement.

A. Background to TAPAA

In March 1968, the Atlantic Richfield Company (ARCO) and Humble Oil and Refining Company (a predecessor to Exxon Mobil Corp.) announced the discovery of large petroleum reserves on land owned by the State of Alaska in Prudhoe Bay in Alaska's North Slope. Later that year, several oil companies, including ARCO, Exxon, and British Petroleum, formed an unincorporated agent, the Trans Alaska Pipeline System (TAPS), later incorporated as the Alyeska Pipeline Service Co., to develop plans to transport the oil to markets in the lower 48 states. *Wilderness Soc'y v. Morton*, 479 F.2d 842, 848-849 (D.C. Cir. 1973). Alyeska proposed to construct a 48-inch diameter pipeline to extend 789 miles from Prudhoe Bay to the Port of Valdez. *Id.* at 849. The pipeline would be capable of carrying 2,000,000 barrels of crude oil per day. Oil arriving at Valdez

would be loaded onto tankers for shipment to ports in the western United States. *Id.*

In 1969, Alyeska's predecessor submitted a request to the Department of the Interior to obtain rights-of-way to construct the pipeline. *Id.* In May 1972, after numerous hearings and a lengthy investigation, the Secretary of the Interior granted Alyeska's request. The decision was accompanied by a 9-volume Final Environmental Impact Statement.[4] Several environmental groups challenged the Secretary's decision. In February 1973, the United States Court of Appeals for the D.C. Circuit ruled that the Mineral Leasing Act did not authorize the Secretary of the Interior to grant federal rights-of-way of the size needed for the pipeline. *Id.*, 479 F.2d at 847-848. With the D.C. Circuit's ruling, the decision whether to authorize the Trans-Alaska Pipeline moved to Congress.

In 1973, the House and Senate Committees on Interior and Insular Affairs held 17 days of hearings on whether to authorize the proposed Trans-Alaska Pipeline.[5] The committees heard from 110 witnesses, including over 20 representatives of the oil industry, as well as many witnesses representing the Department of the Interior, the State of Alaska,

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[4] United States Department of the Interior, Final Environmental Impact Statement: Proposed Trans-Alaska Pipeline [hereinafter "FEIS"].

[5] *See Oil and Natural Gas Pipeline Rights-of-Way*, Hearings Before the Subcomm. on Public Lands of the House Interior and Insular Affairs Comm., 93d Cong., 1st Sess. (1973) [hereinafter "House Hrg."]; *Rights-of-Way Across Federal Lands: Transportation of Alaska's North Slope Oil*, Hearings Before the Sen. Comm. on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973) [hereinafter "Sen. Hrg."].

environmental groups, Native Alaskans, and fishermen. Four committee reports were issued in support of TAPAA.[6] TAPAA was debated on the floor of the House and Senate over 10 days.[7] The legislative history of TAPAA comprises over 3,500 pages.

In those 3,500 pages of hearings, testimony, committee reports, and floor debates, there is absolutely no suggestion that the oil companies sought protection from punitive damages under federal maritime law or any other source of law. Nor is there the remotest suggestion that Congress intended to offer such protection or even considered it. On the contrary, the history of TAPAA demonstrates that the oil companies agreed to abide by heightened standards of care in the shipping of oil. TAPAA imposed a heightened standard of care to protect against oil spills and created new remedies, while preserving existing remedies. In short, under TAPAA, the expansion of liability for oil spills was the price the oil companies paid for authorization to construct and operate the Trans-Alaska Pipeline.

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[6] S. Rep. No. 207, 93d Cong., 1st Sess. (1973) [hereinafter "Sen. Comm. Rpt."]; H. Rep. No. 414, 93d Cong., 1st Sess. (1973) [hereinafter "House Comm. Rpt."]; H. Conf. Rep. 617, 93d Cong., 1st Sess. (1973); H. Conf. Rep. 624, 93d Cong., 1st Sess. (1973) [hereinafter "Conf. Comm. Rpt."]

[7] *See* 19 Cong. Rec. 22795-22840 (July 9, 1973); 19 Cong. Rec. 22978-23019 (July 10, 1973); 19 Cong. Rec. 23312-23356 (July 11, 1973); 19 Cong. Rec. 23543-23621 (July 12, 1973); 19 Cong. Rec. 23746-23783, 23801-23801, 23854, 23858-23860, 23863-23864 (July 13, 1973); 19 Cong. Rec. 23873-23894, 23909-23910, 23954-23955 (July 14, 1973); 19 Cong. 24076-24130 (July 16, 1973); 19 Cong. Rec. 24294-24330 (July 17, 1973); 19 Cong. Rec. 27625-27720 (Aug. 2, 1973); 19 Cong. Rec. 36595-36620 (Nov. 12, 1973); 19 Cong. Rec. 36808-36820 (Nov. 13, 1973).

B. The Oil Industry Repeatedly Promised to Employ the Strictest Possible Controls to Protect Against Oil Spills

Concerns about the possibility of a catastrophic oil spill played a central role in the debates over whether to authorize the Trans-Alaska Pipeline. The Senate Interior and Insular Affairs Committee identified oil spills as a "major issue" needing to be addressed to authorize the pipeline.[8] Opponents of the pipeline supported an overland route through Canada primarily to avoid the need to have oil transported by supertankers.[9]

Proponents of the pipeline never denied that a large oil spill would cause devastating environmental and economic harms. Indeed, when Congress authorized construction of the Trans-Alaska Pipeline, it was universally recognized that a large oil spill off the Alaska coast would be devastating to the marine ecology and marine-based economy. As the Department of the Interior declared: "The existing pristine quality of the environment from Valdez through Prince William Sound would be threatened with severe disturbance from the proposed tanker activity. The major threat would come from oil spills which could affect the total biotic

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[8] Sen. Comm. Rpt., *supra* note 6, at 18-19.

[9] *Id.* at 19 (proponents of the Canadian pipeline emphasize "the danger of marine pollution stemming from the ocean leg of the oil transportation system"); Sen. Hrg., *supra* note 5, at 10 (Sen. Mondale) ("[A] trans-Alaskan pipeline would mean massive oil spills resulting from the trans-shipment of oil from Valdez to American ports."); House Hrg., *supra* note 5, at 385 (Rep. Aspin) ("The Alaska pipeline crosses a bad zone of earthquakes and necessitates moving oil by tankers . . . enormous ones which, when they run aground there are going to be enormous oil spills.").

relationships of the area."[10] Fisheries were especially threatened by oil spills because "[t]he economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities."[11] Native Alaskan communities faced even greater risks: "The greatest threat to Native subsistence resources would come from potential oil spillage."[12]

It was well understood, moreover, that effective cleanup would be impossible. The Department of the Interior concluded that, due to the remote location of Prince William Sound, less than 20% of oil spilled from a tanker grounding could be recovered.[13]

The oil companies repeatedly vowed, however, that they would reduce or even eliminate the risk of a catastrophic oil spill by adhering to the highest possible standards of care. Long before the congressional hearings, the oil industry had launched a public relations campaign to assure the American people and their elected representatives that the oil companies would adhere to strict measures to protect the fragile Alaskan environment. In 1970 and 1971, Alyeska placed

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[10] FEIS Vol. 1 at 150 (1972); *see also id.*, Vol. 2 at 216; *id.*, Vol. 4 at 213, 319; JA 1436-41, 1475-94.

[11] FEIS Vol. 3 at 370; *see also id.*, Vol. 2 at 152-153, 400; *id.*, Vol. 3 at 370; *id.*, Vol. 4 at 432-436; JA 1439-43, 1475-82.

[12] *See* FEIS Vol. 1 at 218.

[13] FEIS Vol. 1 at 224-225 ("[S]tate-of-the-art equipment and techniques for containing and recovering spilled oil can recover less than 20 percent of oil spilled."); *see also id.*, Vol. 1 at 174-175; *id.*, Vol. 4 at 303; *id.*, Vol. 4 at 484 ("Large spills in Prince William Sound would be more difficult to contain, clean up, and restore because of the distances from sources of ships and cleanup gear and the generally limited available manpower in the region."); *id.*, Vol. 4 at 581.

advertisements in major newspapers touting the pipeline as "[t]he most expensive single project ever undertaken by industry."[14] As one of the ads declared:

> What we have learned about the Arctic leads us to believe that there is nothing inherently dangerous to the environment provided the line is designed, built and operated in a manner that is considerate of and responsible to the environment. . . . On this you have our pledge: the environmental disturbances will be avoided where possible, held to a minimum where unavoidable, and restored to the fullest extent.[15]

Alyeska thus pledged to design, build, and operate the pipeline in the most careful manner possible to protect the Alaskan environment.

In the congressional hearings, witnesses on behalf of Alyeska and the oil industry repeated Alyeska's vow to exercise the highest degree of care to reduce the risks of oil spills. The president of Alyeska testified that, with the exercise of proper care, "the likelihood of tankers grounding or colliding is remote."[16] The president of ARCO likewise

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[14] Mary Clay Berry, THE ALASKA PIPELINE 145 (Indiana University Press 1975).

[15] *Id.* at 146.

[16] House Hrg., *supra* note 5, at 1705; *see also* FEIS Vol. 4 at 294 (quoting Alyeska statement) ("[E]nvironmental requirements dictate that the natural scenic beauty of the area and the high water quality standards, which result in sport and commercial fishing and tourism, be maintained . . . Maintaining them would be a responsibility which Alyeska, the tanker owner companies, the State of Alaska, and various federal agencies would have to bear cooperatively.").

testified that "no dollar savings could possibly justify wreaking irretrievable damage on the fragile Alaskan environment. And that is not going to happen. Since the pipeline was originally conceived, its cost has increased by millions of dollars to insure that the stringent challenges of the Alaskan wilderness will be met."[17] Standard Oil Co. submitted a 40-page report, which assured Congress that it had established design standards and imposed standards of care that would "insure that the marine segment of TAPS will have a minimal impact on the environment."[18]

The State of Alaska supported the construction of the pipeline based on the oil industry's repeated promises to employ heightened standards of care to protect the Alaskan environment.[19] Alaska was convinced that the project did not threaten the marine ecology and marine-based economy because the oil companies had promised "unprecedented" attention to protecting against oil spills. As Alaska's Governor William Egan concluded: "The navigational safety aids and procedures planned for the tanker segment of the route proposed for transporting Alaska's North Slope oil to the nation are extensive and impressive. Careful and detailed planning is going into this part of the planned operation and I am convinced that attention to environmental protection on the tanker route will be

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[17] Sen. Hrg., *supra* note 5, at 392.

[18] *Id.* at 215; *see also id.* at 219.

[19] *Id.* at 125 ("The State of Alaska wants to make absolutely certain that the environmental aspect of the project, from the standpoint of safety and ecology, environmental safety and the ecology of that area, will be a model for the rest of the Nation and the world itself to look at.").

unprecedented."[20] As a result of the unprecedented care promised by the oil companies, Alaska expected the oil companies' practices in Alaska "to be first, not last or average, in world trade in their respect for safety and ecological standards."[21]

As with the State of Alaska, the Department of the Interior supported construction of the pipeline based on the oil companies' assurances "that operation of the maritime leg [would] be safer than any other maritime oil transport system now in operation."[22] As a witness for the U.S. Geological Survey testified, "What we have asked for is something beyond the state of the art, the so called sophisticated stage that can go beyond the state of the art."[23] Alyeska had assured the government that it would meet such high standards.[24]

Congress accepted the oil companies' willingness to be subjected to strict standards in transporting the oil. As the Senate Committee on Interior and

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[20] Gov. William A. Egan, "Alaska's Oil and Sea – Antipollution Plans," *reprinted in* 119 Cong. Rec. 22828 (July 9, 1973).

[21] JA 1474 (statement of Gov. Egan to the Dept. of the Interior).

[22] House Hrg., *supra* note 5, at 155 (statement of Secretary of the Interior Rogers C.B. Morton).

[23] *Id.* at 1645.

[24] *See id.* at 1648-1649 (statement of Jack Turner, Bureau of Land Management) ("As far as Alyeska, . . . they have either demonstrated or assured us that they will in fact meet these [environmental requirements]."); *id.* at 1651 (statement of Jared Carter, Deputy Undersecretary of the Department of the Interior) ("[W]e have insisted at all times that the burden of establishing the safety and environmental acceptability of the pipeline in accordance with the stipulations is on the company, on Alyeska, and in cases where we have dealt with them in dealing with specific problems, we have found a willingness on their part to go out and get independent expert assistance to meet that burden.").

Insular Affairs concluded, "the risk of environmental damage from development of North Slope oil and its transportation to markets in the 'Lower 48' has been substantially lessened as a result of the stricter environmental stipulations" that the oil companies had accepted as the price for constructing the pipeline.[25] As Senator Henry Jackson, the lead sponsor of TAPAA, declared: "Damage to the ocean environment by the discharge of petroleum products and contaminated sea water need not take place. It can be prevented. Insofar as the movement of needed oil from Alaska to the markets in the United States is concerned, any risk of damage will be prevented or minimized. . . ."[26] Congress was convinced that, with adherence to the strict safety measures and heightened standards of care promised by the oil companies, "the maritime leg of the Alaskan route will be operated more safely than any other marine transport system functioning to date."[27]

C. TAPAA Authorized the Trans-Alaska Pipeline While Protecting Against Oil Spills by Imposing Strict Standards and Heightened Liability

TAPAA embodies a basic agreement to allow the development of Alaska's North Slope oil while requiring the protection of Alaska's natural resources, particularly its marine resources. On the one hand, TAPAA specifically directs the Secretary of

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[25] Sen. Comm. Rpt., *supra* note 6, at 18.

[26] 119 Cong. Rec. 22838 (July 9, 1973).

[27] 119 Cong. Rec. 22810 (July 9, 1973) (Sen. Fannin); *see also* 119 Cong. Rec. 24296 (July 17, 1973) (Sen. Stevens) ("The trans-Alaska pipeline will be constructed and operated in accordance with the strictest safeguards ever developed for any pipeline.").

the Interior to issue all necessary rights-of-ways and any other permits necessary for the construction and operation of the Trans-Alaska Pipeline System. TAPAA § 203(b), 43 U.S.C. § 1652(b). TAPAA also exempts the decision to authorize the pipeline from further review under the National Environmental Policy Act. TAPAA § 203(c), 43 U.S.C. § 1652(c).

On the other hand, TAPAA imposes strong measures to prevent oil spills. TAPAA directs the Secretary of Transportation to adopt standards regarding tanker design and directs the Coast Guard to establish a vessel traffic control system for Prince William Sound. TAPAA §§ 401, 402. TAPAA establishes a new liability scheme applicable only to spills of oil transported through the Trans-Alaska Pipeline. It provides:

> Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) . . . shall be strictly liable without regard to fault in accordance with this subsection for all damages, including clean-up costs, sustained by any person or entity. . . as the result of discharges of oil from such vessel.

TAPAA § 204(c)(1), 43 U.S.C. § 1653(c)(1). To pay compensation for damage caused by oil spills, TAPAA establishes a liability fund of $100 million, created out of fees on oil transported through the pipeline. TAPAA § 204(c)(3), 43 U.S.C. § 1653(c)(3). Under TAPAA's strict liability scheme, the owner of any ship that causes damages through the discharge of oil is strictly liable for the first $14 million of any

damages claim, and the liability fund is responsible for additional damages, up to a total of $100 million. *Id.* For claims exceeding $100 million, TAPAA expressly preserves state and federal remedies: "The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law." *Id.* In addition to preserving state and federal remedies for claims exceeding $100 million, TAPAA also expressly preserves existing state authority to impose increased liability for oil spills. TAPAA § 204(c)(9), 43 U.S.C. § 1653(c)(9).

II. TAPAA, Not the Clean Water Act, Governs the EXXON VALDEZ Oil Spill

In its brief to this Court, Exxon argues that the Clean Water Act displaces federal maritime law because it "specifically addresses the problem of both negligent and intentional maritime oil spills." Exxon Br. 31. That argument can be rejected out of hand because it fails to acknowledge that TAPAA specifically addresses spills of oil transported through the Trans-Alaska Pipeline, and TAPAA expressly preserves existing federal remedies, including punitive damages under federal common law.

As the courts of appeals have agreed, TAPAA establishes "a comprehensive liability scheme applicable to damages resulting from the transportation of trans-Alaska pipeline oil."[28] While it is surely true that the Clean Water Act specifically

[28] *In re Glacier Bay*, 944 F.2d 577, 580-581 (9th Cir. 1991); *see also In re Tug Allie-B, Inc.*, 273 F.3d 936, 947 (11th Cir. 2001) ("TAPAA's purpose, in part, was to establish a comprehensive liability scheme applicable to damages to natural resources resulting from the transportation of trans-Alaska pipeline oil.").

addresses maritime oil spills, *see* 33 U.S.C. § 1321, TAPAA even more specifically addresses maritime spills of oil transported on the Trans-Alaska Pipeline.

As this Court has repeatedly recognized, "the specific governs the general."[29] That principle applies most strongly in this context because TAPAA, the more specific statute, is also the more recent statute. As this Court has stated, "a specific policy embodied in a later federal statute should control" over a general policy adopted in an earlier statute.[30]

TAPAA itself makes it perfectly clear that Congress intended TAPAA, not the Clean Water Act, to govern liability for private harm caused by spills of oil pumped through the Trans-Alaska Pipeline. The two statutes impose different standards of liability for oil spills, and TAPAA's standards are plainly higher. The Clean Water Act does not establish a private liability scheme for oil spills like that found in TAPAA, which allows recovery in strict liability up to $100 million and preserves existing state and federal remedies for larger claims. As the Ninth Circuit correctly observed, "Congress

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[29] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *see also Simpson v. United States*, 435 U.S. 6, 15 (1978).

[30] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *cf.* 2B Norman J. Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 186-87 (6th ed. 2000). Indeed, a specific statute governs a later-enacted general one. *See Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence.").

consciously and purposefully subjected Alaskan oil to tougher liability standards than other oil."[31]

The legislative history of TAPAA confirms that Congress specifically intended to impose a stricter liability standard for oil spills of Alaskan oil than oil covered only by the Clean Water Act. As the Conference Committee Report explains, TAPAA "provides, for vessels that transport North Slope oil in the coastal trade, liability standards that are much stricter than those that apply to vessels that transport other oil in the coastal or foreign trade."[32]

Moreover, the district court in this case specifically addressed the central role played by TAPAA and Exxon chose not to appeal that ruling. The district court recognized that TAPAA "is certainly a comprehensive, remedial statute." JA 103. In the district court, Exxon moved to dismiss the punitive damages claim on the ground that TAPAA displaces federal common law remedies. JA 60. The district court rejected Exxon's motion, ruling that TAPAA "expressly preserves" existing federal remedies, including punitive damages under federal maritime law. JA 103 (emphasis supplied by the district court). Having chosen not to appeal the district court's ruling that TAPAA is the controlling federal statute and that TAPAA expressly preserves a federal common law punitive damages remedy, Exxon cannot challenge it here. Pet. App. 73a.

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[31] *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992).

[32] Conf. Comm. Rpt., *supra* note 6, at 28, *reprinted in* 1973 U.S.C.C.A.N. 2417, 2523, 2530.

III. TAPAA Preserves Existing Remedies for Oil Spills, Including Punitive Damages Under Federal Common Law

While TAPAA establishes the federal statute that governs the EXXON VALDEZ oil spill, it preserves rather than displaces federal common law remedies, including punitive damages. *See* TAPAA § 204(c), 43 U.S.C. § 1653(c). As the text and legislative history of TAPAA make clear, Congress intended TAPAA to expand ship owners' liability for oil spills without in any way limiting that liability. The district court's unappealed ruling that TAPAA preserves the availability of punitive damages is plainly correct and fatally undermines Exxon's argument that the Clean Water Act displaces punitive damages.

A. When TAPAA Was Enacted, Punitive Damages Were a Well-Established Remedy Under Federal Maritime Law

When Congress enacted TAPAA in 1973, punitive damages had long been available as a matter of federal maritime law. As the First Circuit has explained, "[a]lthough rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others."[33] Punitive damages were plainly available when ship owners recklessly hired incompetent ship masters. As the Sixth Circuit stated in 1969: "Punitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in

[33] *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995) (listing cases).

employing him."[34] Congress, of course, must be presumed to know this common law background against which it enacted TAPAA.[35]

B. In Enacting TAPAA, Congress Concluded that Existing Compensatory Damages Provided Inadequate Compensation for Oil Spills Off the Alaska Coast

In 3,500 pages of congressional hearings and debates leading to the enactment of TAPAA, there are precisely zero references suggesting that oil companies should be immunized against punitive damages for oil spills under federal maritime law. On the contrary, Congress was gravely concerned about the possibility of oil spills and sought to increase the standard of care applicable to the shipment of oil and to increase liabilities for oil spills. Congress did so by imposing strict liability against oil companies for oil spills, while preserving existing remedies under state and federal law for claims exceeding $100 million. TAPAA § 204(c), 43 U.S.C. § 1653(c).

Congress imposed strict liability for oil spill damages because it concluded that maritime law might not ensure the availability of compensatory damages. As the Conference Report declared: "The

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[34] *U.S. Steel Corp v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969).

[35] *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law . . . principles."); *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."); *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

Conferees concluded that existing maritime law would not provide adequate compensation to all victims . . . in the event of the kind of catastrophe which might occur. Consequently, the Conferees established a rule of strict liability for damages from discharges of the oil transported through the trans-Alaska Pipeline up to $100,000,000."[36] Specifically, Congress was concerned that, under maritime law, compensatory damages might be limited to the value of the ship and its cargo.[37] Limitations on compensatory damages might render them insufficient for a catastrophe resulting from an oil tanker spill. As the Conference Committee explained, "Oil discharges from vessels of this size could result in extremely high damages to property and natural resources, including fisheries and amenities, especially if the mishap occurred close to a populated shoreline area."[38]

To ensure that sufficient damages would be available for persons injured by oil spills, TAPAA imposes liability without fault for any oil spills involving oil transported on the Trans-Alaska pipeline. TAPAA § 204(c)(1), 43 U.S.C. § 1653(c)(1). That standard is tougher than the common law standard.[39] As Congress concluded, the liability

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[36] Conf. Comm. Rpt., *supra* note 6, at 28, *reprinted in* 1973 U.S.C.C.A.N. at 2530.

[37] *See* 119 Cong. Rec. 24296 (July 17, 1973) (Sen. Hathaway) (describing the need "to revise existing laws limiting the liability of the owner of a vessel to the value of the vessel and cargo at the time of the accident").

[38] Conf. Comm. Rpt., *supra* note 6, at 28, reprinted in 1973 U.S.C.C.A.N. at 2530.

[39] *See Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992) ("Congress consciously and purposefully subjected Alaskan oil to tougher liability standards than other oil."); *In re*

regime established by TAPAA, which imposes strict liability with existing federal and state law serving as a backup, "would provide an incentive to the owner or operator to operate the vessel with due care."[40]

C. TAPAA Preserves Existing Remedies, Including Punitive Damages Under Federal Maritime Law

By its express terms, TAPAA expands the availability of compensatory damages for oil spills while preserving existing remedies under state and federal law. Section 204(c) provides that claims not paid by the $100 million liability fund "may be asserted and adjudicated under applicable Federal or state law." TAPAA § 204(c)(3), 43 U.S.C. § 1653 (c). TAPAA further expressly preserves state authority to impose "additional requirements." *Id.* § 204(c)(9), 43 U.S.C. § 1653(c)(9).

Notwithstanding the plain language of TAPAA, Exxon argued in the district court that TAPAA establishes a comprehensive regulatory scheme that should be construed to extinguish common law remedies, including punitive damages under federal maritime law. JA 60-93. The district court correctly ruled that the text of TAPAA "expressly preserves," rather than displaces, the availability of punitive damages under federal maritime law: "TAPAA is not intended to occupy the entire field of trans-Alaskan oil spills. TAPAA is certainly a comprehensive,

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Glacier Bay, 944 F.2d 577, 582 (9th Cir. 1991) ("This strict liability provision ensures that trans-Alaska oil spill victims receive prompt compensation without resort to prolonged litigation.").

[40] Conf. Comm. Rpt., *supra* note 6, at 29.

remedial statute. However, TAPAA was intended to provide plaintiffs with a new strict liability remedy." JA 103 (citations omitted).[41]

As the district court correctly found, oil spills were a primary environmental concern Congress sought to address in enacting TAPAA. It would make little sense to read TAPAA to preclude existing common law remedies for oil spills, given the clear congressional intent to expand existing. As the district court explained: "Congress, in enacting TAPAA, was expanding recovery, not restricting recovery. . . . Congress dispensed with fault, but Congress did not intend to limit the liability of vessel owners and operators." JA 105 (citations omitted). The legislative history clearly bears this out.[42]

Exxon chose not to appeal the district court's ruling that the plain text of TAPAA preserves punitive damages. Pet. App. 73a. Exxon cannot challenge it here.

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[41] *See also In re Glacier Bay*, 741 F. Supp. 800, 804 (D. Alaska 1990), *aff'd*, 944 F.2d 577 (9th Cir. 1991) ("Congress was concerned with the source of funding for oil spill damage claim compensation, rather than with limiting the liability of vessel owners and operators.").

[42] *See, e.g.*, 119 Cong. Rec. 26821 (Nov. 13, 1973) (Sen. Magnuson) ("Section 204(c) should considerably enhance the availability of compensation to injuries parties *without disrupting existing Federal law, State law, or international treaties.*") (emphasis added). TAPAA thus also refutes the claims of certain of Exxon's *amici* that congressional maritime policy uniformly favors the limitation of ship owners' liability. *See* Brief of Amici Curiae Transportation Institute at 13-19. TAPAA expanded (rather than limited) ship owners' liability due to the grave threat that oil spills posed to Alaska's rich marine environment.

IV. The Jury's Award of Punitive Damages Is Appropriate Because Exxon's Recklessness Violated the Fundamental Terms of the Social Compact Embodied in TAPAA

The oil companies gained authority to develop Alaska's oil reserves based on their repeated promises to the people of Alaska that they would take every possible precaution to protect against oil spills. Those vows were a central trade-off in the social compact embodied in TAPAA, which expressly preserves existing remedies, including punitive damages.

It is clear that Exxon breached its promise. Far from taking every possible precaution against oil spills, Exxon recklessly gave command of a loaded oil tanker to a known, relapsed alcoholic. As the Ninth Circuit explained:

> Here the jury found that the corporation, not just the employee, was reckless. The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies.

Pet. App. 83a. Furthermore:

> There was substantial evidence . . . that Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez*

> through the icy and treacherous waters of Prince William Sound.

Pet. App. 89a.[43]

Punitive damages are appropriate in these circumstances. As has long been established, "punitive damages may be awarded in maritime tort actions where defendant's actions were intentional, deliberate or so wanton and reckless as to demonstrate a conscious disregard of the rights of others."[44] Punitive damages are warranted against a corporation where harm occurs as a result of its reckless hiring. As the New York Court of Appeals declared well over a century ago:

> If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages.[45]

This Court quoted that language with approval in *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101, 116 (1893), and it remains good law today.

Punitive damages are appropriate here because Exxon recklessly put at risk Alaska's marine resources and marine-based economy after it and the

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[43] *See also* Pet App. 29a, 64a, 121a-122a, 154a-157a.

[44] *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 354 (1st Cir. 1988).

[45] *Cleghorn v. New York Central & Hudson River R.R. Co.*, 56 N.Y. 44, 47-48 (1874).

other oil companies solemnly vowed to protect them. Having profited from the terms of the social compact underlying TAPAA, Exxon should not be heard to challenge those terms.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

Selected Provisions of the Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. 93-153, 87 Stat. 584, codified in part in Title 43 of the United States Code

Sec. 202, codified at 43 U.S.C. § 1651

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country.

Section 203, codified at 43 U.S.C. § 1652

(a) Congressional declaration of purpose

The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto.

(b) Issuance, administration, and enforcement of rights-of-way, permits, leases, and other authorizations

The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate Federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. The route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection.

* * *

Section 204, codified at 43 U.S.C. § 1653, repealed by the Oil Pollution Act of 1990

* * *

(c)(1) Notwithstanding the provisions of any other law, if oil that has been transported through

the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from vessel.

(2) Strict liability shall not be imposed under this subsection if the owner or operator of the vessel, or the Fund, can prove that the damages were caused by an act of war or by the negligence of the United States or other governmental agency. Strict liability shall not be imposed under this subsection with respect to the claim of a damaged party if the owner or operator of the vessel, or the Fund, can prove that the damage was caused by the negligence of such party.

(3) Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed. Financial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control act, as amended (33 U.S.C. 1321(p)) before the oil is loaded. The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

(4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name. The Fund shall be administered by the holders of the trans-Alaska pipeline right-of-way under regulations

prescribed by the Secretary. The fund shall be subject to an annual audit by the Comptroller General, and a copy of the audit shall be submitted to the Congress.

(5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel a fee of five cents per barrel. The collection shall cease when $100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below $100,000,000.

(6) The collections under paragraph (5) shall be delivered to the Fund. Costs of administration shall be paid from the money paid to the fund, and all sums not needed for administration and the satisfaction of claims shall be invested prudently in income-producing securities approved by the Secretary. Income from such securities shall be added to the principal of the Fund.

(7) The provisions of this subsection shall apply only to vessels engaged in transportation between the terminal facilities of the pipeline and ports under the jurisdiction of the United States. Strict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States.

(8) In any case where liability without regard to fault is imposed pursuant to this subsection and the damages involved were caused by the unseaworthiness of the vessel or by negligence, the owner and operator of the vessel, and the Fund, as the case may be, shall be subrogated under applicable State and Federal laws to the rights under said laws of any person entitled to recovery hereunder. If any subrogee brings an action based on unseaworthiness of the vessel or negligence of its owner or operator, it may recover from any affiliate of the owner or operator, if the respective owner or operator fails to satisfy any claim by the subrogee allowed under this paragraph.

(9) This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.

THE WHOLE TRUTH
What Exxon *really* paid for the Exxon Valdez Oil Spill

By Amy E. Trainer
For
The Whole Truth
www.wholetruth.net

In the wake of the Exxon Valdez Oil Spill two major lawsuits arose. The State of Alaska and the Federal Government joined together and brought criminal and civil suits against Exxon for *damage to the environment*. Exxon pled guilty to three crimes, punishable up to $3 billion dollars but settled with the governments for a $25 million dollar criminal fine, $100 million in restitution to the State and Federal Governments, and a $900 million dollar civil fine payable over 10 years.

Separate from that suit, a class action composed of 32,677 commercial fishermen, related individuals and businesses, private landowners, Native Alaskans, municipalities, and others sued Exxon for *private economic damages*. This lawsuit is the focus of The Whole Truth campaign and is on appeal to the United States Supreme Court. Even though these lawsuits originated from the same event the suits represent very different interests and require separate remedies.

Exxon is attempting to muddy the waters and commingle the two cases in an effort to shield itself from further punitive damages. In its appeal to the United States Supreme Court, Exxon specifically claims that its "payment of 3.4 billion in fines, penalties, cleanup costs, claims payments, and other expenses, has fully achieved both punishment and deterrence." Not only is this argument irrelevant for this case but it also disguises the whole truth about what Exxon actually paid for the Exxon Valdez Oil Spill. The true amount of financial liability that Exxon incurred, after factoring in tax credits, insurance payments, and the discount rate as applied to the civil natural resources damages fine, is much closer to $1,776,000,000 or ROUGLY HALF of what Exxon has claimed. This is the "Whole Truth."

I. Criminal Penalties

Exxon entered into a criminal plea agreement with the United States for violations of the Clean Water Act, the Rivers and Harbors Act, and the Migratory Bird Treaty Act.[1] Exxon was penalized $250 million dollars in fines and restitution for its unlawful actions, but was required to pay only $125 million.

A. Fines

As a result of its guilty plea, the court imposed fines totaling $150 million.[2] However, the court remitted $125 million of the fines due to Exxon's cooperation with federal investigators and its expenditures of approximately $2.1 billion for clean up costs. Of the $25 million in fines that

[1] Plea Agreement, U.S. v. Exxon Corporation, et al., Case No. A90-115 CR, Para. I.A.
[2] Id., at Para. III.C.

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Exxon actually paid, $12 million went into the North American Wetlands Conservation Fund and $13 million went into the Victims of Crime Act account.[3]

	Amount Fined	Amount Remitted	Amount Paid
Exxon Shipping Co.:	$125 million	$105 million	$20 million
Exxon Corporation:	$25 million	$20 million	$5 million

B. Restitution

In addition to fines, the court ordered Exxon Shipping and Exxon Corporation to pay restitution totaling $100 million dollars.[4] This amount was considered a "remedial and compensatory payment," of which the State of Alaska received $50 million and the United States received $50 million. These monies were to be used exclusively for restoration projects.

The criminal penalties in this case did not close the door to future punitive damage awards in this case or others arising from the oil spill. Specifically, the plea agreement stipulates and the parties agreed that "all payments made under paragraph IV.A. are exclusively remedial, compensatory, and *non-punitive* and are separate and distinct" from the other fines imposed in the plea agreement "and from any other criminal, civil, or administrative penalties that could have been imposed upon the defendants."[5]

II. Civil Penalties

A. Civil Settlement

The United States and the State of Alaska entered into a settlement agreement with Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V Exxon Valdez (Exxon) for natural resource damages. Exxon agreed to pay the United States and Alaska up to $900 million over a period of ten years beginning in December 1991.[6]

The civil settlement payment was as follows:

Payment Scheduled Date	Payment Amount
December 1991	$90 million
December 1992	$150 million
September 1993	$100 million
Sept. 1994 – 2001	$70 million each year
Total:	$900 million

The settlement also contained a "reopener" clause that allowed the United States and Alaska to seek up to $100 million dollars in additional funds by September 1, 2006 to restore one or more

[3] "The *Exxon Valdez* Oil Spill – Final Report, State of Alaska Response," Ernest Piper on behalf of the Alaska Department of Environmental Conservation, June, 1993: p. 171.
[4] Plea Agreement, Para. IV.A.
[5] Plea Agreement, Para. IV.D. (Emphasis added).
[6] *See* Agreement and Consent Decree, United States v. Exxon Corp., civil action A91-082, and State of Alaska v. Exxon Corp. civil action A91-083.

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populations, habitats or species that suffered a substantial loss or decline as a result of the spill.[7] On June 1, 2006, the U.S. Department of Justice and Alaska Attorney General sought that right and requested $92,400,000 in additional funds for restoration of affected habitat.

B. Exxon Credit

The civil settlement allowed Exxon to deduct from its 1992 civil settlement payment the amount for the costs of cleanup completed after January 1, 1991.[8] Exxon deducted $39,913,700 from its 1992 payment.[9] "With Exxon able to deduct its cleanup costs from what it owed the government, essentially, the government was paying for the cleanup."[10] In addition, when Exxon settled punitive claims with certain seafood processors, Exxon included a provision that would grant it an 11.38% rebate on any punitive damages awarded against the company.[11]

C. Exxon's Actual Liability of the $900 million Civil Settlement

On March 19, 1991 the Congressional Research Service (CRS) presented a report to the House Committee on Merchant Marine and Fisheries concerning the criminal and civil settlements between the United States, Alaska and Exxon.[12] The Committee requested a report on the "present value of the recent settlement of the Exxon Valdez" because the "gross amount received by the United States can differ from the net cost" to Exxon "depending on tax liabilities, and values could differ with choice of discount rate."[13] The CRS Report concluded that the "undiscounted" cost of the $1 billion in criminal and civil liability would be smaller than a true $1,000,000,000.

The CRS Report stated that the "net cost to Exxon will be smaller … because the civil payments can be deducted from income for purposes of both State and Federal taxes. The Federal tax rate is set at 34 percent; and we add three percentage points to account for State income taxes."[14] As

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[7] "Exxon Valdez Oil Spill Restoration, Volume I, Restoration Framework," Exxon Valdez Oil Spill Trustees, April, 1992: p. 6.

[8] "The *Exxon Valdez* Oil Spill – Final Report, State of Alaska Response," Ernest Piper on behalf of the Alaska Department of Environmental Conservation, June, 1993: p. 172.

[9] "1994 Status Report on the *Exxon Valdez* Oil Spill," Exxon Valdez Oil Spill Trustee Council: p. 18.

[10] "The *Exxon Valdez* Oil Spill – Final Report, State of Alaska Response," Ernest Piper on behalf of the Alaska Department of Environmental Conservation, June, 1993: p. 172.

[11] See Brief of Respondents, Exxon Shipping Company and Exxon Mobil Corporation v. Grant Baker et al., On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 07-219, Footnote 10.

[12] The CRS Report was prepared by Bernard A. Gelb, Specialist in Industry Economics, and Jane G. Gravelle, Senior Specialist in Economic Policy.

[13] "The Recently Negotiated Settlement of Civil and Criminal Liabilities Resulting From the Exxon Valdez Oil Spill," Hearing before the Committee on Merchant Marine and Fisheries, United States House of Representatives, 102nd Congress, Congressional Research Service, Library of Congress, Serial No. 102-8, March 20, 1991: p. 1.

[14] The CRS Report notes, at Footnote 1, that the adjustment for state income taxes "was suggested to us by Andy Yood of the American Petroleum Institute, who indicated that an add on

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a result, the CRS Report concluded that "the ***net cost to Exxon*** (net receipt to the Government) will be ***$655 million without discounting***."[15] If the additional $100 million reopener clause is factored in, then the net cost to Exxon would be $716 million.

The CRS Report considered three discount rates, a high, medium and low rate. Applying the medium rate, which corresponds to the average pre-tax return on private capital, ***Exxon's cost net of taxes for the $1 billion dollars in civil and criminal liability would be between $456 and $474 million, less than half of the actual penalties imposed***.

	Net Cost w/out Discount	Net Cost with Mid. Discount
$1 B civ/crim Penalties	$655 million	$456 million
Penalties + Reopener	$716 million	$474 million

D. Exxon's Insurance Settlement from Lloyd's of London

In the class action lawsuit for economic harm, Exxon has not reported the insurance settlement that it received as a result of the Exxon Valdez oil spill. The law firm, Helm, Pletcher, Bowen & Saunders L.L.P, was lead counsel for Exxon in "the jury trial against Lloyd's of London involving insurance proceeds for the clean up of the Valdez oil spill. The case was tried to a jury just over one year after the first deposition was taken. The jury found in favor of Exxon, and the Court entered a $410 million verdict on the breach of contract claim. After trial, Lloyd's agreed to pay over $780 million to resolve both the breach of contract claim and the pending insurance bad faith claim."[16] The $780 million that Exxon received as an insurance payoff was not reported or factored into Exxon's actual costs incurred.

III. Exxon's Trial Exhibit of Actual and Potential Costs Incurred

As part of its civil defense, Exxon submitted an exhibit entitled "Total Actual and Potential Cost of the Exxon Valdez Spill." [17] The entirety of this exhibit is reproduced in the table below.

Expenditures: Incurred and Fixed		
Type of Expenditure	$$ Amount CREDIT	$$ Amount COST
Claims Payments		304,000,000
Federal Fines		25,000,000
State and Fed Restitution		100,000,000
State and Fed Settlement		900,000,000
Clean Up Costs		2,097,000,000
Casualty Loss: Vessel, Cargo		46,000,000
Phase IIA Award		287,000,000

of two to three percentage points was a typical rule of thumb to obtain a combined Federal and State income tax rate."

[15] See CRS Report, p. 2. (Emphasis added).

[16] See www.helmpletcher.com/practice/litigation.cfm, Practice Areas: Commerical Litigation, published February 12, 2004: p.1.

[17] See Defendant's Exhibit, State of Alaska v. Exxon Corporation, DX-6399A, Case No. A89-095-CV.

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Phase IIB Award		20,000,000
Tax Reduction	1,115,000,000	
Adjustment[18]	218,000,000	
		Subtotal $2,446,000,000
Expenditures: Potential and Contingent		
Type of Expenditure	$$ Amount CREDIT	$$ Amount COST
Plaintiffs' State Court Claims		165,000,000
Recoverable Costs		17,000,000
Interest		103,000,000
Plaintiffs' Phase IV Claims		174,000,000
Contingent State/Fed Settlemt		100,000,000
Tax Reduction	207,000,000	
		Subtotal $352,000,000

Total Net Actual and Potential Cost: $2,798,000,000

When the total cost (2,798,000,000) is reduced by the Lloyd's Insurance Payment (780,000,000) and the Net Cost of Civil Payment With Discount Rate applied,[19] ($242,000,000),
THE TRUE TOTAL COST IS 1,776,000,000.[20]

The Whole Truth is a far cry from the $3.4 billion that Exxon claims it has paid.

[18] It is unknown whether the $39.9 million credit that Exxon received for cleanup costs is considered part of this "adjustment."
[19] Since Exxon already figured in its tax deduction, the correct sum to add here is the difference between the Net Cost with and without the Discount Rate as calculated by the CRS Report.
[20] Exxon has been required to maintain a letter of credit since the $5 billion jury verdict. While information about the cost to Exxon of maintaining the letter of credit is not publicly available, it is estimated to be in the range of $15 million (largely dependent on fluctuating financial terms from major lenders).

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STEVE SMITH
PO Box 1724 | Cordova AK 99574 | srsmith@ak.net | Ph: 907-424-7354

The Honorable Senator Patrick Leahy
United States Senate
Committee on the Judiciary, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

July 21, 2008

Dear Senator Leahy,

Thank you for the opportunity to provide written testimony for review by the Senate Committee on the Judiciary regarding the hearing on "Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations" scheduled for Wednesday, July 23, 2008.

My name is Steve Smith and I live in Cordova Alaska, on the east side of Prince William Sound, about 40 miles from the ExxonValdez spill site. I have been a commercial fishermen here for 45 years. My main sources of fishing income have been salmon and herring.

Prior to the spill, herring was 50% of my annual income. Shortly after the spill they got sick and died. At the time of the trial there wasn't enough scientific evidence to prove oil was responsible. There is now!

This is an unforeseen damage from the spill that was never figured into the damage equation. Just imagine your life with 50% less income. This spill continues to haunt us.

Corporations have no conscience. Their only responsibility seems to be to make a profit at all costs. We need to give them a conscience, and punitive damages should do that. Clearly, in this case punitive does not equal punishment. Punitive damages should be a tool to encourage corporations to do the right thing in the future.

What's at stake here? At stake is the future of our waters – yours and mine! We can no longer allow large corporations – or small ones – to foul and poison our oceans. Remember, your water and your shore could be next.

The Supreme Courts recent ruling to reduce Exxon's punitive damages to such a drastic degree, says that it's 'okay' to cause immense environmental and economic disaster in a far away place to a lowly bunch of fishermen, in favor of

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corporate profit. This is not only unfair, it's morally wrong. Welcome to fascism in America.

In a country founded on the rule of law – what happened to "Liberty and Justice for all?" If we do not have justice---do we really have liberty?

I respectfully request that your committee consider efforts to address the Supreme Courts seemingly pro-corporation decision in this case. Additionally, I appreciate your acknowledgement of the situation and look forward to being involved in any future action taken as a result of this hearing.

Sincerely,
Steve R. Smith

Written Statement of
Joe Solmonese
President
Human Rights Campaign

To the

Committee on the Judiciary
United States Senate
Room 226
Dirksen Office Building
July 23, 2008

Mr. Chairman and Members of the Committee:

My name is Joe Solmonese, and I am the President of the Human Rights Campaign (HRC), America's largest civil rights organization working to achieve gay, lesbian, bisexual and transgender (GLBT) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against GLBT citizens and realize a nation that achieves fundamental fairness and equality for all. On behalf of our over 700,000 members and supporters nationwide, I thank you for holding this hearing titled, "Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations." I am honored to submit this statement in defense of all American workers and their right to work in an environment free from discrimination. I especially want to thank Chairman Leahy for acknowledging the importance of the issue before us today.

The Supreme Court's decisions on employment conditions, discrimination, pay equality, and harassment dramatically affect the entire country, but particularly minorities, such as the GLBT community, who too often face prejudice and discrimination. While there is no federal protection against employment discrimination based on sexual orientation, nor is there clear and comprehensive protection against gender identity-based discrimination, how a court interprets the existing statutes will affect GLBT Americans' success under future statutes and, ultimately, their financial wellbeing.

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Existing civil rights laws such as the Civil Rights Act of 1964, which includes Title VII, the Americans with Disabilities Act, and the Civil Rights Act of 1991created strong protections against workplace discrimination. These laws were designed to ensure a person's right to work and to be judged based on performance and merit. However, the Court must interpret these laws robustly so that they protect a wide range of people and situations, or Congress's intent in creating the laws is undermined, and workers pay the price.

When people are denied equal treatment and security in the workplace, through narrow interpretations of existing law or the absence of a law altogether, their earnings invariably decrease. This is true in the GLBT community, which is not protected by the non-discrimination laws of many states or at the national level. In fact, it remains legal to fire someone because of their sexual orientation in 30 states and because of their gender identity in 38 states[1]. As a result of the low job security that many GLBT people experience, pay disparities between the GLBT community and the average American worker are well documented. For example, gay men earn on average 10% to 32% less than equally qualified heterosexual men.[2] It is important to recall that discrimination such as this not only hurts workers on an individual level; it hampers them as consumers. Therefore, the effects of discrimination reverberate throughout the national economy.

We are hopeful that Congress will enact statutes protecting GLBT people. However, judicial interpretations of similar statutes demonstrate that those protections could also be diluted if the court continues on its present course. Title VII prohibits employment discrimination based on the following protected classes: race, color, religion, sex, or national origin.[3] However, the courts have of late weakened this provision, which should shield the protected classes from unjust workplace discrimination. The recent case *Ledbetter v. Goodyear* exemplifies this disturbing trend.[4] The Supreme Court decided that because Lilly Ledbetter had not known that she was

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[1] HUMAN RIGHTS CAMPAIGN, *Statewide Employment Laws & Policies*, http://www.hrc.org/documents/ Employment Laws and Policies.pdf .

[2] *See* M. V. LEE BADGETT ET AL., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 13 (The Williams Institute ed., 2007).

[3] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) *et seq.*

[4] *See* Ledbetter v. Goodyear, 127 S. Ct. 2162 (2007) (concluding that plaintiff could not pursue a Title VII claim).

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receiving lower wages because of her gender, therefore not reporting the discriminatory treatment to the EEOC within 180 days of her first paycheck, that her employer, Goodyear Tire & Rubber Company, could not be held responsible.

By denying Ledbetter's access to her rights, the Court effectively erased those rights and closed the courthouse door for workers whose employers manage to conceal their discriminatory practices. In her dissent, Justice Ginsberg stated that "the Court has strayed from interpretation of Title VII with fidelity to the Act's core purpose."[5] For Lilly Ledbetter, the law meant to protect her was rendered powerless because of the Court's refusal to interpret it in a way that made it applicable to the real circumstances of everyday hard-working Americans. Essentially, the Court said that if an employer can conceal discrimination long enough, discrimination is acceptable; Ledbetter's employer was able to hide the discrimination for over twenty years.

Other recent Court decisions, such as those in *Albertsons v. Kirkingburg*,[6] *Sutton v. United Airlines*,[7] and *Murphy v. United Parcel Service*,[8] have also restricted a person's ability to seek protection from discrimination under the Americans with Disabilities Act. These cases served to narrow the interpretation of a disability, thereby making it difficult for people who are able to overcome their disability in a way that makes them more employable to be protected under the ADA. In *Kirkingburg*, a monocular truck driver with a perfect driving record was dismissed by his employer, citing his impairment, yet the Court concluded his ability to do his job with that impairment meant he had no recourse under the ADA. While a person may be able to work despite disability, that person is still vulnerable to discrimination because of that disability. These decisions greatly limit a person's recourse in such a situation, and, like *Ledbetter*, dilute the strong protections Congress afforded America's workers under our civil rights laws.

Because of the immense power that the courts can have in protecting and ensuring, or denying, workers' rights, it is of the utmost importance to appoint fair-minded judges who will use

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[5] *Id.* at 2187 (Ginsberg, J., dissenting).
[6] 119 S. Ct. 2162 (1999).
[7] 119 S. Ct. 36 (1998).
[8] 119 S. Ct. 2133 (1999).

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their ability to interpret laws as a means to ensure the intent of Congress and protect people's ability to exercise their rights.
HRC defines a fair-minded judge as a person who demonstrates:

- A commitment to full equality under law for gay, lesbian, bisexual and transgender Americans; individuals living with HIV and AIDS; women; people with disabilities and racial, ethnic, and religious minorities;
- A commitment to the constitutional right to privacy and individual liberty, including the right of two consenting adults to enter into consensual intimate relationships;
- A respect for the constitutional authority of Congress to promote equality and civil rights and provide statutory remedies for discrimination and violence;
- A sophisticated understanding of and commitment to the separation of church and state and the protection of those citizens with minority religious views;
- A respect for state legislatures' attempts to address discrimination and violence based on sexual orientation, disability, race, ethnicity and other factors through carefully crafted legislation that meets the requirements of the Constitution.

We are confident that fair-minded judges will use their power to promote workers' rights by interpreting civil rights laws to benefit those people that they were designed to protect, instead of restricting the laws and enabling discriminatory practices. As Supreme Court Justice Brennan said in reference to interpreting our Constitution and laws, "The ultimate question must be, what do the words of the text mean in our time?"[9] A fair-minded judiciary would certainly not have disappointed Lilly Ledbetter by interpreting the text to mean that discrimination is permissible as long as it is well-concealed.

The ability of individuals to work and to advance based on their merits is a cornerstone of the American work ethic. Existing civil rights laws are designed to protect the right to work, but it is the responsibility of the courts to ensure that these protections are faithfully and amply applied in order to respect the intent of Congress and to shield workers from the unjust

[9] Justice William J. Brennan, Jr., Remarks to the Text and Teaching Symposium, Georgetown Univ., Oct. 12, 1985, http://www.fed-soc.org/resources/id.50/default.asp.

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denial of their rights. I ask you, Mr. Chairman, to advocate for the appointment of fair-minded judges, thereby, defending workers' ability to labor freely and in turn, contribute to the larger life of our economy. Thank you.

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CORDOVA DISTRICT FISHERMEN UNITED
PO Box 939 | Cordova AK 99574 | cdfu@ak.net | www.cdfu.org
Representing the commercial fishermen in Prince William Sound since 1935

The Honorable Senator Patrick Leahy
United States Senate
Committee on the Judiciary, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

July 19, 2008

Dear Senator Leahy,

Thank you for the opportunity to provide written testimony for review by the Senate Committee on the Judiciary regarding the hearing on "Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations" scheduled for Wednesday, July 23, 2008.

As one of Alaska's oldest fishing organizations, Cordova District Fishermen United represents the interests of over 1200 Prince William Sound permit holders. In 1989, 100% of our constituents were affected by the Exxon Valdez oil spill. I am writing on behalf of our membership and Board of Directors to provide information that highlights the sway of the recent Supreme Court's decision towards big business, in particular in the case ExxonValdez vs Baker.

1. LOSS OF HERRING

After the oil spill the pacific herring populations in Prince William Sound crashed. They are still listed as a species not recovering from the effects of the oil spill. Herring fishing was the first fishery each year, beginning in April, and one of the last, with the fall food and bait fishery.

The loss of the Prince William Sound herring fishery affected native villages and small coastal fishing communities. **Over 1,100 people directly participated** in the Herring fishery. Small and mid sized family fishing vessels, with between two and five crewmen harvested herring and herring egg covered kelp for special markets in Japan. Harvesting wild kelp covered with herring eggs by hand, and by diving, was open to anyone willing to work 20-hour days for a week or so. There were 24 small "Gillnet" boats, 107 somewhat larger "Seine" boats, 107 "jitneys" to assist the seine vessels, and 129-Pound Fishery Permits. On average, 263 Hand harvest and diving permits, 350 crewmembers, and about 40 spotter pilots also directly participated in the fishery, **a total of 913 fishermen, their crew and pilots**. In addition, processor boats and canneries employed another 200 or more people. The value of Herring fishing permits in 1989 exceeded $34 million. Today, both the permits and the equipment used to harvest herring are completely worthless.

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Based on the historic harvest values of this fishery, over $137 million in income and $50 million in permit value and equipment equity has been lost through the 2008 season, and the losses accumulate each year; a total of **over $187 million in losses to fishing families and the small local businesses and communities who depend on them.**

2. INADEQUATE DETERRANT FOR FUTURE SPILLS

Back in 1994, the jury in the Exxon Valdez case agreed that punitive awards should be connected to corporate profits, and should provide appropriate punishment to deter corporations from repeat offences. They also recognized that the "compensatory damages" were far less than the damages that could be expected from the oil spill over time.

When the Supreme Court reversed the 9th circuits already reduced award, and further reduced the punitive damages to $507.5 million, they eliminated the major deterrent for Exxon Mobil and other corporations to abide by marine safety precautions, and environmental laws. The 1:1 ruling of punitive vs compensatory damages provides big business with the formula they need to calculate any costs for their actions ahead of time. Actions that can destroy the very fabric of our ocean environment. Corporate lawyers and actuaries now have the methods for calculating potential damages, payouts, and punitive award costs for various activities. They will then calculate the costs of safety, maintenance, and prevention. In many cases they will find that they will "make money" by taking risks and delaying maintenance, knowing that there are low limits to their liability. Punitive damages will become simply part of the cost of doing business.

Limiting punitive damages to equal no more than compensatory damages has created a barrier of financial protection around negligent corporations including those engaged in misconduct. In this case, the ruling ensures that there is no incentive for Exxon and other corporations to act responsibly. This presents a grave future risk to citizens of our nation, and defeats the purpose of punitive damages as a way to punish corporations for wrongdoing.

Additionally, the Supreme Court's reduction of the punitive damages award has ensured commercial herring fishermen in Prince William Sound will never recover even a small portion of their losses, thus forcing many into bankruptcy. These small business owners, among thousands of others in Alaska, have had their livelihoods permanently damaged as a result of Exxon Mobil's reckless behavior.

3. THE DEMISE OF SMALL BUSINESSES

In 1991, when both the major seafood processors, and the small family owned Copper River Fisherman's Cooperative in Cordova were suffering from reduced market opportunity and difficulties in securing "pack" financing, Exxon negotiated a secret agreement with seven of the major processing companies, paying them over $65 million under the table. The "Seattle 7" agreed to return to Exxon any court awarded payments they received. Excluded from the deal, the family

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owned fisherman's cooperative was unable to secure pack financing and was bankrupted. Over 130 fishing families lost their processing plant, market, and the equity they had developed. Other small locally owned processing facilities throughout the spill-impacted region suffered the same fate. These and many other types of losses were not part of the "compensatory" damages awarded by the court.

When there is a catastrophic oil spill that severely damages an ecosystem, the impacts to the communities and the fishing dependent families will continue long after the compensatory damages are determined and paid. Punitive damages not only help deter large corporations from cutting corners, they help offset the continuing losses that can be expected from disrupted and damaged ecosystems.

We respectfully request that your committee consider efforts to address the Supreme Courts seemingly pro-corporation decision in this case. Additionally, we appreciate your acknowledgement of the situation and look forward to being involved in any future action taken as a result of this hearing.

Sincerely,

Rochelle van den Broek
Executive Director
Cordova District Fishermen United

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To:
The Honorable Senator Patrick Leahy
United States Senate
Committee on the Judiciary, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

From:
Zed Veale
3605 Paradise Road
Flagstaff, AZ 86004

Re:
Senate Committee on the Judiciary
July 23 Hearing: Corporate Misconduct and Laws Governing Corporations

Please find included in this e-mail a written statement for submission to the committee for inclusion in it's July 23 hearing
regarding Corporate Misconduct and Laws Governing Corporations.

" Mr Chairman,
It is unfair and unamerican to force the small business owners to suffer the results of errors made by the largest corporation in our country. That is what our Supreme Court has done. The recent ruling by our Supreme Court must be overthrown if Justice is to prevail in America."

Thank you
Zed Veale

Senate Committee Judiciary
July 23, 2008
Hearing on Corporate Misconduct and Laws Governing Corporate Misconduct

Statement of Travis Vlasoff
Native Village of Tatitlek
Prince William Sound, Alaska

I am honored to submit this testimony as a record of the hardships that the Chugach Region Tribes of Alaska continue to endure as a result of the Exxon Valdez Oil Spill disaster. In order to adequately convey the magnitude of this event, it is important to understand the history of the Chugach Region Tribes in relation to the spill affected areas. The Alutiiq people who comprise the Chugach Region Tribes have literally relied on the subsistence resources of south-central Alaska for several thousand years. The bond between the Alutiiq people and the subsistence resources upon which they relied became so strong that the culture, social protocols, and religion of the Alutiiq people were all based on the practice of subsistence gathering. This elevation of subsistence gathering to a sacred spiritual practice is maintained to this day.

The Exxon Valdez Oil Spill disaster, which occurred on March 24, 1989, is the single most culturally, socially, and economically destructive event in the history of the Chugach Region Tribes. The eleven million gallons of crude oil that were lost on Bligh Reef eventually contaminated over one thousand three hundred miles of coastline. Although Exxon has expended considerable effort to focus media attention on the dollar amount associated with the cleanup attempt, it is important to note that less than ten percent of the spill volume was ever recovered. It should also be noted that at the time of the spill, Exxon had no usable oil spill response equipment on site. The cleanup effort was delayed a full three days, due to the need for equipment to be located and mobilized. This was a total failure by Exxon to adhere to protocols established in the Trans Alaska Pipeline Act. It is currently estimated that twenty six thousand gallons of crude oil are still present on Alaskan shoreline.

Chugach Region Tribes continue to express concern over the quality and quantity of subsistence resources in the vicinity of tribal communities. These concerns are well justified, as there are no species that have made a full recovery from the disaster. In fact, only six species are considered to have had any margin of recovery at all. Even more concerning is the fact that keystone species such as Pacific Herring continue to show no improvement. The loss of the traditional subsistence diet has had a profound impact on the health of tribal members. Incidence of diabetes and pre-diabetes among Chugach Region Tribes have risen over two

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hundred percent. As this prevalence continues to rise, it is matched by similar statistics on heart disease.

Although the social impact of the cultural devastation is more difficult to quantify than the physical effect, it has had an equally disastrous impact on tribal members. Anxiety, depression, and the stress of cultural erosion have lead to an increase in substance abuse, an increase in destructive behaviors among youth, and an increase in vandalism incidents among tribal communities. The loss of community based subsistence activities, due to lack of resources, have lead to a break down in family cohesion, as well as a loss of tribal unity.

Many of the spill affected communities continue to struggle to remain economically viable entities. The tribal communities, whose economies were formerly based on commercial fishing and subsistence, are in dire need of relief. The remote location and disadvantaged business environment of these communities have made it increasingly difficult to establish appropriate and culturally sensitive economic development projects. Many tribal members are left to survive on temporary, grant funded, seasonal construction projects. It can be estimated that more than twenty five percent of these community members are living below the poverty line.

In closing, we would urge you to consider legislation to afford greater protection for subsistence dependent communities. Please recognize that a one to one ratio of punitive to compensatory damage payments will not restore the harm of a major oil spill catastrophe, nor will it deter future corporate misconduct involving the transportation of oil. Finally, we ask that you consider the restoration of the authority of a jury of peers to determine the appropriate levels of damage compensation in cases of corporate misconduct. It is imperative that the rights of private citizens be protected against the interests of big business.

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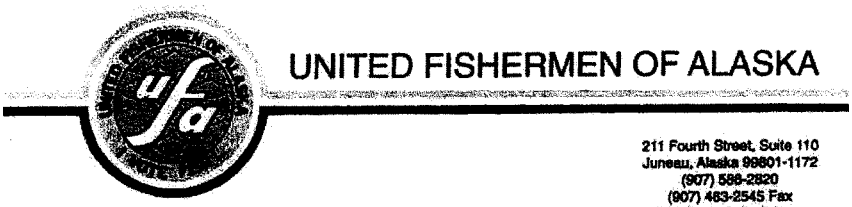

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July 21, 2008

The Honorable Senator Patrick Leahy
United States Senate
Committee on the Judiciary, Chair
224 Dirksen Senate Office Building
Washington, DC 20510
Via Email: Kristine_Lucius@Judiciary-dem.senate.gov

Dear Chairman Leahy and Committee Members,

On behalf of Alaska commercial fishermen, we appreciate your calling for a hearing to look at how recent decisions by the Supreme Court have shielded corporations engaged in misconduct. The recent decision that reduced punitive damage awards in the Exxon Valdez Oil Spill case removes the practical need for precautions to repeat such egregious and irresponsible behavior.

Exxon's recent call to the Court to eliminate interest on the reduced punitive damages is clear indication of a lack of remorse or acceptance of responsibility for the severe and permanent damage Exxon inflicted on Alaska's fishing industry, and the 32,000+ plaintiffs affected by the spill. The punitive damage limit set by the Court removes any financial incentive for Exxon and other corporations to act responsibly, and presents grave future risk to all U.S. citizens.

There is no law established by Congress limiting the ratio of punitive damages to compensatory damages to 1:1, so in this the Court has taken the role of creating rather than interpreting law. Compensatory damages are intended to put the injured party in the position he was in prior to the injury. In this case that includes an assumption that the ecosystems directly affected have been restored but they have not and likely never will be. The value of the world's remaining pristine ecosystems and sustainable fisheries is infinite, as is the value of damages inflicted through Exxon's negligence. In contrast, the punitive damages established by the Court are miniscule to Exxon and cannot be expected to deter future corporate misconduct.

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We ask that your committee consider any possibilities within Constitutional limits to address the Court's pro-business tilt, defeating the rights of Americans to receive damages for harm inflicted by large corporations.

United Fishermen of Alaska represents 37 Alaska commercial fishing trade associations participating in fisheries throughout Alaska and its offshore waters, altogether producing roughly half of U.S. domestic seafood production.

Thank you for your consideration,

Mark Vinsel
Executive Director

CC: Honorable Ted Stevens, U.S. Senate
Honorable Lisa Murkowski, U.S. Senate
Honorable Don Young, U.S. House of Representatives

UFA MEMBER ORGANIZATIONS

Alaska Crab Coalition • Alaska Independent Tendermen's Association • Alaska Longline Fishermen's Association
Alaska Scallop Association • Alaska Trollers Association • Alaska Whitefish Trawlers Association • Armstrong Keta • At-sea Processors Association
Bristol Bay Reserve • Bristol Bay Regional Seafood Development Association • Cape Barnabas Inc. • Concerned Area "M" Fishermen
Cook Inlet Aquaculture Association • Cordova District Fishermen United • Crab Group of Independent Harvesters • Douglas Island Pink and Chum
Fishing Vessel Owners Association • Groundfish Forum • Kenai Peninsula Fishermen's Association • Kodiak Regional Aquaculture Association
North Pacific Fisheries Association • Northern Southeast Regional Aquaculture Association • Petersburg Vessel Owners Association
Prince William Sound Aquaculture Corporation • Purse Seine Vessel Owner Association • Seafood Producers Cooperative • Sitka Herring Association
Southeast Alaska Fisherman's Alliance • Southeast Alaska Regional Dive Fisheries Association • Southeast Alaska Seiners Association
Southern Southeast Regional Aquaculture Association • United Catcher Boats • United Cook Inlet Drift Association • United Salmon Association
United Southeast Alaska Gillnetters • Valdez Fisheries Development Association • Western Gulf of Alaska Fishermen

The Honorable Senator Patrick Leahy

United States Senate

Committee on the Judiciary, Chair

222 Dirksen Senate Office Building

Washington, D.C. 20510

Andrew Wills

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Mermaid Café & B&B

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Homer, Alaska 99603

907-235-7984

RE: Senate Committee on the Judiciary July 23 Hearing: Corporate Misconduct and Laws Governing Corporations

Dear Senator Leahy,

I thank you for holding this hearing to investigate the gross injustice done to the plaintiffs in the Exxon Valdez case. The fact that you are holding this hearing gives me a glimmer of hope in an otherwise darkening world.

Hamlet said, "Something is rotten in Denmark". As a plaintiff in the Exxon Valdez case, I feel like we got the royal shaft when the spill occurred and then nineteen years later got insult added to injury when the supreme court denied us the settlement . Exxon not only ruined the herring fisheries in Prince William Sound, where I fished before the oil spill, they bought the justice system, changed the rules, and cruelly denied fishermen compensation for their gross recklessness. Despite overwhelming Amicus Briefs filed on the plaintiff's behalf calling to uphold punative damages, the supreme court decided to let Exxon off the hook. It basically gives corporations the green light to cut corners, where spilling oil is cheaper than prevention. It is a bad precedent. This decision is just plain wrong. It's corrupt and pandering to big oil. The corporate citizen now has more rights than the people. This needs to be overturned.

I personally lost 14 seasons of herring fishing since the spill, perhaps as much as three quarters of a million dollars. I got divorced after the spill and lost everything I'd worked so hard for except my fishing permits and they lost 80% of their value soon afterwards when fishing runs began to fail and our

markets crashed. I had a stomach ulcer and was extremely depressed for a long time. We're told not to expect another herring fishery in Prince William Sound any time soon. The oil is still there. The harm is ongoing. I knew fishermen in Cordova who committed suicide over this spill. The litigation has been extremely stressful. And yet the callous arrogant Exxon waits till the supreme court is stacked with big oil friendly justices to make its move. And they win. Goliath stomps on David. I can tell you when I heard the supreme court overturned the ruling my faith in American Justice evaporated. Our country is dear to me yet the justice system needs to do the right and honorable thing. Letting Exxon off the hook sends the message that corporations have more rights than the citizens of this country. As Mussolini stated, When industry and government are linked, you have fascism. Please stand up for us, the hardworking people of this country. We need this decision overturned Now!

Respectfully,

Andrew Wills 7/20/08

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TO:
The Honorable Senator Patrick Leahy
United States Senate
Committee on the Judiciary, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

FROM:
Donna J. Young
7321 Selzer Road-Box 94
Fairfax, IA 52228

RE: Senate Committee on the Judiciary
July 23 Hearing: Corporate Misconduct and Laws Governing Corporations

Please find attached a written statement for submission to the committee for inclusion in its July 23 hearing regarding Corporate Misconduct and Laws Governing Corporations.

I am the sister of Dean A Buser, deceased. Dean was the proud owner of a salmon license which he paid for in cash in the amount of $89,500. He had saved the money from crab fishing. He worked very hard, was honest, and loved the people of Cordova, where he had lived for a number of years.

Dean took his life on November 19, 2005. I had a total hip replacement on November 16, 2005 and had spoken to him 5 times among those 3 days and sensed nothing was wrong. Cordova was in the middle of a driving rain storm and he had lost parts of the roof of his apartment building and also the Anchor Bar which he owned. To my knowledge there was no suicide note left.

As time passed, through an unbelievable turn of events, I accessed his financial records and was appalled at his debt of approximately $200,000. I will always believe that he would be here today if the Exxon-Valdez oil settlement had been paid to the deserving fishermen whose income had been challenged by the oil spill. I do not understand how a company who has recorded record profits can escape paying for an event caused by an intoxicated employee. The fishermen deserve full payment with interest.

While I am aware there are many stories like this, I cannot tell you the grief this has caused my family. Dean had adopted a grandchild of a partner so I will not inherit his estate. It is all so sad, and I will never, ever purchase any item connected with Exxon.

Thank you for your kind attention to this sad state of affairs. I do hope something can be done to amend the ruling.

Warm Regards,

Donna Young
319-846-2485

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