

members of that committee speak as I, as if with one voice, how we appreciate his public service. He has great knowledge. He has great wisdom. It is tempered with a wonderful personality that is most studious and deliberative. Few have done as much to champion the cause of our men and women in the Armed Forces of the United States as JOHN WARNER.

This Senator admires him for his sense of fairness, for his mutual respect of all the Members of the Senate. We know there has to be civility in the Senate for it to function. There has to be mutual respect. There has to be respect for the truth. There has to be respect for the dignity of individuals and those Senators' families. All of that is certainly apropos of the senior Senator from Virginia. Over and over, I have been in situations with him that could have been adversarial. Yet his calm judgment and reason have brought people together. Of course, that is the admonition of the Good Book: "Come let us reason together."

Over and over, as I have sought his counsel on matters of some of the Nation's highest secrets, JOHN WARNER has provided the leadership and the clarity, as we have made those decisions, sometimes making those decisions together.

So it is with a great reluctance on my part that I see our colleague, Senator WARNER, retire after a very distinguished and long career. It has been a privilege to serve with JOHN. I will miss him as a colleague. I will miss his leadership, his fairness, and his great capacity as a gentleman of the Senate.

Madam President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. WHITEHOUSE. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WHITEHOUSE. Madam President, I ask unanimous consent to speak for up to 15 minutes as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### AUTOMOBILE INDUSTRY CRISIS

Mr. WHITEHOUSE. Madam President, I rise today to address what I feel is an unfortunate omission from our economic rescue strategy to date. This week, we are considering another bailout which would give \$15 billion in so-called bridge loans to America's struggling automakers.

Now, when we debated a bailout program to protect our Nation's financial system back in September, we created legislative branch roles and executive branch roles. We ultimately passed legislation that empowered the Department of the Treasury to invest up to \$700 billion. Debate was rushed. The

Treasury Secretary came to us on a Friday in September and told leaders of both parties in both Houses that our economy would collapse if we did not take immediate action. With the threat of immediate financial calamity and the apparent good faith of Secretary Paulson, Congress moved quickly to pass the best bill we could. Senator CHRIS DODD of Connecticut and my colleague from Rhode Island, Senator JACK REED, worked heroically, almost around the clock, to negotiate for taxpayer protections and several levels of oversight. In the end, we created a program of congressional and executive roles but no judicial role. We ignored the role that courts can play here or, more correctly, that executive agencies can play when supported by judicial or even quasi-judicial due process. We are about to ignore that role again in the auto bailout.

Why is this point important? This is important because under our American system of government, there are important powers of government that can only be exercised after due process opportunity for a hearing. The famous Supreme Court case of *Fuentes v. Shevin* is on point. I quote:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions.

That is citation 407 U.S. 67 at 82.

In other words, some means of restructuring require due process if they involve adjusting people's financial rights and claims. When we fail to provide that process, we unilaterally disarm government's response, taking away its ability to restructure using those means.

The price of this repeated omission has been high. Going back before we even got into this current mess, when there was only a subprime mortgage problem, Senator DURBIN of Illinois proposed a bill that would have empowered bankruptcy judges to modify the terms of a mortgage on a person's primary residence. One needed a due process hearing such as that in order to adjust the rights within that mortgage of the banks and the myriad investors who bought strips of that mortgage when it was carved up and sold to the four winds. Our Republican colleagues stymied this provision which we now see could have kept tens of thousands of families in their homes. Because the clarity and finality of a court decision on a troubled mortgage was not available, there was little alternative to foreclosure, and troubled mortgages, by the tens of thousands, cascaded into foreclosure—numbers never before seen in our history. Our fault. Bad design. And every day we don't get it right, every day we don't pass Senator DURBIN's bill, that foreclosure problem worsens.

Similarly, as part of the \$700 billion Wall Street bailout, we could have addressed lavish and indefensible executive compensation by providing for

some judicial power to restructure these packages. Because we didn't, these grotesque liabilities remain on the books of the bailed out entities as obligations to their disgraced management. According to an analysis by the Wall Street Journal, the executive deferred compensation obligations of bailed out Wall Street firms amount to more than \$40 billion. Banks participating in the bailout program carried these obligations on their books, and the cash from our bailout is being used to pay them—or will be used to pay them. Taxpayer dollars will end up in the pockets of the scoundrels who tanked those firms. I contend we have to find ways in which the court system, due process, can be brought to bear on this problem. But again, the inaction on that so far is our fault. Bad design. Unilateral disarmament in the face of the Wall Street meltdown.

Now we have the auto bailout plan with its provision for a "car czar," but once again, lacks a role for those due process powers of government. Once we are committed to this deal—once we are in—the only tool we will have at that negotiating table is Uncle Sam's checkbook—that, and the somewhat improbable threat to walk away and tank the auto companies after having put \$15 billion into them. So now we will have to negotiate about the companies' continuing lavish executive and board compensation packages and other obligations impeding a fair and rational recovery. As for looking backwards at preexisting obligations, as we say in Rhode Island, forget about it. That requires due process. We have created no process to even invoke government's power to review those. So the effect of all of this is to encourage special interests to play the holdout in the auto negotiations and dare us to tank the companies. It is going to be a high stakes game of chicken and, no matter who wins, the taxpayers lose.

We created this "hold out" problem by not providing a judicial role in the restructuring. We could, for example, give the car czar the powers of a judicially appointed conservator or receiver—those are roles I have held—and the power to go to court for an order approving his plan or her plan over the objections of any holdouts. If we did that, it would change the bargaining position of the holdouts. This judicial due process would allow the strong powers of government that require due process to be brought to bear on this mess. We do this in a lot of different contexts.

Bankruptcy courts oversee restructuring all the time and so do other quasi-judicial bodies. For example, the FDIC has the power under current law to place a troubled bank into receivership and wind it down as if in chapter 7, or put it under conservatorship to restructure it as if in chapter 11. The bankruptcy courts and the FDIC possess the tools necessary to cut through whatever Gordian knots may snarl restructuring plans absent that power.

The judicial imprimatur will also increase public confidence in the fairness and the propriety of these plans. There is flexibility about how we do this. We don't have to have it be the FDIC. We don't have to have it be a bankruptcy court to recognize the due process powers of government.

Fuentes v. Shevin again, and I quote:

Due process tolerates variances in the form of a hearing "appropriate to the nature of the case," and "depending upon the importance of the interests involved and the nature of the subsequent proceedings, if any."

I hope my colleagues will recognize the importance of authorizing judicially supervised powers in these bailout plans. I pledge to work hard with anyone who wants to achieve this goal. It is vital, I contend, to recognize that directed judicial oversight expands government's powers and authorities to do the things the public and the circumstances demand. It gives us a means to unsnarl the foreclosure mess on Main Street, to restructure obscene executive compensation on Wall Street, and to force good-faith negotiations in Detroit.

We cannot ignore the judicial power in restructuring companies and industries. We must not let that sword sleep in our hands. Times are bleak in Detroit, as they are around the country. The automobile industry stands on the brink of collapse, and the jobs of thousands—some say millions—of workers hang in the balance.

Michigan shares the sad distinction with my home State of Rhode Island in having the Nation's highest unemployment rate, 9.3 percent, in October. Families are struggling in Rhode Island and across the country. That is the background against which we must consider whether to bail out yet another industry. In making such a weighty decision, I implore my colleagues, we must not consider just whether but how we go about doing this.

I contend that we should empower our Government to take steps that we have, to date, foreclosed—steps that exercise the power of Government that can be only exercised after due process of law. I hope we consider that.

Madam President, I ask unanimous consent that the Wall Street Journal article to which I referred be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[The Wall Street Journal, October 31, 2008]

#### BANKS OWE BILLIONS TO EXECUTIVES

(By Ellen E. Schultz)

Financial giants getting injections of federal cash owed their executives more than \$40 billion for past years' pay and pensions as of the end of 2007, a Wall Street Journal analysis shows.

The government is seeking to rein in executive pay at banks getting federal money, and a leading congressman and a state official have demanded that some of them make clear how much they intend to pay in bonuses this year.

But overlooked in these efforts is the total size of debts that financial firms receiving

taxpayer assistance previously incurred to their executives, which at some firms exceed what they owe in pensions to their entire work forces.

The sums are mostly for special executive pensions and deferred compensation, including bonuses, for prior years. Because the liabilities include stock, they are subject to market fluctuation. Given the stock-market decline of this year, some may have fallen substantially.

Some examples: \$11.8 billion at Goldman Sachs Group Inc., \$8.5 billion at J.P. Morgan Chase & Co., and \$10 billion to \$12 billion at Morgan Stanley.

Few firms report the size of these debts to their executives. (Goldman is an exception.) In most cases, the Journal calculated them by extrapolating from figures that the firms do have to disclose.

Most firms haven't set aside cash or stock for these IOUs. They are a drag on current earnings and when the executives depart, employers have to pay them out of corporate coffers.

The practice of incurring corporate IOUs for executives' pensions and past pay is perfectly legal and is common in big business, not limited to financial firms. But liabilities grew especially high in the financial industry, with its tradition of lavish pay.

Deferring compensation appeals both to employers, which save cash in the near term, and to executives, who delay taxes and see their deferred-pay accounts grow, sometimes aided by matching contributions. In some cases, firms give top executives high guaranteed returns on these accounts.

The liabilities are an essentially hidden obligation. Even when the debts to their executives total in the billions, most companies lump them into "other liabilities"; only a few then identify amounts attributable to deferred pay.

The Journal was able to approximate companies' IOUs, in some cases, by looking at an amount they report as deferred tax assets for "deferred compensation" or "employee benefits and compensation." This figure shows how much a company expects to reap in tax benefits when it ultimately pays the executives what it owes them.

J.P. Morgan, for instance, reported a \$3.4 billion deferred tax asset for employee benefits in 2007. Assuming a 40% combined federal and state tax rate—and backing out obligations for retiree health and other items—implies the bank owed about \$8.2 billion to its own executives. A person familiar with the matter confirmed the estimate.

Applying the same technique to Citigroup Inc. yields roughly a \$5 billion IOU, primarily for restricted stock of executives and eligible employees. Someone familiar with the matter confirmed the estimate.

The Treasury is infusing \$25 billion apiece into J.P. Morgan and Citigroup as it seeks to get credit flowing. In return, the federal government is getting preferred stock in the banks and warrants to buy common shares. The Treasury is injecting \$125 billion into nine big banks and making a like amount available for other banks that apply.

It's imposing some restrictions on how they pay top executives in the future, such as curtailing new "golden parachutes" and barring a tax deduction for any one person's pay above \$500,000. But the rules won't affect what the banks already owe their executives or make these opaque debts more transparent.

Asked about the Journal's calculation, the Treasury said, "Every bank that accepts money through the Capital Purchase Program must first agree to the compensation restrictions passed by Congress just last month—and every bank that is receiving money has done so."

Bear Stearns Cos., the first financial firm the U.S. backstopped, owed its executives \$1.7 billion for accrued employee compensation and benefits at the start of the year, according to regulatory filings. When Bear Stearns ran into trouble after investing heavily in risky mortgage-backed securities, the government stepped in, arranging a sale of the firm and taking responsibility for up to \$29 billion of its losses.

The buyer, J.P. Morgan, says it will honor the debt to Bear Stearns executives, which it said is shrunken because much of it was in stock that sank in value.

J.P. Morgan will also honor deferred-pay accounts at another institution it took over, Washington Mutual Inc. It couldn't be determined how big this IOU is. J.P. Morgan's move will leave the WaMu executives better off than holders of that ailing thrift's debt and preferred stock, who are expected to see little recovery. J.P. Morgan's share of the federal capital injection is \$25 billion.

Obligations for executive pay are large for a number of reasons. Even as companies have complained about the cost of retiree benefits, they have been awarding larger pay and pensions to executives. At Goldman, for example, the \$11.8 billion obligation primarily for deferred executive compensation dwarfed the liability for its broad-based pension plan for all employees. That was just \$399 million, and fully funded with set-aside assets.

The deferred-compensation programs for executives are like 401(k) plans on steroids. They create hypothetical "accounts" into which executives can defer salaries, bonuses and restricted stock awards. For top officers, employers often enhance the deferred pay with matching contributions, and even assign an interest rate at which the hypothetical account grows.

Often, it is a generous rate. At Freddie Mac, executives earned 9.25% on their deferred-pay accounts in 2007, regulatory filings show—a better deal than regular employees of the mortgage buyer could get in a 401(k). Since all this money is tax-deferred, the Treasury, and by extension the U.S. taxpayer, subsidizes the accounts.

In addition, because assets are rarely set aside for executive IOUs, they have a greater impact on firms' earnings than rank-and-file pension plans, which by law must be funded.

Bank of America Corp.'s \$1.3 billion liability for supplemental executive pensions reduced earnings by \$104 million in 2007, filings show. By contrast, the bank's regular pension plan is overfunded, and the surplus helped the plan contribute \$32 million to earnings last year.

While disclosing its liability for executive pensions, the bank doesn't disclose its IOU executives' deferred compensation, and it couldn't be calculated. The bank's share of the federal capital injection is \$25 billion.

Bank of America has agreed to acquire Merrill Lynch & Co. Merrill is a rare example of a firm that has set aside assets for its deferred-pay obligation: \$2.2 billion, matching the liability. Morgan Stanley also says its liability for executives' deferred pay is largely funded.

To be sure, deferred-compensation accounts can shrink. Those of lower-level executives usually track a mutual fund, and decline if it does. Often the accounts include restricted shares, which also may lose value, especially this year. To the extent financial-firm executives were being paid in restricted stock, many have lost huge amounts of wealth in this year's stock-market plunge.

The value of Morgan Stanley Chief Executive John Mack's deferred-compensation account declined by \$1.3 million in fiscal 2007, to \$19.9 million; much of it was in company shares. Mr. Mack didn't accept a bonus in 2007.

Executives can even lose their deferred pay altogether if their employer ends up in bankruptcy court. When Lehman Brothers Holdings Inc. filed for bankruptcy last month, most executives became unsecured creditors. The government didn't come to Lehman's aid.

In assessing liabilities, the Journal examined federal year-end 2007 filings by the first nine banks to get capital injections, plus six other banks and financial firms embroiled in the financial crisis. In many cases, the firms didn't report enough data to estimate their obligations to executives. As for identifying amounts due individual executives, company filings provided a look at only the top few, and not a full picture of what they were owed.

Just as banks aren't the only financial firms getting federal aid amid the crisis, they aren't the only ones facing scrutiny of their compensation programs.

Struggling insurer American International Group Inc. agreed to suspend payment of deferred pay for some former top executives pending a review by New York state Attorney General Andrew Cuomo. Mr. Cuomo is also demanding to know this year's bonus plans for the first nine banks getting federal cash, as is House Oversight Committee Chairman Henry Waxman.

Among the payouts AIG agreed not to make are disbursements from a \$600 million bonus pool for executives of a unit that ran up huge losses with complex financial products. AIG also is suspending \$19 million of deferred compensation for Martin Sullivan, whom AIG ousted as chief executive in June. His successor as CEO, Robert Willumstad, who left when the U.S. stepped in to rescue AIG in September, has said he's forgoing \$22 million in severance because he wasn't there long enough to execute his strategy for AIG.

However, the giant insurer—whose total liability for its executives' deferred pay couldn't be calculated—says most of the managers will receive the compensation. "Of course, we'll be looking at all these to make sure they're consistent with the requirement of the program," said spokesman Nicholas Ashooh.

AIG isn't eligible for the government's capital-injection plan, since it's not a bank, but it's getting plenty of U.S. aid of another sort. The Treasury has made \$123 billion of credit available, a little more than two-thirds of which MG has borrowed so far.

Fannie Mae and Freddie Mac also don't get in on the capital-injection plan for banks. But under a federal "conservatorship," the Treasury agreed to provide each with up to \$100 billion of capital if needed. In return, the government got preferred shares in the firms and the right to acquire nearly 80% of them.

Their regulator, the Federal Housing Finance Agency, says it will bar golden-parachute severance payouts to the mortgage buyers' ousted chief executives. The executives remain eligible for their pensions.

Fannie Mae had a liability of roughly \$500 million for executive pensions and deferred compensation at the end of 2007, judging by the size of its deferred tax assets. A spokesman for the firm wouldn't discuss the estimate or whether the executives would get the assets.

At Freddie Mac, most will. "Deferred compensation belongs to the officers who earned it," said Shawn Flaherty, a spokeswoman.

Indeed, in September Freddie Mac made its deferred-compensation plan more flexible, allowing executives to receive their money earlier than initially spelled out. "Officers were nervous about market changes," said Ms. Flaherty. "We wanted a retention tool for top talent."

Mr. WHITEHOUSE. I thank the Chair, yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEVIN. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. Madam President, I ask unanimous consent that the Presiding Officer, the Senator from Missouri, be recognized for up to 5 minutes, and that I be recognized for 30 minutes in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. MCCASKILL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. LEVIN). Without objection, it is so ordered.

Mrs. MCCASKILL. Mr. President, I know we have an important piece of legislation that we are going to vote on today. I desperately want to support that legislation. I wish to ask first and most importantly if anyone has the information as to whether the CEOs of Wells Fargo or Bank of America or Citigroup have taken private jets in the last month. Has anyone asked the CEOs of Citigroup, Wells Fargo—all of these financial companies—to take a cut in compensation? Has anyone asked about their workers and how much money they make and whether they are overpaid and whether they are competitive with the salaries of community bankers across the country?

Every one of the institutions I named has gotten \$15 billion or more of taxpayer money. Think about that for a minute. Citigroup has gotten \$50 billion. Have we checked on their private jets? Have we checked on their CEO compensation? Have we checked on their work rules and whether their workers are given enough flexibility?

It is unbelievable to me that we are setting this double standard. The thousands of jobs and families who build great American cars do not deserve this incredible hypocrisy in terms of the different treatment they are getting. What is good for the goose is good for the gander.

I say let's call in those CEOs of those big companies that have gotten more than \$15 billion of our money and ask them when they are going to take a dollar in pay, ask them if they got here on a corporate jet, ask them if their workers have cut their pay to \$14 an hour, ask them if they have talked about cutting their pension costs and their health care costs. Until we do that, we ought to be quiet about the

American autoworkers, and we ought to be quiet about these companies that have reduced fixed costs, that have agreed to sell corporate jets, that have agreed to cut executive compensation.

I want to support this bill on behalf of manufacturing in the United States of America, on behalf of wonderful, hard-working families in Missouri. However, there is one problem that has arisen, and that is, unfortunately, in this bill right now, as written, is a provision to increase the pay of Federal judges. Wrong time, wrong place.

We have unemployment numbers today that show we have the highest unemployment in this country we have had in decades. We have families all over this Nation who are scared today, who are not buying Christmas presents. Federal judges get lifetime appointments and they never take a dime's cut in pay. They die with the same salary they have today. My phone is ringing off the hook from people who want to be Federal judges. I am having to have staff work overtime to handle all the phone calls I am getting from people who think there may be a Federal judgeship opening in the eastern district of Missouri and how badly accomplished, wonderful, smart lawyers want that Federal appointment.

We are not hurting for qualified applicants for the Federal judiciary. Is it fair that they have not gotten a cost-of-living increase like every other Federal employee? Probably not. But you know what is a lot more unfair is to give somebody with a lifetime appointment, great health care, no cut in pay when they actually retire, what is unfair is to give them a pay raise on this day in this bill at this time. It is not the right time. And if it is in the bill, I regrettably will have to vote against this legislation because I feel so strongly that it sends the wrong message to the United States of America at this scary moment in our economic history.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEVIN. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mrs. MCCASKILL). Without objection, it is so ordered.

#### ORDER FOR RECESS

Mr. LEVIN. Madam President, I ask unanimous consent that at the conclusion of my remarks, the Senate stand in recess until 3 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### DOMESTIC AUTOMOBILE INDUSTRY

Mr. LEVIN. Madam President, the bill that has been filed by the chairman