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TERRORISM: VICTIMS' ACCESS TO TERRORIST ASSETS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

EXAMINING PROPOSALS TO FURTHER AMEND THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA) AND RELATED TERRORISM ISSUES, FOCUSING ON EFFORTS TO HELP FAMILIES OF THE VICTIMS OF INTERNATIONAL TERRORISM RECEIVE COMPENSATION

OCTOBER 27, 1999

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TERRORISM: VICTIMS' ACCESS TO TERRORIST ASSETS

WEDNESDAY, OCTOBER 27, 1999

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

The committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Jon Kyl presiding.

Also present: Senator Feinstein.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. This hearing of the U.S. Senate Committee on the Judiciary will come to order. I would like to welcome everyone to today's hearing. We will today examine an issue of great importance to victims of terrorism and their families.

In 1996, Congress passed and the President signed the Anti-Terrorism and Effective Death Penalty Act, which allowed American citizens injured in an act of terrorism to bring a private right of action against the terrorists responsible for that act.

In February 1996, two aircraft flown by the Brothers to the Rescue organization were shot down by Cuban MiG aircraft in international airspace over the Florida Straits. Four people, including three American citizens, were killed in that attack. President Clinton provided $300,000 to the victims' families from Cuban assets frozen in the United States, and he further called upon Congress to pass legislation ensuring that the victims would have access to Cuban frozen assets to settle any claim for damages won in Federal court.

In response to the President's suggestion, Congress passed Section 117 of the fiscal year 1999 Treasury Department Appropriations Act, allowing Americans to attach the assets of terrorists' estates in the United States in order to collect judgments won against those estates in Federal court. That legislation allowed the President to issue a waiver to block the attachment of assets in the interest of national security.

On March 15, a Federal judge upheld a $187 million judgment against Cuba for its attack against the Brothers to the Rescue aircraft. The President, however, issued a waiver that will prevent the families of the victims from attaching Cuban funds related to telecommunications services that are currently in a bank account in New York, assets that have been held by the United States for more than 37 years. These are the same funds that President Clin-

ton drew upon earlier when he gave $300,000 to the victims' families.

The family of Alisa Flatow has won a similar judgment against the government of Iran for its involvement in a bus bombing in Israel in April 1995 that took Alisa's life. Again, the President issued a waiver that prevents the Flatow family from attaching certain Iranian assets in the United States.

I am concerned that the President has exercised what was intended to be a narrow waiver too broadly, and as a consequence, those who have suffered from acts of terror resulting in the death of American citizens will not be adequately compensated and the acts of terror will go unpunished. This runs contrary to the intent of the Anti-Terrorism and Effective Death Penalty Act. It runs contrary to the intent of this Congress when it passed section 117 of the fiscal year 1999 Treasury Appropriations Act, and I believe it runs contrary to the concept of justice for the victims of terrorism.

This year, in response to the concerns of the administration, Senators Mack and Lautenberg and I proposed a modification of the waiver, allowing the President to prevent the attachment of diplomatic property as part of a judgment. I believe that this modification would have been a prudent step toward ensuring the protection of American diplomatic property abroad while still allowing victims of terrorism to attain the justice that U.S. courts have said that they deserve.

Unfortunately, the President opposed this modification, insisting on the maintenance of the current broad wavier, thereby blocking the Flatow family and the families of the Brothers to the Rescue from receiving justice.

I am pleased that today's hearing will allow this committee to hear testimony from the perspective of the victims, as well as the administration. Prior to the time that the ranking Democrat arrives, I will call upon our first panel of witnesses to take testimony and then take the opening statement from the ranking Democrat when he or she arrives.

Our first panel this morning will be Senator Connie Mack of Florida and Senator Frank Lautenberg of New Jersey, the two proponents of the amendment to which I spoke. Senator Connie Mack of Florida.

STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator MACK. Thank you, Senator Kyl. I want to thank the committee, its staff, Senator Hatch, and particularly you, Senator Kyl, for holding this hearing today. This is an issue that several of us have been pursuing for a number of years now, so thank you for the opportunity to present, if you will, our case this morning before the committee.

As a nation, we took up this issue in earnest several years ago. In fact, we joined with the President in passing the Anti-Terrorism Act of 1996. This law serves as a manifestation of the will of the President and the Congress to fight and deter acts of terrorism.

In spite of this good news, or what Americans thought was good news, the antiterrorism provision is not being implemented as promised. The President has not only failed to use the powers he

asked for, but he is using the other considerable powers of the Presidency to block the implementation of the very law he requested. If you would think for a moment of a movie you may have seen or an article in the news you may have read which told the story of the U.S. Government misleading, mistreating, and manipulating vulnerable Americans, think of how angry that made you feel.

Today, we have some American families here in the room with us who have been mislead, mistreated, and manipulated by the President. In fact, they were twice victimized, first by terrorism from Cuba and Iran, both designated terrorist states, and second, by their own government. They were made promises in their time of need. They were offered comfort and the promise of justice. But after letting these families fight for several years to seek justice, and after they succeeded in obtaining judgments from the courts, the administration has blocked them at every turn.

The administration questions their patriotism, saying that their actions, complying with U.S. law, would undermine the national security of our Nation. The pain of their losses has been compounded by the betrayal of their own government.

The families before you today will provide the details of their own stories. The administration witness will tell you several reasons why they cannot help these families. But I want the members of this committee to watch for the contradiction between words and action. Ask yourself how the administration's actions have contradicted their arguments.

Here is an example. At the White House press conference after the Brothers to the Rescue shoot-down on February 26, 1996, on national television, the President asked for legislation. Since this is or may be a contentious issue with the administration, I want you to see for yourself what the President said in making his request. Let us take a look at the videotape.

[A videotape was shown.]

Senator MACK. Let me emphasize what you just witnessed. The President said, "I am asking that Congress pass legislation that would provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States."

If you think the President may have been caught up in the moment and speaking what he did not mean out of the emotion of the moment, I would submit to the committee a White House press release dated February 26, 1996, in which the President requested the same legislation as we just heard him request. My point there is it was not just the President making this statement at this press conference, but the entire team followed up, saying that the legislation should be passed, asking the Congress, in fact, to do so.

Senator KYL. Can we put that in the record at this point?

Senator MACK. Absolutely, and I have one other document I would like to have in the record, as well. It is a transcript dated February 26, 1996, in which senior White House officials state to the media that blocked assets are not ever going to be returned to the Cuban government.

The reason that I have submitted that, as well, is because, at least in the beginning, the arguments that we were hearing from

the administration is we needed to hold on to these assets so that we could use them somehow to negotiate with the Cuban government. I mean, they clearly knew at the beginning and stated at the beginning they had no intention of these dollars ever getting into the hands of the Cuban government.

Again, I would ask unanimous consent that they be included in the record, and I encourage the members of the committee to ask Maggie Khuly today if the President's actions have supported the declaration.

[The information of Senator Mack follows:]

Victims of terrorism still waiting for justice

By Connie Mack

Not long ago, a stretch limousine pulled up in front of the federal courthouse in Jacksonville, Fla., where American families were seeking justice for their loved ones who had been murdered by the Cuban government. As a small crowd watched, U.S. State Department lawyers stepped out of the limo, entered the courthouse — and defended the Cuban government.

I know people must be thinking this cannot be true. It is true.

In 1996, President Clinton signed a law that allows Americans harmed by terrorist acts to seek justice in U.S. federal courts against the responsible countries. The law, which Clinton signed with a great public display of enthusiasm, gives victims' families the ability to tap into the U.S. assets of countries, such as Cuba, that support international terrorism.

Legal response to Cuba's downing of plane

The law was a response to the Cuban Air Force's killing earlier that year of four men, three of them U.S. citizens, who were flying in unarmed airplanes over international waters. The men were on a humanitarian search for people stranded in rafts between Florida and Cuba. Clinton condemned the killings and encouraged the families to seek justice through the courts. He also asked Congress "to pass legislation authorizing payment of compensation to the families of victims out of blocked Cuban accounts in New York."

So the Americans' families, using the law Clinton signed, went to court and were awarded $187 million by a federal judge. But then the president broke faith with these families: He has thwarted their attempts to collect any of that money.

AP

Alisa Flatow: Killed in Gaza Strip bombing in 1995.

That is not the only terrorism case in which the president promised justice, then helped block it. In 1995, Alisa Flatow of New Jersey, a college junior visiting Israel, was killed when her bus was rammed by a carload of explosives. The government of Iran backed the terrorist group that rammed her bus.

President and Mrs. Clinton called Alisa's father to express their sorrow and pledge their support for justice. Her father, Stephen Flatow, says the president encouraged him to file a lawsuit against Iran, calling it "brave and courageous."

In 1998, a U.S. court found the government of Iran responsible for the murder of Alisa Flatow and ordered her family paid $247.5 million. But, when the family tried to reach Iranian assets frozen in this country, the president blocked it.

MONDAY, OCTOBER 25, 1999 · USA TODAY

THE NATION'S NEWSPAPER

USA TODAY

NO. 1 IN THE USA . . . FIRST IN DAILY READERS

In both cases, the president has claimed a "national security" reason for keeping the families away from the frozen assets, saying they were needed as leverage in negotiations with terrorist regimes. But of what negotiating use are these assets if terrorists' countries know their victims' families can't get at them? The Clinton administration also claims that releasing the terrorist nations' assets would subject U.S. assets to erroneous claims overseas or interfere with the United States' ability to abide by its international obligations. No such interference exists. But even if it did, why the promises to the families and the request to Congress to pass the law in the first place?

Empty promises to victims' families

The president betrayed these American families. It is that simple. Words can be easily said; it is one's actions that matter.

There are more cases. Americans David Jacobsen, Joseph Cicippio and Terry Anderson all were taken hostage by Iran-funded terrorist groups in Lebanon during the 1980s. Jacobsen, held captive for 17 months, and Cicippio, a hostage for more than five years, haven't collected any of the Iranian millions a federal court awarded them. Anderson, held more than six years, seeks $100 million from Iran; will he ever see it? And now that the families of the 1988 Pan Am Flight 103 murder victims have filed suit for billions against Libya, what will President Clinton do? Join forces with Moammar Gadhafi in court to defeat them?

This U.S. government's embarrassment could be over tomorrow. The president has the authority — indeed, the obligation — to respect the rule of law and the power of the courts. He made promises to the families, he pledged to fight terrorism, and he signed several laws that support the rights of victims to take terrorists to court.

By now, we all know the deplorable story of Clinton's decision to offer clemency to 16 Puerto Rican terrorists — even though, it appears, the terrorists themselves feel little, if any, remorse. What kind of message are we sending when the U.S. government protects terrorists from U.S. law — and denies justice to American citizens?

U.S. Sen. Connie Mack, R-Fla., is a sponsor of legislation that would limit the president's ability to block monetary collections under the 1996 law.

THE WHITE HOUSE

OFFICE OF THE PRESS SECRETARY

For Immediate Release

February 26, 1996.

Fact sheet on Cuba

The President has directed his Administration to take the following steps immediately in response to the Cuban Government's blatant violation of international law:

Seek rapid international condemnation of Cuba's actions.

The European Union today strongly condemned the Cuban shootdown.

The United States will seek United Nations Security Council condemnation and press that sanctions be imposed until Cuba provides compensation to the families of victims and abides by international law.

The United States will seek condemnation of Cuba by the International Civil Aviation Organization and other relevant international bodies.

Move promptly to reach agreement with Congress on the pending Helms-Burton Cuba legislation so that it will enhance the effectiveness of the embargo in a way that advances the cause of democracy in that country.

Request the Congress to pass legislation authorizing payment of compensation to the families of victims out of Cuban blocked accounts in New York.

Restrict the movement of Cuban diplomats in the U.S. and tighten criteria for issuing visas to employees of the Cuban government.

Increase support for Radio Marti to overcome jamming by Cuba.

Indefinitely suspend all commercial charter flights to Cuba.

* * * * *

BACKGROUND BRIEFING BY SENIOR ADMINISTRATION OFFICIALS

February 26, 1996.

THE BRIEFING ROOM

4:12 P.M. EST

SENIOR ADMINISTRATION OFFICIAL: Good afternoon. I'm not going to take much time from here because I'll wait for your questions in a moment. But let me just say a few words about the international efforts that we are making with considerable success to get international support for worldwide reaction to condemn what the Cubans have done.

We're really very encouraged after a couple of days that around the world many countries are expressing to us bilaterally and in international settings their outrage at what the Cuban government did on Saturday; and the fact that it's recognized, I think, throughout the world that this was, as the President said a moment ago, a flagrant violation of international law. Secretary Christopher, who is El Salvador, not only meeting with the government of El Salvador but with representatives of several of the Central American governments, is finding that sentiment in his meetings.

As the President indicated, the European Union just offered a very strong statement of condemnation of the Cuban action. Ambassador Albright, last night in an emergency session of the U.N. Security Council, again found considerable support for the proposition that the Cubans had violated international law and their behavior was outrageous and inappropriate. And Ambassador Albright is also beginning, in a preliminary fashion, discussions at the U.N. Security Council about further measures that could be taken in the form of sanctions. Those conversations have not developed to a large extent, but she is beginning those discussions in New York.

And finally, the United States is seeking condemnation of the Cuban action in the international civil aviation organization in Montreal where, again, the initial reports from this morning—because in many of these international organizations it was not possible to have such discussions in a formal way until Monday morning—has indicated a good degree of support.

Now, I think I'll let my colleague talk about some of the bilateral measures that the President announced, and he will take your questions.

SENIOR ADMINISTRATION OFFICIAL: Thanks. Good afternoon.

The question that was raised by these incidents on Saturday is whether our relations with Cuba should change as a result of the downing of two unarmed civilian aircraft, and the answer is, absolutely, yes.

One of the things that we will be doing as Congress comes back this week is moving to make some proposals about how we could reach agreement on the Helms-Burton legislation that will further tighten the U.S. embargo against Cuba.

As you know, the administration has said from the beginning of debate about Helms-Burton that we shared the objectives of promoting a peaceful democratic transition, but we had serious doubts about whether all the provisions of the bill were capable of addressing that goal. And we're going to move very quickly in the next two days to make clear to the Congress some specific ways in which we think we could improve the legislation. I think it's fair to say the President wants to achieve a compromise on Helms-Burton, and we'll try to find a way to do that that advances our interests.

We are also, as my colleague indicated, going to insist through international forum that Cuba both reject its position that it is entitled to shoot down aircraft, civilian aircraft, and to compensate the victims. But we're not going to wait for the Cuban government to acknowledge its responsibility. We will take the frozen assets that we have had in the United States blocked for Cuba for some time and provide a mechanism by which the families can receive compensation if they wish. We'd need legislation to do that, and so we'll make a proposal to Congress, a means to do that.

We have the ability to restrict the movement of Cuban diplomats here in the United States, and we will be moving to do that this week, to make it clear that they are restricted only to certain kinds of activities that are essential for their functions here. And we will also be tightening the criteria that we use for admitting employees of the Cuban government to the United States. We have provisions already in executive authority that allow us to deny entry to any employees of the Cuban government or members of the Communist party, and we will be interpreting that very strictly.

We will increase financial support for Radio Marti, which will allow the radio station, which is listened to by an important segment of the Cuban population, to reach even further into Cuba and to overcome the expensive jamming that the Cuban government engages in to try to block the signal. And we will be able to do that also relatively quickly.

And finally, probably within a matter of hours, we will be moving to suspend all commercial charter flights to Cuba. Obviously, the action that the Cuban government engaged in in shooting down unarmed aircraft does not encourage us to permit further flights to Cuba. And so we will now cut off all U.S.-based charter flights to Cuba starting, probably as I say, within a very short period of time.

Why don't we stop there and invite questions.

Question. On Helms-Burton, Republicans are saying today that they don't need to compromise with the President, that they now have the votes to pass it. Would the President veto the Helms-Burton legislation in its current form?

SENIOR ADMINISTRATION OFFICIAL: Well, I've just indicated that the President has said that he wants us to find a good compromise on Helms-Burton. We're going to try to do that. Senator Dole has said that that is one thing that he would like to see happen.

So I would hope that on reflection members of Congress would rather have a piece of legislation that has the support and the signature of the President than something that is used for demonstration purposes and never has any possibility of becoming law.

So I hope, as the time passes and they see what we have to offer, that we'll be able to reach some sort of compromise.

Question. What parts of the bill do you object to?

SENIOR ADMINISTRATION OFFICIAL: Well, it's no secret that from the beginning of the conversations about Helms-Burton with the Congress, Title III, the title that deals with property, asserting the establishment of a right of action in the U.S. court system for those U.S. citizens who have had property expropriated in Cuba before or after they were U.S. citizens is the problem, the part of the bill that bothers us the most and the part of the bill that the Congress has always insisted on not changing. And that is, in fact, the issue on which the bill was hung up in the Senate the last time.

So I think it's fair to say that that will be a focus of concentration for both sides in trying to work out a compromise.

Question. So what's the difference between before and after the shooting? If you objected to that provision then and you object to it now, what's the difference?

SENIOR ADMINISTRATION OFFICIAL: Well I hope the difference is on the part——

Question [continuing]. Object to it less?

SENIOR ADMINISTRATION OFFICIAL: No, I think the difference is on the part of Congress. I would hope that Congress would want to engage in sending a message of bipartisan repudiation to Cuba and not engage in posturing with a bill that neither serves U.S. interest nor, in fact, the purpose of being tough on Cuba.

Question. Is the objection to that is that it would violate extraterritoriality provisions of international law?

SENIOR ADMINISTRATION OFFICIAL: That it would give the Cuban government a tremendous propoganda victory; undermine precisely the international support that we have been developing over the last year, which led to the condemnation widespread last week of the violations of human rights around the arrests of Concio Cubano; now, today, with the condemnation by the EU of the shooting down of the airplane. It's clear that the more we reduce Castro's international acceptance, the better off we are in our attempt to promote a peaceful transition.

Question. On two separate occasions the United Nations has voted to urge the United States to get rid of the embargo. What makes you think that the United Nations is now going to support what the United States wants to do, and if it does, that they won't condition it to lifting the embargo against Cuba?

SENIOR ADMINISTRATION OFFICIAL: Let me make an additional comment on Helms-Burton, and then I'll get to the question. The difference in what the President has instructed us to do today is to be very forthcoming in trying to obtain passage of Helms-Burton. I think up until this point you will know that we have said there are certain parts of it we like, there are certain parts of it we don't like. But the President has given a real impetus to those in the Executive Branch dealing with the Congress on this issue to actively find a forum that is acceptable to both us and to the Congress.

On the question I just received, I think that there is a significant difference in what we can report from the conversations in New York, both with members throughout the United Nations and in the Security Council, despite the differences. And, of course, there have been differences between the United States and a majority of members of the United Nations over overall policy towards Cuba, or the techniques that the United States believe are appropriate for bringing pressure on Cuba.

Nonetheless, this example of a flagrant violation of international law by any standards is meeting with enormous sympathy and support. And for that reason we have every reason to hope and expect that the President's statement, or even a resolution that will come out of the Security Council, will not make reference to the embargo.

Question. Are you also grounding the Brothers to the Rescue and their planes?

SENIOR ADMINISTRATION OFFICIAL: The FAA has had a long-term investigation under way, not only against Mr. Basulto, but other pilots, Brothers to the Rescue. In fact, their cases are under appeal, and we have underway a review by FAA of what further actions should be taken as a result of the clear safety threat that's represented by this unlawful action of the Cuban government on Saturday.

So we anticipate that there will be further action, but I can't be more specific today.

Question. So the edict on the commercial traffic doesn't have anything to do with the light plane——

SENIOR ADMINISTRATION OFFICIAL: No, that's on commercial charter flights. That's right. This would be——

Question. This action has been going on by these Cuban emigres since '91—about 3,000 trips. Each one of these tried to evoke us into war. Are you going to let that continue?

SENIOR ADMINISTRATION OFFICIAL: Well, as a nation of laws, we have great difficulty in restraining people from breaking the law, just because they—ma'am, would you like me to answer your question?

Question. Yes, I would.

SENIOR ADMINISTRATION OFFICIAL: We have great difficulty in exercising prior restraint against people for what we think they might do. I'm sure you would like us to keep that a part of our constitutional system. That means we have to proceed lawfully and carefully against people, and it's difficult when people want to violate the law. In fact, just because we would say that people can't take off airplanes legally doesn't mean they can't violate it. But we will be doing things that we think will have the result of lowering the risk for U.S. aircraft in this area.

Question. On that point, does the U.S. regard the pilots and crew of those two airplanes as totally innocent victims?

SENIOR ADMINISTRATION OFFICIAL: There is no justification under international law for shooting down an unarmed civilian aircraft. It doesn't matter where it is. It's the nature of the aircraft and what it is doing. And this is a clear violation of international law. There is no justification.

Question. Even if the crews ignored a specific radio transmission warning them to stay out of a certain area?

SENIOR ADMINISTRATION OFFICIAL: Absolutely. Cuba has no right to shoot down civilian, unarmed aircraft.

Question. What is the amount of money in frozen Cuban assets in the U.S.?

SENIOR ADMINISTRATION OFFICIAL: There's something around $100 million.

Question. And how much compensation could these families be likely to expect based on actuarial settlements or——

SENIOR ADMINISTRATION OFFICIAL: That's exactly what you said. It's an actuarial problem that when one looks at the life expectancy of these people—I don't want to get into the grim details of people who have lost their lives and their families are grieving right now. The point of this is not compensation to the families. (The point of this is that this is Cuban government money that will never go to Cuba. It is never going to be seen by the Cuban government.)

Question. To what extent—how does the suspension of the charter flights——

Question. Can you talk to us a little bit about how many people have been going since October on charter flights? Can you tell us whether or not Cuban families—Cuban family members can still go back automatically once a year whether academics; whether other researchers, human rights activitists can go just by going now through Mexico or through Canada? Or are they going to have to now apply to the Treasury Department again and have a specific license? What does this do for travel to Cuba?

SENIOR ADMINISTRATION OFFICIAL: Well, first, journalists' licenses will continue, but you won't be flying from Miami any longer. The point of the stopping of the charter flights is specifically to the violation of international law committed by the Cuban government in the shooting down of the planes. We don't want U.S. planes flying into Cuba.

But we had a clear discussion and examination of the kinds of pressure that our so-called "track two" program has been putting on the Cuban government domestically. And it was the feeling of all of the advisors of the President and, ultimately, the President himself that in fact we have the Cuban government on the defensive. Some of these outrageous acts against Concilio are a demonstration that what we are doing is working, and we will continue that.

But, frankly, I would hope that Cuban Americans and many others who are concerned about Cuba would question whether they should be flying into Cuba from any place in the world right now.

Question. How many people have gone since October on these charter flights? How much loss of revenue does this mean, and does this mean that as a Cuban American or human rights person or an academic, all you have to do now is just go to a third country to get to Cuba? And will you automatically have a license from the Treasury Department to travel?

SENIOR ADMINISTRATION OFFICIAL: No, there are no automatic licenses, except for U.S. government officials and the once-a-year humanitarian license that exists for Cuban American families. There have been increases in the charter flights from Miami, as those of you who have followed this are witness to. We aren't sure how much of it was due to a backlog that we had of many people who had applied for licenses and had not been able to receive them, how much it is people who used to go illegally without asking for a license from third countries and now all of a sudden are showing up in Miami where there was more access.

It is always difficult to enforce an embargo if people won't comply with it, particularly the Cuban-American community itself. And that's why we hope there will be voluntary compliance by Cuban Americans with this provision. But the basic licensing structure that was put in place on October 6th still exists. We believe that the program of support for the Cuban people is, in fact, having important effects inside Cuba. We are not going to abandon the human rights groups and dissidents and other independent groups that have, in fact, developed in response to this greater contact with the people of the United States.

Question. How many flights does this affect?

Question. —will see more refugees coming? Have you gamed out that scenario, as to what would happen?

SENIOR ADMINISTRATION OFFICIAL: I don't want to get into future plans either about migration or military issues. But we're always thinking about the worst that could happen, as well as hoping for the best.

Question. Could you be a little more specific about numbers, sir?

Question. How many flights, how many people have been going since October?

SENIOR ADMINISTRATION OFFICIAL: I'd be happy—we could try to get that information for you, but I don't have the total number since October. There are about 120,000 to 140,000 people that travel from the United States to Cuba in a given year. I think that's probably for 195, in fact. This is not a huge number of people. It's significant, but not huge.

And how much of that has been since October, I can't say. There was an ariticle in the Miami Herald that perhaps my colleague would be happy to give you copies of that has more specific figures than I had ever seen.

Question. Can I ask you a question, though, about——

SENIOR ADMINISTRATION OFFICIAL: Yes. Since I gave you a plug at least.

Question. I appreciate that. The pro-engagement policy on track two that remains intact. The United States continues to seek people-to-people contact to build——

SENIOR ADMINISTRATION OFFICIAL: Yes. There's no question that this outrageous action by the Cuban government on Saturday and a parallel action against the Cuban people on the island rounding up dissidents puts a chill in the overall relationship—and should. But we continue to believe that we have to reach out to the Cuban people around their government, especially when it demonstrates more and more to the international community its illegal and unethical actions with regard to human life.

Question. The Cuban American delegation, a visit to the White House, what is their opinion of the——

SENIOR ADMINISTRATION OFFICIAL: Well, I'm sure that they'll provide their views directly to you. They've never been shy about expressing themselves. (Laughter.)

Question. Well, what——

SENIOR ADMINISTRATION OFFICIAL: I had a brief meeting upstairs with people, and I'm going to see a larger group of Cuban Americans at the State Department in an hour or so. And I'd rather reserve comment until I receive the full weight of their views.

Question. What do you know about this——

Question. —restrictions actually punishes more the people than the Cuban government?

SENIOR ADMINISTRATION OFFICIAL: Well, that's a basic problem that we face in dealing with Cuba—that you have a government that's willing to hold 11 million people hostage in defense of its own behavior. And so we believe, and I think the President expressed himself very clearly, that he wanted these measures focused as tightly as possible on the Cuban government.

And I think if you look at these measures you will see that they are significant and that they do just that—they hit the Cuban government more than the Cuban people, which we think is important.

Question. Were there charter flights allowed from Miami before October, so is this a narrow—in the narrow sense, a roll-back of that October easing, or was that——

SENIOR ADMINISTRATION OFFICIAL: Well, there were charter flights, there have been charter flights allowed for a long time between the United States and Cuba. The number of people who were licensed to use them was quite restricted—yourselves, journalists, yourselves, government officials, academic researchers—a relatively small number of people.

In October, a larger number of—a larger group of categories was permitted, as well as this once-per-year exemption for Cuban-American families with emergencies. So the authorization of charter flights has existed for quite some time. That now stops totally. Whether there's demand or not, there are no charter flights indefinitely from Miami or any other place.

Question. How does that affect Cuba's pocketbook?

SENIOR ADMINISTRATION OFFICIAL: In the short term, it should have a dramatic impact. It should reduce revenues to the Cuban government significantly, especially if those people who cannot fly from Miami decide to voluntarily exercise restraint and not go to Cuba. It could send a very important message.

Question. You seem to be using "commercial" and "charter" interchangeably. What you really mean is a charter flight.

SENIOR ADMINISTRATION OFFICIAL: Commercial charter flight, yes.

Question. And how much money is the President asking for Radio Marti?

SENIOR ADMINISTRATION OFFICIAL: I'd rather not give you a specific number. It's not—we're talking about millions, a couple of million dollars per year. We're not talking about tens of millions of dollars per year.

Question. And what's that supposed to accomplish, specifically?

SENIOR ADMINISTRATION OFFICIAL: Well, Radio Marti is—if you have gone to Cuba—I can't remember if you have—you know, if you ask people, a lot of people get their main source of news from Radio Marti. In fact, that's the way they heard about the incident on Saturday. It took a long time for the Cuban government to say anything about it publicly.

Cuba engages in jamming, more and more expensive jamming all the time. And this increased power and widening the band width allows the signal to reach more parts of the island for more hours during the day than before. It provides information. It provides support for on-island groups. It provides information about how to start your own business, how to be—have an independent lawyers' group. There's lots of information that's provided by Radio Marti that's very important for democracy promotion.

Question. Specifically, the money will be used to increase power and widen the band?

SENIOR ADMINISTRATION OFFICIAL: That's right.

Question. But you're still allowing the money transfers and telephone service—money transfers, telephone service, communications?

SENIOR ADMINISTRATION OFFICIAL: Let me be clear about that. Money transfers is different from everything else you've mentioned. The only reason for which anyone in the United States can send remittances to Cuba is to pay visa fees or for humanitarian exemption. If you know anyone who is sending money to Cuba, not in one of those two categories, with a prior license, please call the Treasury Department and report them. They're violating the law.

For the rest of track two, for contact—people-to-people contact, for yourselves, for journalists, for academic researchers and so on, you will still be able to obtain a license to go to Cuba as you were after October 6th.

Question. What sanctions do you want the Security Council to pass?

SENIOR ADMINISTRATION OFFICIAL: Well, there are two actions that Ambassador Albright is pursuing—Security Council. As I mentioned, the first, which she initiated last night, was to get a statement by the President of the Security Council expressing the unanimous view of the 15 members that a flagrant violation of international law has occurred.

Subsequent to that, she will begin discussions with the members of the Security Council about a broader sanction regime. And without giving specifics, because we have not made any firm decisions.

We'll be looking at sanctions which are appropriate to the lawless act of the Cuban government affecting Cuban airlines, travel by air in and around Cuba. Those are the kinds of categories of sanctions——

Question. Restricting Cuban aviation internationally?

SENIOR ADMINISTRATION OFFICIAL: Those are the kinds of categories that we'll be looking at on the sanctions front.

Question. —diplomatic relations?

SENIOR ADMINISTRATION OFFICIAL: One at a time, please.

Question. Are the Russians being helpful or unhelpful in this——

SENIOR ADMINISTRATION OFFICIAL: The only conversation with the full counsel took place last night, because the business meeting which was scheduled today is proceeding on other grounds. But I can say that all of the members of the Security Council, including, of course, the Russians, were very concerned at the obvious serious breach in international law; that was very much of the spirit of the discussion last night that Ambassador Albright reported.

Question. Excuse me. Why aren't you going to the OAS among the other——

SENIOR ADMINISTRATION OFFICIAL: Because we think that the Security Council is a higher-profile organization and we're looking for condemnation not only within the hemisphere, but throughout the world, and that's why the Security Council is the first focus for this.

Question. What sort of warning, if any, did we get from the Cuban Interest-Section here about the probability or possibility, specifically, that something could have occurred on this particular date, that based on Cuban somehow, you know, knowledge or infiltration of their Brothers to the Rescue that they had any indication that there might be provocative flights on that day?

SENIOR ADMINISTRATION OFFICIAL: Well, they want to amplify this, because he, of course, follows the cable traffic, too, that we all look at. For some time, the Cuban

government, of course, has expressed its concern about flights which they regarded as violations of their territory; whether or not these flights took place, whether or not the flights were in every case as alleged by the Cubans' actual violations.

What we have done constantly since these flights began some time ago is to say two things: First of all, that there's a legal action that the United States is pursuing, and that's what my colleague and others have talked about. We are a country of laws; it's much more complicated to pursue people by virtue of their intentions in this country compared to Cuba. But the United States takes these potential violations of international law very seriously. And, second point, that the Cubans have to be mindful of the fact that there is international law that applies to the way they handle these flights if they choose to react, and we counseled restraint and we pointed out very forcefully over a period of many months what we believe their obligations to be.

Question. Did they give us any warning of an anticipation of an attack of a flight on this particular day?

SENIOR ADMINISTRATION OFFICIAL: There was, to my knowledge, no specific warning except that they have been constantly on alert because flights of this sort have been coming for some time, as you know.

Question. Did the government warn the Cubans that there was a flight imminent on this day?

SENIOR ADMINISTRATION OFFICIAL: No, the—it depends on what you mean by warning. I think you have seen reports that the FAA files a flight plan routinely that it receives for all aircraft, not just small private aircraft that fly in the vicinity of Cuba, and prior flotillas that had had some air overflight associated with them that were announced in advance and publicized in great detail. We had made specific public warnings, both to those participating in the flotilla and to the Cuban government to exercise restraint, not violate international law. But nothing like that second thing occurred on Saturday.

Question. The Cuban government this afternoon said that they have now picked up debris in their territorial waters from these two planes, and challenge the United States to come up with any debris in international waters. The President, when he made a statement, again talked about these planes having been downed over international airspace. How do you reconcile these two things?

SENIOR ADMINISTRATION OFFICIAL: One side is right and the other side is wrong. That's how I reconcile them. We're right and the Cuban government is wrong, and we will be happy to present this information to any international forum so that they can make their own evaluation.

SENIOR ADMINISTRATION OFFICIAL: Yes, I think we did present a briefing last night to the Security Council of everything that we had. And as my colleague indicated, if other international organizations or the Cuban government, for that matter, wants to be informed in whatever detail they desire about the information we have, we're prepared to present it there, as well.

Question. What about the renegade pilot that they say they have?

Question. Have you made all this information public, or is there further documentation on it?

SENIOR ADMINISTRATION OFFICIAL: Yes. I mean, basically, the background briefing that occurred—what was it, Saturday—Saturday——

Question. Does that include photos?

SENIOR ADMINISTRATION OFFICIAL: There are various electronic reading of what took place. But, essentially, yes, we have made this all available.

Question. Were these same planes warned in the morning not to—and went back in the afternoon? Has that been acknowledged?

SENIOR ADMINISTRATION OFFICIAL: We are aware of the Cuban government assertion that there were planes in this area earlier in the day. We have no information to indicate that that is the case. But I can't get into much more detail about it than that.

Question. What about the pilot that they say they've now got from Brothers to the Rescue?

SENIOR ADMINISTRATION OFFICIAL: Well, we eagerly anticipate his information, and we suspect it will not be—it will be supportive to the Cuban government's case. Let me just respond that way.

Question. Well, do you have information that Brothers to the Rescue has a missing pilot other than from the downed flights?

SENIOR ADMINISTRATION OFFICIAL: We don't have any—there are no missing pilots, there was no one picked up in the water, there was no one who landed in Cuba on Saturday that we aren't aware about. But we are aware that there may be a

member of Brothers to the Rescue—a former member of Brothers to the Rescue in Cuba at this time.

Question. A defecter? He defected?

Question. How do you think this will impact the immigration accord in that if we accuse this of being a government that has no regard for the rule of law and at the same time send refugees who are fleeing that country back to that country?

SENIOR ADMINISTRATION OFFICIAL: Well, we expect that it will have no effect on the Cuban government's fulfillment of the immigration agreement. It's something that is working in the interest of both countries. That's why we monitor returned refugees, returned rafters ourselves directly, because we do not trust in the behavior of the Cuban government and we have had a small number of problems with people who have been returned as a result of this policy. But by and large, it's worked to save lives and protect immigration flows in a safe and orderly fashion.

Question. Why did the Clinton administration rule out a military response at this point? Was it seriously discussed?

SENIOR ADMINISTRATION OFFICIAL: There were all options examined by the President's advisor and by the President. And I think the phrase you used, ''at this time,'' is what was indicated in the President's statement, that he felt that this package of measures that he announced today was an appropriate response, but we continue to watch the situation.

Question. Does this incident render the administration's Cuba policy a failure?

SENIOR ADMINISTRATION OFFICIAL: No, despite what—think I saw you at 7:00 this morning say that a senior official had said that. The United States is receiving more support internationally for its policy from other governments, as the journalists here are quick to point out—a rarity in U.S.-Cuba policy. We've seen the development on the island for the first time in 30 years of an umbrella organization of all human rights groups, including those who support Helms-Burton and oppose Helms-Burton; and an equally amazing phenomenon, the development in Miami and New Jersey of widespread support group for those on island activities.

I think that the regime in Cuba is acting desperate, precisely because it doesn't know how to cope with a policy that emphasizes peaceful, democratic transition, support for independent actors on the island, and has made it clear that we want to see a peaceful transition on Cuba—apparently a transition that the Cuban government has no interest in.

Thank you.

END.

4:32 P.M. EST

Senator MACK. Let me suggest two images to keep in mind as you listen to the testimony today. First, the President by his own words and by signing the laws passed by Congress encouraged the families to take the terrorists to court. Second, picture a black stretch limousine pulling up in the front of the Federal courthouse, a gaggle of Justice Department attorneys rolling out and entering the court, not to take sides with the families, but with Castro's agents. I cannot imagine a greater hypocrisy.

Let me tell you what Judge King, the U.S. District Court judge who heard the case, said about the President's actions. And again, I would underscore, this is a Federal judge who is saying this, not some political operative. ''The court notes with great concern that the very President who in 1996 decried this terrorist action by the government of Cuba now sends the Department of Justice to argue before this court that Cuba's blocked assets ought not to be used to compensate the families of the U.S. nationals murdered by Cuba. The executive branch's approach to this situation has, at best, been inconsistent. It now apparently believes that shielding a terrorist foreign state's assets are more important than compensating for the loss of American lives.''

For the past 2 years, I, along with Senator Lautenberg, have sought to work with the administration on this issue. Stuart Eizenstat, a most competent and dedicated government official, has

offered to work with me on three different occasions. In fact, I anticipate he may offer again today. But after waiting so long, I must say with due respect, there must be action for me to believe his words. To be frank, all that I have noticed to date is a lack of response on behalf of the administration, and I sense no sincerity on their part at all.

That is why yesterday we introduced a bill to address this in justice. It completes the work of the Anti-Terrorism Act of 1996. Currently, President Clinton waives the legal right of American victims of terrorism to obtain damages from blocked terrorist assets in the United States. This bill will support the victims' rights to the blocked assets while providing full authority for the President to protect diplomatic property. The way forward is to seek to set a bar by which all victims of terrorism are treated equally under the law.

Finally, Mr. Chairman, the President made promises to the families, encouraged them to seek justice, calling their efforts brave and courageous. He pledged to fight terrorism and signed several laws supporting the rights of victims to take terrorists to court.

But ultimately, he has chosen to protect terrorist assets over the rights of American citizens seeking justice. This is simply not what America stands for. Victims' families must know that the U.S. Government stands with them in actions, as well as words. Thank you very much, Mr. Chairman.

Senator KYL. Thank you very much for that compelling testimony, Senator Mack.

Senator Feinstein has agreed to allow Senator Lautenberg to proceed with his testimony and then she will make her opening comments. Senator Lautenberg of New Jersey.

STATEMENT OF HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. That is very kind and I appreciate it. Thank you, Mr. Chairman, for enabling us to present this testimony this morning and for hearing this matter.

I appreciate the opportunity to testify before the Judiciary Committee this morning to talk about the Justice for the Victims of Terrorism Act, which I introduced yesterday with my friend and colleague, Senator Mack. I at the outset want to say that we share a common interest in preventing and deterring terrorist acts against American citizens abroad, as well as at home. But I hope that as we review this, we will not make what I think, frankly, is an onerous comparison between the President's intention as I heard it. We want to get to the same objective, Senator Mack and I. I will say that I intend to hold the administration as closely as I can to our effort to see that victims of terrorism are heard, understood, and compensated for the terrible things that happen to them and their families.

But I do not think that one can say with impunity that the President of the United States, President Clinton, is willing to subordinate the victims' rights to a grander scheme for improving international relationships, not at all. There may be a difference in approach. I confess that I have not always been satisfied with the response that we have gotten from administration people, but the fact is that there is a response to terrorism which has been

strengthened substantially, and we all see it many ways. We all saw it, whether it was in Afghanistan, or Senator Kyl, you and I serve on the Intelligence Committee and we know that there is substantial effort being developed to try to protect our citizens against acts of terrorism. We both are, I think, vigorous in our support of that.

In 1996, as was noted by Senator Mack and you, Mr. Chairman, Congress passed and President Clinton signed into law anti-terrorism legislation giving American victims of state-sponsored terrorism the right to sue the sponsoring state. We deliberately created a narrow exception to the foreign sovereign immunity protections that our laws afford to other countries. The exception was deliberately narrow, and any country sued under the 1996 law must be on the State Department's list of terrorist states, and only victims of terrorism and their families may file a suit.

Our goal then and our goal now is to allow American victims of terrorism to seek some measure of justice in U.S. courts and to make state sponsors of terrorism pay for the injury and death and devastation that terrorism causes.

The victims of terrorism, including the people you are going to hear from today, have put the 1996 law to good use, and I am particularly proud to have worked with Steve Flatow, whose 20-year-old daughter, Alisa, was killed when a Palestinian suicide bomber attacked a bus in the Gaza strip in 1995, a day that I entered Israel on a trip that I was on and had come from Egypt to Israel to learn of the tragedy that befell the passengers on the bus that was attacked. It was awful. We made decisions as a result of that to fight even harder than we had against terrorism and to make sure—we did not think then about compensation, but we thought then about striking back in meaningful ways, and one of the ways to strike back is to make sure that these countries pay for their involvement in terrorist activities.

Mr. Flatow won a U.S. court judgment against Iran. In another case, the families of the Brothers to the Rescue pilots won a judgment against the government of Cuba. But these terrorist states have yet to pay a dime, and the reason is that Iran and Cuba and other rogue states targeted by the 1996 law tend to have few, if any, assets in the United States other than the assets that the Treasury Department has frozen under our sanctions law.

But we can solve that problem by releasing some of these frozen assets to let victims of terrorism collect what they fought for and won in our Nation's courts. Now, I know that you are going to be hearing from Deputy Treasury Secretary Eizenstat this morning, who is, as Senator Mack said, someone who has earned the respect and admiration of all who know him in the pursuit of his assignments, many that he has taken on on behalf of our Government and our people. But I want to address some of the issues that he may raise.

First, I do share the administration's view that the legal status of foreign embassies must be respected because American embassies around the world rely on reciprocal protection. Even at times when we do not get it, nevertheless, that is the rule of international law and we do have to respect it. However, one must note that Iran abused the rights of our embassy in Teheran. That aside,

this bill would allow the President to exempt the premises of foreign diplomatic missions in the United States from attachment in these terrorism cases.

Second, I have heard complaints that the first victims to gain judgments against foreign terrorist states would end up getting all of the frozen assets, leaving none for future cases. But unfortunately or not, that is the way American civil law treats all assets that are part of a court judgment, and frankly, I agree with that, because perhaps by satisfying those claims, we can deter terrorist acts in the future.

The Treasury Department has suggested using the Crime Victims Fund to satisfy these court judgments, but that proposal misses the point. Foreign countries that sponsor terrorism should have to pay a price for the toll that terrorist attacks take on families like the Flatows and the Brothers to the Rescue families. Making terrorist states pay that price will help deter them from engaging in terrorism in the future.

Finally, I understand that the State Department would like the frozen assets of terrorist states, like Iran and Cuba and Libya, to remain available in efforts to improve relations, as bargaining chips in efforts to improve relations with those countries. However, any reconciliation would require those countries to make good on their obligations to American victims of terrorism. So the U.S. court judgments would have to be satisfied in any case. The only question is, do we satisfy them now or do we make the victims of terrorism, like the Flatows and the others, wait years longer.

Waiting is not the answer. They have conducted their process according to the law and have seen declarations made by our court system that coincides with our view that terrorism did occur as a result of foreign countries, Iran, Cuba's, involvement, and awarded these claims accordingly. It is not fair to the victims for them to continue to wait and it would dilute the punitive and deterrent effect of our antiterrorism laws.

The bottom line is that this law would not stand in the way of America's foreign policy. Rather, I think it would strengthen our nation's strong stand against terrorism directed at American citizens.

Mr. Chairman, before I close, I would just like to say again that President Clinton has stood up against terrorism around the world and here at home. He has directed efforts to tighten airport security, impose sanctions against nations that support terrorists, outlaw money laundering and financial support for terrorists, and provided law enforcement agencies with the latest technologies to combat terrorism, and he has responded decisively, as I earlier mentioned, to Bin Laden's attacks on our embassies. I suspect the administration policy and this legislation is being set more by the legal departments and the bureaucracy, and I hope that the President will sign this legislation when it reaches his desk.

I close by thanking the committee once again for your attention to this bill. I hope that the committee will approve this bill in a timely fashion so that we can finally arrive at some justice for the victims of terrorism. I thank you.

Senator KYL. Thank you, Senator Lautenberg.

Senator Feinstein, whose reputation is one of the most significant advocates for victims in the U.S. Senate, has joined the panel. Senator Feinstein, would you like to make an opening statement?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thanks very much, Mr. Chairman. Let me begin by thanking you for holding this hearing and let me thank both Senators Mack and Lautenberg for being here and for your, I think, very excellent comments.

Essentially, the question on everyone's mind is this. If the U.S. Government holds frozen assets of a foreign terrorist nation and a U.S. court awards monetary damages to victims of that terrorist nation, then why can the victims not recover from the frozen assets? I think that is clearly the question before us. There really is no other option for them. They cannot go to the country at issue and demand payment.

I want to talk about just one person, largely because he is today a California resident and because I have followed his case with some interest in the newspaper. In 1985, David Jacobsen was residing in Beirut, Lebanon. He was the chief executive officer of the American University of Beirut Medical Center. Shortly before 8 o'clock in the morning on May 28 of that year, he was crossing an intersection with a companion. He was assaulted, subdued, and forced into a van by two or three assailants. He was pistol-whipped, bound, gagged. He was pushed into a hidden compartment under the floor in the back of the van.

He was held by these men, members of the Iranian-backed Hezbollah, for 532 days, nearly 1½ years. He was held in darkness. He was blindfolded. He was chained by his ankles and wrists. And he wore nothing but undershorts and a t-shirt. He said in the past that he was allowed to see some light just twice in those 17 months. The food was meager. Sometimes the guards would spit on his food before handing it over. He was subjected to regular beatings. He was often threatened with immediate death. He was forced to listen as fellow captives were killed.

As a result of this physical and mental torture, he has been under continuous treatment for post-traumatic stress since his release in November 1986, nearly 13 years ago. Last August, he was awarded $9 million by a U.S. Federal court. The judgment was against the government of Iran, and pursuant to a bill that Congress signed in 1996 allowing victims of foreign terrorism to recover against terrorist nations, the bill was, of course, encouraged by the current administration. To date, he has collected nothing. He cannot go to Iran to ask for the verdict, and our own Government, frankly, has not helped him.

Now, I, too, have great respect for Mr. Eizenstat and I am very interested to hear his comments on the four basic points that I understand the administration reserves against any kind of payment of these frozen assets.

The first, as I understand it, is leverage, and I understand the administration claims that allowing recovery from frozen assets would diminish their leverage in negotiating with Cuba for foreign policy concessions. However, I might argue that that leverage is

worthless if the U.S. Government is going to protect those assets from victims of human terrorism.

Second, the administration, I believe, has argued, with respect to Cuba only, that it would be unfair to allow victims of terrorist acts to jump to the head of the line and collect frozen assets when thousands of displaced Cubans have been waiting for more than 30 years to recover lost property or other wrongs. This argument might have some merit with regard to Cuba, but not necessarily for other terrorist states.

The third argument I believe they make is protection of United States diplomatic property abroad. This argument had some merit under past law, since we would have reason to fear reprisals if we were to allow victims to seize embassies or other diplomatic property here. However, the Mack-Lautenberg bill now allows such physical property to be exempted by the President. Only liquid assets would be available to victims. So I would be interested in the administration's response on that point.

And fourth, violation of established treaties and accords. I believe the administration argues that this bill would force us to violate certain international treaties and could result in American taxpayers picking up the tab for required payments to foreign nations. I would like to hear more about these arguments at the hearing.

Basically, I do not think these arguments—these are the only four that I have heard to date. I do not have Mr. Eizenstat's comments. Perhaps he will make more today. But I do not think any of them overcome or outweigh a legal Federal court decision held against the governments that committed the acts of terrorism. Now, particularly, I do not think any of us doubt that Hezbollah is a government-sponsored terrorist organization. Therefore, it would seem logical that a Federal court verdict against a country for an act carried out by a government-sponsored terrorist organization, that the plea for those frozen assets is a just one, clearly now a legal one with the Federal court decision, and should be recognized as such. Of course, this raises the question of the use of the waiver by the administration in these cases.

So I think both Senators Mack and Lautenberg do an enormous service in presenting this legislation at this particular point in time. I think we have had enough court verdicts now which really call into question the policy of a waiver, certainly based on the four points that I have elucidated so far that the administration has pressed, and it will be interesting to hear if they have additional cases to bring before us today.

I thank you both very much for being here. If you have any comments, perhaps the chair would recognize you.

Senator KYL. Thank you, Senator Feinstein.

Senator Mack.

Senator MACK. Just briefly, because I know that the committee wants to get to the other panelists, but first of all, Senator Feinstein, thank you very much for those comments. I just want to respond to one of those four arguments that you stated that the administration has raised, one specifically having to do with Cuba.

Again, I have responded to all four of them at different times, but I just want to make this point. With respect to there being a lot of Cubans, Cuban-Americans today, who have claims against or

have charges against the Cuban government, if you will recall, we passed the Helms-Burton law a few years ago and title III of that allowed for individuals who have experienced losses as a result of the taking of property. There was an avenue for them to pursue justice, if you will, through title III of Helms-Burton.

Most individuals who have claims against Cuba for the taking of properties have an avenue through that law. I will tell you, though, that again, the President has waived title III ever since it has become law, so that even that avenue has been denied to Cuban-Americans to receive some form of compensation for those who are trafficking in properties.

So there is more recourse. This is not the only recourse that is open with respect to collection.

Senator FEINSTEIN. Thank you. I think that is an excellent point.

Senator LAUTENBERG. If I might, and I, too, add my thanks to you, Mr. Chairman, and Senator Feinstein, for your support in these actions that we are taking. I do not want to in any way suggest that we ought to be less than as aggressive as we can be to make these countries pay. I do, however, say this, that the administration may view things differently, and we are going to hear from Stuart Eizenstat shortly, on the approach to things.

While I will not, again, defend their opposition to getting compensation for the victims, I am forced as we talk here to think back about times when it was inconceivable that we would ever communicate with countries who brutalized and tortured and murdered our people when they were captured in wars, one of which I fought in, World War II, and the enemies of that time with whom we fought back so vigorously. I never apologized for dropping the atomic bomb. I was a soldier. I was in Europe on my way then to Japan after the war in Europe closed down, and I was happy that we did what we did to end that war.

Therefore, it recalls for me that at times when you deal with these terrorist countries, whoever they are, and as much hatred as we develop for them, for the acts that they have committed against innocent people, we do have to trust in some form a government's judgment in how you resolve conflict, and the best way to resolve conflict is to bring these people into an orbit that has them dealing civilly, humanely with their citizens.

So while, again, I want to press on and I want to make sure that compensation is given to these people who have been victimized, we have to listen, even if we do not agree, to the argument that is made on behalf of perhaps eventually getting to a peaceful situation.

I would rather, as much as I despise things that are going on in Iran, I would rather have them stop making atomic and nuclear weapons and join the family of civilized nations. So if there is a bargaining chip that can be used, we have to decide how the chip is played. And if it is not from the terrorist countries themselves, then perhaps this country has to step in and compensate our citizens for the fatalities that fell on them. Thank you.

Senator KYL. If I could make a quick comment before the two of you leave the dias, it seems to me that, Senator Lautenberg, what you have just said suggests to me that the first step in the path for a country to become part of the family of nations is to acknowl-

edge the rule of law. It seems to me, second, that this country has done everything—that the Senate has done everything that we can for this country to pursue and abide by the rule of law in this case, by using a mechanism that was available to us, passing a law, pursuant to the President's request that we do so, that enabled a family to take advantage of our judicial processes, that it did so, that a Federal court judge rendered a decision which is recognized by the law of our land as a valid judgment.

As you pointed out in your testimony, under that system, it allows these people to be the first in line to collect on their judgment, so that everything has occurred except the final step, and that is making those funds available. The President has exercised a waiver which all of us, the four of us who have spoken here, have indicated we believe was much narrower than the President interpreted it as being.

If I could just indulge Senator Mack for just a moment, my understanding is that the first and only objection at the time to the initial legislation was that it did not provide a waiver for diplomatic property and that the legislation or the amendment that you proposed to the appropriation bill this year as a follow-on to last year's appropriation bill corrected that deficiency, that it allowed a waiver for diplomatic property and that that waiver is also included in the legislation that you and Senator Lautenberg have introduced now, is that correct?

Senator MACK. That is correct.

Senator KYL. So today, the President could exercise a waiver to protect all diplomatic property. Is that the only waiver, then, the only waiver authority that the President would have under this legislation?

Senator MACK. That is my understanding. Again——

Senator LAUTENBERG. Narrowly defined, as well. We will not take any commercial result from the use of those properties and exempt those. It has to be very narrow. We are not talking about consulates that service passports and relations for people who live in this country. We are talking about the embassy and the functions that they perform. If they rent it out as office space, we want to use those funds.

Senator KYL. So, then, the only thing standing between these families and recovery under the law of the United States would be the adoption of the legislation that you have proposed here today and the signing into law of that legislation.

Senator MACK. Let me make a point. The President could choose to use the waiver strictly for the purpose—under present law, he could have chosen to have said that he was going to use that waiver to protect diplomatic properties and allowed Treasury to execute a license.

But I think that both Frank and I believe that it is important that we really clarify this thing legislatively, that it is very clear that it is a narrow waiver so that in the future, if there are other victims of terrorism that go to court, receive a judgment, and try to collect, that it is very clear that the only use of that waiver is for a narrow use and for protection of diplomatic property.

Senator KYL. I take another point that Senator Lautenberg made, which is that if you are going to negotiate with a country

to bring that country into the family of nations, the first thing you would do is clear up the past accounts, to settle with the victims of terror. This would be step number one in that process, so there is no reason not to go forward with it.

Thank you very much for your testimony. We appreciate it.

Senator MACK. Thank you very much.

Senator LAUTENBERG. Thank you.

Senator KYL. Now, if I could invite Stuart Eizenstat to the panel. We thank you, Mr. Eizenstat.

Our second panel this morning consists of Deputy Secretary of the Treasury Stuart E. Eizenstat. He has served in that position since July 19, 1999. From June 1997 until July 1999, Mr. Eizenstat served as Under Secretary of State for Economic, Business, and Agricultural Affairs. Mr. Eizenstat has also previously served as Under Secretary of Commerce for the International Trade Administration, and as the U.S. Ambassador to the European Union.

Mr. Eizenstat, we welcome you to the committee today.

STATEMENT OF STUART E. EIZENSTAT, DEPUTY SECRETARY, DEPARTMENT OF THE TREASURY, WASHINGTON, DC

Mr. EIZENSTAT. Thank you, Mr. Chairman. I very much appreciate the opportunity.

Let me begin by expressing the administration's and my own personal sympathy to victims of international terrorism, particularly these families, an evil that this administration has taken world leadership in combating. People like the Flatows and the families of the Brothers to the Rescue deserve government support in their demand to be compensated for their grievous losses, and we are dedicated to working with the Congress to achieve this goal by setting up a commission to recommend proposals to help families of the victims of the international terrorism receive compensation.

This, however, must be done in a way that is consistent with our national interests, is not done piecemeal with a race to the courthouse, and does not touch blocked assets or diplomatic property to achieve this end.

Mr. Chairman, I personally met in Miami with the families of the Brothers to the Rescue members in the office of El Diario. It is a day I will never forget. It is one that personalized for me the brutality of the Castro regime. I have also met on several occasions with Mr. Flatow in my office and in the State Department, who lost his daughter in a bomb attack in Gaza. Having had children in Israel who were subject to the same threat, I particularly empathized with Mr. Flatow.

I was touched by the depth of the suffering as well as impressed by the strength and determination of the families to seek justice for their loved ones. We understand the frustrations that have led the sponsors of this legislation to introduce it. The plaintiffs have suffered grievously at the hands of terrorists and should be compensated by those responsible.

As part of our efforts to combat terrorism, we impose a wide range of economic sanctions against state sponsors of terrorism in order to deprive them of the resources to fund acts of terrorism to effect their conduct. Because of these measures, terrorist-list states

engage in minimal activity in the United States, and in most cases, the only assets available are either blocked or diplomatic property.

With all respect, Mr. Chairman, and knowing that we want to achieve the same goal, we believe that the legislation before us is fundamentally flawed for the following reasons.

First, blocking assets of terrorist states is one of the most significant economic sanctions tools available to any President in dealing with terrorist countries. This legislation would, unfortunately, undermine the President's ability to combat international terrorism by permitting the attachment of blocked property, thereby depriving the United States of a critical source of leverage, such as we used to gain the release of our citizens held hostage in Iran.

Second, it would cause the United States to violate our obligations to protect diplomatic property of other countries and thereby put our own diplomatic property around the world at risk.

Third, it would benefit one small group of Americans over a far larger group. Those with judgments in court since the FSIA amendments of 1996 would benefit over others, many of whom have waited for decades to be compensated by Cuba and Iran, both for loss of property and loss of lives of their loved ones, and would leave no assets for their claims or others that may follow.

Fourth, it would breach the longstanding principle that the U.S. Government has sovereign immunity from garnishment, thereby preventing our Government from making good on its debts and potentially causing U.S. taxpayers to incur substantial financial liability.

And fifth, it would direct courts to ignore the separate legal status of states and their agencies and instrumentalities, overturning Supreme Court precedent and basic principles of corporate and international law by making state-owned corporations liable for the debts of the state. This would also expose U.S. investors in such enterprises abroad to retaliation.

Attachment of blocked or diplomatic property, Mr. Chairman, would jeopardize our national security and seriously prejudice a number of important national interests: The preservation of our asset-blocking program to combat threats to our national security, our legal obligations to protect diplomatic property of foreign states, avoiding gross inequities by similarly situated U.S. nationals with claims against foreign governments.

Permit me briefly to take each of these up. Our efforts to combat threats to our national security posed by terrorism-list countries rely upon our ability to block their assets. These blocking programs permit Presidents at any time to withhold substantial benefits from countries whose conduct we abhor and to offer a potential incentive to such countries to reform their conduct. Our blocking programs provide us with a unique form of leverage over countries that engage in threatening conduct.

Presidents have blocked property and interests in property of foreign states and foreign nationals that today amount to over $3.4 billion, Republican and Democratic Presidents alike. The leverage provided, Mr. Chairman, by these blocked assets is central—central—central—to our ability to protect important U.S. national security and foreign policy interests.

I myself was personally involved in one of those, and that is the Iran hostage crisis from 1979 to 1981. Our blocking of Iranian assets was a critical bargaining chip to resolve the crisis, almost $10 billion in assets that the President had blocked shortly after taking of our embassy.

Likewise, in the case of Vietnam, the leverage provided by the some $350 million in blocked assets played an important role in persuading Vietnam's leadership at the time of normalization to address our concerns, including a full accounting of POW's and MIA's from the Vietnam War, as well as accepting responsibility for over $200 million in U.S. claims.

In addition, blocked assets have helped us to secure equitable settlements of claims of U.S. nationals in countries from Romania and Bulgaria to Cambodia in the context of normalization of relations.

Our blocking programs cannot function if blocked assets are subject to attachment and execution by private parties, as the proposed legislation would permit. Private rights of execution against blocked assets would permanently rob the President of the leverage blocking provides.

The Brothers to the Rescue families and the Flatow family, in effect, through their attachment, would leave no remaining assets of terrorism-list governments in the President's control, thereby denying this President and any future President an important source of leverage and seriously weakening a President's hands in dealing with the threats to our national security.

The legislation would also cause the United States to violate our obligations under international law to protect diplomatic property and would undermine the legal protections for that property on which we rely every day to protect the safety of our diplomatic property and personnel abroad.

We appreciate very much, Mr. Chairman, some of the changes that you made to 118, but that still leaves attachable consular property, diplomatic residences, and consular bank accounts. The failure to permit the President to protect such properties would seriously impair our own interests because we have more diplomatic property and personnel abroad than any other country in the world, and we would be more at risk than any other country if the protections of diplomatic and consular property were eroded. If we flout our obligations, we can expect other countries to target our diplomatic property when they disagree strongly with our policies or actions.

In the specific case of Iran, attachment of Iran's consular and diplomatic properties could also result in substantial taxpayer liability, and that is because Iran's diplomatic and consular properties in the United States are the subject of a claim brought by Iran against the United States before the Iran-United States Claims Tribunal.

In addition, there is yet a third problem, and this is among and between American nationals. The proposed legislation, Mr. Chairman, would frustrate equity among U.S. nationals with claims against terrorism-list states. It would create a winner-take-all race to the courthouse, arbitrarily permitting recovery for the first or

first few claimants out of limited available resources, leaving others similarly situated stranded with no recovery at all.

The Alejandre and Flatow cases do not represent the only claims of U.S. nationals against Cuba and Iran. No other claimants would be able with this legislation to recover, and that would seriously prejudice their interests.

In the case of Cuba, if I can just show this chart, Mr. Chairman, the U.S. Foreign Claims Settlement Commission has certified 5,911 claims of U.S. nationals against the government of Cuba, totaling approximately $6 billion with interest, dating back to the early 1960's. These include not only property claims, but wrongful death claims of people assassinated by the Cuban government. These claimants have waited over 35 years and have received no compensation for their losses. It would be unseemly to deprive them of an opportunity to recover by giving someone else the opportunity who had received a judgment.

The same situation, Mr. Chairman, applies with respect to Iran. In addition to the Flatow case, the plaintiffs in the Beirut hostage case, David Jacobsen, Joseph Cicippio, Frank Reed, and their families, collectively have won judgments against Iran totaling $65 million arising from their having been held hostage in Lebanon. Similar suits against Iran, including one brought by Terry Anderson for damages related to his captivity, are currently pending in the Federal District Court.

Mr. Chairman, as this chart shows and this indicates, the assets that were, in effect, transferred at the time of the hostage release at the end of the Carter administration and the beginning of the Clinton administration, some $10 billion, but it indicates there are still some $500 million in claims by both private U.S. citizens and the U.S. Government against Iran in the Iran-United States Claims Tribunal.

Against this background in which outstanding claims far exceed available funds, the proposed legislation would simply permit the first claimants to reach the courthouse to deplete all the available assets, leaving nothing for others similarly situated, indeed, others who had filed claims years, and indeed decades, before these. This is fundamentally unfair. Equitable resolution of all outstanding claims of terrorism-list states has to be accomplished systematically to ensure fairness to all parties, not in a piecemeal fashion envisioned by the proposed legislation.

There is also a garnishment provision, and permitting garnishment of the payment of tribunal awards against the United States will result in U.S. taxpayers paying twice, because it does not extinguish the claim. We are still liable, once when a private claimant garnishes the payment, and then a second time when Iran would attempt to enforce the still unsatisfied award against us abroad.

Let me conclude with this, and that is the 1996 amendment waiving sovereign immunity and creating a judicial cause of action for damages arising from the acts of terrorism has not met its purposes of providing compensation to victims and deterring terrorism. A system that is to date left no recovery option, other than one that conflicts so fundamentally with both U.S. national interests or international obligations and elemental fairness among and be-

tween claimants, is not an acceptable system. We are anxious to work with Congress to address this difficult problem. We would like to formulate, Mr. Chairman, with you, and I know your deep interest in this and with Senator Lautenberg, Senator Mack, and others, a short- and long-term approach to address these concerns. We also need a careful and deliberative review of the issue.

Therefore, we suggest that Congress and the administration commit to a joint commission to review all aspects of the problem, to recommend to the President and the Congress proposals to find ways to help these families receive compensation and a way consistent with our national interests and international obligations. A fundamental principle for this joint commission would be the need to inventory outstanding claims and develop an effective and fair mechanism for compensation of victims of terrorism.

We would suggest that the commission present alternatives to statutes that would make blocked assets available for attachment, but we are committed to working together with you to find legislative and nonlegislative means for addressing these issues. We would also look forward to making sure, so this is done expeditiously, Mr. Chairman, and the people who have waited a very long time do not have to wait longer, to begin working on a commission so it can be constituted soon and be charged with making its recommendations within 12 months after its constitution.

Thank you again for giving me the opportunity to appear, and I look forward to your comments and questions.

Senator KYL. Thank you, Mr. Eizenstat. Let me begin by refreshing your recollection as to what the President asked us to do. He said, this is on February 26, 1996, on national television, "I am asking that the Congress pass legislation that would provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States."

Now, are you telling us that he was not sincere or that he had not checked with you lawyers first to realize that we could not do what he was asking us to do?

Mr. EIZENSTAT. I believe that he was entirely sincere, Mr. Chairman, and the way that that sincerity was demonstrated was that he determined that he already had authority under the Trading with the Enemy Act, under which Cuban assets were blocked, to make an immediate ex gratia payment to deal with the tremendous trauma during the same year in which this disastrous affair had occurred. He in no way was encouraging an act which would have provided a private right of action. Indeed, when the amendment in 1996 was proposed to the antiterrorism legislation, the administration indicated its grave concern with such suits.

Senator KYL. Did the President sign that legislation?

Mr. EIZENSTAT. He did, and the reason he signed it is because he thought that the overall Act, which he had proposed and which was a key feature of the administration's fight against antiterrorism, had enough provisions in it that merited signature, notwithstanding the very real concerns that we had with this particular provision.

Senator KYL. Now, the $300,000 that he provided, that was a humanitarian gesture. That was not intended to be full and complete compensation, was it?

Mr. EIZENSTAT. It was intended as a humanitarian ex gratia payment, yes, sir.

Senator KYL. Otherwise, he would not have called on the Congress to provide for immediate compensation to the families, which he said they were entitled to under international law.

Mr. EIZENSTAT. He felt that this was the appropriate response to make. It could be done quickly and without implicating the national security and equity concerns that I have raised.

Senator KYL. Did the President ever tell the families and the Flatows that their investment of time and emotional energy was inconsistent with U.S. national interests and it interfered with this administration's policy toward Cuba and Iran?

Mr. EIZENSTAT. I am not aware of personal conversations that he had with them, but I can tell you about my personal conversations with them.

Senator KYL. Did you ever tell them to cease their litigation?

Mr. EIZENSTAT. I will tell you that what I did is I have spent dozens and dozens and dozens of hours trying to help on this. I met Mr. Flatow and his lawyer, Mr. Peerless, on several occasions. We turned over thousands of pages of documents to Steve and to Mr. Flatow's counsel to try to help them locate nonblocked assets. We identified some bank accounts where they could potentially get funds. We have turned every stone possible over to try to help them find assets that did not implicate these problems. We have given them documents that were under our control because of our concern. I have on two or three occasions met with Mr. Flatow, and as I mentioned, the meeting that I had with the families to the Brothers to the Rescue, and I can remember exactly the room in the El Diario building on the second floor, was one that, to me, was one of the most emotional meetings I have ever had.

We want to be able to help them, and what I am suggesting, Mr. Chairman, and I do not mean this in any way to suggest that we are sort of pushing this off to a commission, because I have been around Washington for over 20 years and a lot of times, you just push problems off to a commission. What we are suggesting is two things. We are talking about trying to develop short- and long-term solutions.

The problem, if we can take this in addition to the Flatow problem and the Brothers to the Rescue problem, what are we going to do with Terry Anderson and his suit? What are we going to do with the Jacobsens? What do we do with these 5,911 people? What we need is a systematic, systemic way of dealing with Americans who are injured or killed by acts of terrorism. That is why we think we need a commission.

Senator KYL. Have you told the Andersons and the Jacobsens that they are wasting their time in pursuing their claims in court?

Mr. EIZENSTAT. I do not think it is for the U.S. Government to tell private litigants how they should spend their time. But what we are suggesting now is that there has to be a systematic and systemic way, because, frankly, if this attachment were to occur, as

this legislation would permit, Mr. Anderson would have nothing to attach if he won his judgment. Neither would the Jacobsens.

Senator KYL. Mr. Eizenstat, what I am troubled with is, going back to the President's statement, it is totally inconsistent with your testimony. Now, you said he was sincere, but it sounds to me like this is an after-the-fact, it is an afterthought, your testimony is, saying, oh, my gosh, look what the President said. We cannot do that. What he said was, one, immediate compensation, not waiting for some commission to try to figure out something, to which they are entitled under international law. You said, no, international law does not permit this garnishment and so on. Three, out of Cuba's blocked assets, and you are saying, no, we should not let them get this compensation out of Cuba's blocked assets because we need to use that for leverage. Now, the President said, get it out of blocked assets. You are saying, no, we cannot get it out of blocked assets. Please explain.

Mr. EIZENSTAT. Yes, sir. First of all, the President did not suggest that legislation be passed which would have all the negative implications that I have suggested. He did not suggest that suits be brought and he did act within the same year to provide payments, and he made them, sir, out of blocked assets, out of blocked Cuban assets.

Senator KYL. If I can just interrupt you for a second, you have made the argument here that we cannot pursue blocked assets, that that would interfere with U.S. national security interests. It was almost a direct quotation.

Mr. EIZENSTAT. That is correct——

Senator KYL. But the President called for compensation out of Cuba's blocked assets here in the United States.

Mr. EIZENSTAT. What he did is on a one-time ex gratia payment, not as intended, and at a time of great emotion and great pain, he made a one-time gesture, a humanitarian gesture, out of blocked assets. That was not intended to create a precedent, and I think the best evidence——

Senator KYL. But then he called upon us to pass, and I am quoting now, "I am asking that Congress pass legislation that would provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States." He was not saying, now I have, out of the goodness of my heart, taken $300,000 out of these blocked assets, but, of course, it would be contrary to our national security interest to take any more. No. He did not say that. He said, I am asking you, Congress, to pass legislation that will provide immediate compensation out of those blocked assets. You are now coming here saying, we lawyers have taken a look at this and we think it would be inimical to U.S. national security interests to do that.

Mr. EIZENSTAT. Yes, sir, I understand your point, and let me respond again in two ways. No. 1, the President did act. He acted under the Trading with the Enemy Act and he made a one-time payment out of blocked assets as a humanitarian gesture.

No. 2, Strobe Talbott, our Deputy Secretary of State, sent a letter to the Congress as soon as we had the opportunity of looking at the 1996 amendment and expressed, not in 1999 with Stu Eizenstat,

in 1996 expressed our grave concern with very similar legislation and made many of the points that I am making now.

And again, there is simply no doubting that this would enormously complicate our major sanction against terrorist countries and the major leverage we have and used in Vietnam, with the Iranian hostages, and which we would use in a post-Castro era, which I hope comes much sooner than later. This would be very important leverage for us to have.

But there is the additional point of the equity. What do you say to the 5,911 people who have waited for 35 years for recovery, including several families whose families were assassinated? What do you say to the Jacobsen family, that they simply did not get to the courthouse quickly enough?

So that is why we would like to work with you to develop a systematic and systemic approach to this problem and not have an unseemly race to the courthouse in which similarly situated American citizens are disadvantaged, and indeed, some are not even similarly situated. Some have prior claims.

In the 1970's, Mr. Chairman, these 5,911 people, including the families whose family members were assassinated, did not have the opportunity to bring suits. It was not open to them at that time because this amendment did not exist. But they have legitimate claims. They went through whatever legal process one could go to to get their claims, and our own commission, the Foreign Claims Settlement Commission, sifting through thousands of claims, certified these 5,911 claims as legitimate claims.

Again, in a post-Castro era, what we would hope to do with this $166 million is to trade it, in effect, as leverage so that Cuba compensates these claimants, or returns, even better, the expropriated property that they are still holding, or if they do not, that we take that $166 million and we distribute it immediately to those 5,911 claimants and to the Brothers to the Rescue.

Senator KYL. So you agree with the White House briefers who said on February 26, 1996, that Cuba will never get the blocked assets?

Mr. EIZENSTAT. We believe—yes. We believe that these blocked assets should be used, Mr. Chairman, as leverage for the purposes that I have indicated.

Senator KYL. I am going to turn to Senator Feinstein. I just——

Mr. EIZENSTAT. What actually happens in a negotiation, obviously, I cannot tell. But our basic goal is to use this, as we have done under so many Presidents for so many decades, as leverage in the event in a post-Castro era there is a normalization of relations.

Senator KYL. With all due respect, I find your attempt to explain the difference between the President's request of the Congress and your position now to be unsatisfactory. I think that our Government's treatment of these people now amounts to very cruel and cavalier treatment of the victims, and it seems to me that it puts us in the position of hiding behind legalisms in a situation in which we ought to be promoting the rule of law and justice and that justice is not being served in this case.

I am going to submit some additional questions for the record, to which I would appreciate answers as soon as you can get them to us.

At this point, I turn to Senator Feinstein.

Mr. EIZENSTAT. If I may, just on your last point, I do not see how it promotes the rule of law when we would be required under the legislation to undercut international legal obligations to protect property and thereby subject our own property to seizure. It seems to me that that undercuts the rule of law.

Senator KYL. Senator Feinstein.

Senator FEINSTEIN. I have great respect for your intelligence, but I am a lot simpler person than you are. I think for a state to sponsor terrorism is just plain wrong. I see nothing wrong with having the assets of a country go to reimburse victims of that. I do not believe our policy against terrorism works very well. I do not believe we protect our diplomatic embassies. I mean, we have had ample evidence of that. So I do not really think the five points that you have elucidated here, in reality, work.

I might say that I have always believed that when somebody does not know what to do, you appoint a commission. I mean, mayors have done that, governors have done it, Presidents do it. This is an issue over money, and either the money is going to come from us or it is going to come from the responsible government.

I mean, I just do not understand this convoluted rationale that——

Mr. EIZENSTAT. Senator Feinstein, I have had the pleasure of knowing you for many years. There is nothing convoluted about this. It is about as straightforward as a straight arrow and I am going to, please, explain that.

I know that you have a family in the State of California, the Jacobsen family.

Senator FEINSTEIN. Right.

Mr. EIZENSTAT. They would not get a plugged nickel, because in this race to the courthouse that this legislation would sanction, all the assets available, even if they could be taken, would be depleted. Now, that cannot be a fair solution. How is it possible that it is fair to treat American citizens similarly situated and simply allow a race to the courthouse? That is not fair at all.

Senator FEINSTEIN. Can you make these judgments? I mean, is this not up to a judge to make those judgments, if a judge, looking at the whole situation, makes a judgment?

Mr. EIZENSTAT. The judge only made the judgment of how much they are entitled to. He cannot make the judgment about whether or not they have any assets to recover against, and the fact is, there would not be any assets. They would be taken.

The problem and the reason we need a systemic solution is that the claims—let us take the $247 million award that the Flatow family got. It exceeds the amount of assets. There would not be anything left.

With the Brothers to the Rescue, what do you say to the families who have been waiting since the 1960's to recover?

Senator FEINSTEIN. Well, maybe what you do is you apportion some proportion of assets in terms of a token payment, but at least it is a recognition that governments cannot get away with sponsor-

ing terrorism. I do not see any abatement of terrorism in the world today because of our great policies here.

Mr. EIZENSTAT. At the end of the road, we have a variety of things we obviously try to do with respect to terrorist countries. But I think that it is very clear that one of the strongest—you know, we put the boycotts in, we try to get our allies to help us on sanctions. Some are better than others. But what we try to do——

Senator FEINSTEIN. Most of the sanctions hurt innocent people.

Mr. EIZENSTAT. I have testified about the problem of sanctions, as you know. But one of the best, most important, and most effective weapons we have against terrorist countries is the capacity to block their assets and then hold that for leverage. If this had occurred in 1978 or 1979 and the Flatows had been able to recover, we might not have been able to get some of the hostages out. We used those blocked assets as leverage to get the hostages out. In Vietnam, we used the blocked assets to be able to get information on MIA's. With respect to our normalization with Cambodia and some of the former East Bloc Communist countries, when we normalized, we used that. We would intend to use these blocked assets as leverage, as well.

With respect to Iran, essentially, the major properties were returned as part of the hostage deal. They were returned in 1981 and what remains is under the Iran Claims Tribunal and it is subject to the Algiers Accord, diplomatic and consular properties and other properties which are in litigation. We cannot give that back because it is part of the Algiers Accord.

Senator FEINSTEIN. I guess, you know, terrorism is a very visceral thing and it does not abide by law. I am not sure that one can always fight terrorism with law. I think there comes also a visceral response. I have a hard time when people go to Federal court, they have experienced horrendous situations, they get a judgment, we have assets, and then you are saying, well, theoretically, we might use this money for this or that or the other thing, and I do not doubt they are all good causes. But maybe you strike a blow against terrorism that is meaningful by saying all these blocked assets essentially go to reimburse people who have suffered because your government sponsors terrorism. Maybe these countries stop sponsoring terrorism. Maybe that is naive on my part, but nonetheless, whatever we are doing does not seem to make any kind of demonstrable change.

Mr. EIZENSTAT. I think we all are frustrated by the difficulty of dealing with terrorist countries. We all want the maximum leverage. But if the United States of America, as the principal critic of those who flaunt international principles and values and human rights, ends up taking actions which violate the Vienna Convention on diplomatic property, which violate other international obligations, which undercut the Algiers Accord, that sets a very poor example at a time when we are contending that others are acting contrary to international norms. We have to be the upholder of those norms if we are going to have any moral voice to deal with these situations.

Senator FEINSTEIN. Well, a lot of people believe we violated international law by attacking Kosovo, too. I mean, there is a different point of view there.

But let me ask you this. If you are concerned about these assets, there not being enough in the assets to recompense people, supposing we put a cap on the legislation before us of a limited amount of money that would be available to a victim from these assets, $1 million, $2 million, whatever it might be, so that it would not take all of the assets, would you then support the legislation?

Mr. EIZENSTAT. It would still basically have the fundamental flaws that we indicated in terms of violating our international obligations and the leverage that these frozen assets have over the terrorist countries and that we would intend to use. So we would still have grave difficulties.

But we are willing to sit down sincerely to deal with this problem, and we think the commission is necessary for a long term. But I said in my testimony, we are willing to look at short-term and long-term solutions and we would welcome the opportunity to sit down with you and explore a variety of options that do not implicate some of the problems I mentioned, but that could potentially provide some measure of justice to the families. We are——

Senator FEINSTEIN. Can you name one of those options? You probably know them better than anyone else.

Mr. EIZENSTAT. Well, we are looking at a variety of things and we would like the opportunity perhaps to sit down and discuss them. I can tell you sincerely, we have had several interagency meetings at which we have explored all sorts of options, all sorts of options, and we are trying very hard to come up with something. We are sincere in this. We want to see the Brothers to the Rescue families and the Flatow families compensated. We want that to happen, and we would like to try to work with you on that at the same time as we set up this commission and look at the long term.

Why do I say that? Not because I am trying to push it off and not deal with the particular problem at hand. I said in my testimony, we are willing to look at short-term and long-term solutions. But, unfortunately—unfortunately—with the kind of terrorist-list states that we are dealing with, there will be another case tomorrow and the day after tomorrow and the day after that, and if we do not develop something, you would not want us to have this hearing a year from now with Terry Anderson and Terry Anderson is going to face no assets, nothing. Nothing is available to him. What do you say to him?

Senator FEINSTEIN. Well, he faces that situation now.

Mr. EIZENSTAT. He does. But then you have created a race to the courthouse, and the same with the Jacobsens. They have got a judgment. They have got a judgment. So we would like to——

Senator FEINSTEIN. What you are saying is families give up. There is no sense in going to court.

Mr. EIZENSTAT. What we are saying is we would like——

Senator FEINSTEIN. There is no sense in trying to get justice because your government is not really going to support you.

Mr. EIZENSTAT. No, ma'am. What we are saying is, if I may say so, this government does support American citizens. We try to protect them against terrorism, and when they are the victims, we do

everything humanly possible to provide them relief and benefits. That is why the President acted with the Brothers to the Rescue. That is why I spent hours and hours and hours trying to help Mr. Flatow's attorneys identify properties, and if I may so, at the potential expense of the Jacobsens, because they did not ask.

What I am suggesting is we need a systematic approach. Whatever short-term solutions, and we will try to work with you on those, we obviously—I mean, it is just patently obvious that we need a long-term approach to deal with this situation because there are not enough assets. These countries do not have that much assets. In the case of Iran, we transferred all of the assets basically to Iran and what is remaining is a relatively smaller amount in the claims tribunal, pursuant to the Algiers Accord that President Carter and President Reagan completed.

So we are dealing with a problem that is going to recur. We have got real live people, like Terry Anderson, like the families of the Jacobsens and Reeds and Cicippios, who are also waiting for judgment. We have 5,911 people who have been waiting for 35 years to get a bloody red cent out of the Cubans. We need to do something that more systemically deals with this problem, rather than just say, you filed a suit. You can have a hearing. You are going to get recovery. Then we are left with other people holding the bag.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Senator KYL. Thank you, Senator Feinstein.

It seems pretty clear to me that the way to go here is to satisfy the judgments that have been entered, to the extent they can be satisfied, and then require as a condition to the kind of diplomatic relationships that we would hope to have with these countries in the future compensation for the other people that have judgments against their country. That is the only way they are going to get compensated, unless the U.S. Government comes up with the money.

I just continue to be struck by the fact that you contend two other things, one, that diplomatic property has to be protected. We have provided for a waiver for diplomatic property in the legislation. And that it is a violation of international law to provide for compensation out of blocked assets. But the President said, again, "I am asking that the Congress pass legislation that would provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States."

Either the President did not know the law when he said that or his agents, yourself included, are not complying with his desire that these people be satisfied in accordance with international law out of blocked assets here in the United States. I suspect that what has happened here is that the President, to make a point that he would like to help these people, made a statement which later his lawyers say he should not have made, that it is more complicated than that, Mr. President.

If that is the case, then I would like a candid statement to that effect. But we have got double-talk here, not a repudiation of what the President said, but a clear contradiction to what he said in your testimony. I think before we can have a rational discussion about how to resolve the problem, we have to have a candid ac-

knowledgement as to what the case is. Are people entitled to compensation out of blocked assets under international law or not? If it cannot happen——

Mr. EIZENSTAT. A couple of points, Mr. Chairman. I do not——

Senator KYL [continuing]. Then the President should not have requested us to pass that kind of law.

Mr. EIZENSTAT. A couple of points. I do not engage in double-talk.

Senator KYL. Pardon?

Mr. EIZENSTAT. I do not engage in double-talk.

Senator KYL. Well, I have yet to receive a satisfactory answer, then, as to how the President could ask us to provide for compensation out of blocked assets, something to which they are entitled under international law, and your testimony that says, no, international law forbids us from doing that.

Mr. EIZENSTAT. Yes, sir. You mentioned that you had taken care of the problem of diplomatic property, and I do appreciate, I really do appreciate the fact that you made an effort at that. However, with your change, you do not cover consular property. You do not cover diplomatic residences. You do not cover consular bank accounts. And in addition, your legislation would also add something that is not in section 118, and that is you would deal with all assets of any agency or instrumentality of a foreign state and those would be subject to attachment.

Now, this is an extraordinary situation because you would be punishing innocent co-investors in a state-owned enterprise who have no connection whatsoever to the terrorist act. It would also subject on a reciprocity basis many U.S. investors who are engaging in publicly-owned facilities abroad. So this expands the problem to some extent, and again, the legislation does not deal at all with the blocked property issue.

In terms, again, of the President's statement, I have tried to explain as best I could that the President did, in fact, do what he suggested. He did act with respect to the Trading with the Enemy Act. He took monies out of a blocked account and made an ex gratia humanitarian payment.

Senator KYL. Thank you very much for your testimony.

Mr. EIZENSTAT. Thank you. I appreciate very much the opportunity, Mr. Chairman.

[The prepared statement of Mr. Eizenstat follows:]

PREPARED STATEMENT OF STUART E. EIZENSTAT

MR. CHAIRMAN, RANKING MEMBER LEAHY, AND MEMBERS OF THE COMMITTEE: Good morning. I am here to discuss the Administration's position on proposals to further amend the Foreign Sovereign Immunities Act ("FSIA").

Let me begin by expressing the Administration's and my own personal sympathy to victims of international terrorism—an evil that this Administration has taken world leadership in combating. It is the responsibility of the United States Government to do everything possible to protect American lives from international terrorism. People like the Flatows and the families of the Brothers to the Rescue deserve government support in their demand to be compensated for their grievous losses. The Administration is dedicated to working with the Congress to achieve this goal by setting up a commission which would recommend proposals to the President and to the Congress to help families of the victims of international terrorism receive compensation. But this must be done in a way that is consistent with our national interest, is not done in a piecemeal fashion, and does not touch blocked assets or diplomatic property to achieve this end. The commission would also review all other aspects of the problems presented by acts of international terrorism.

International terrorism is an all too common evil in today's world, affecting the lives of too many Americans. In my capacity as the President's Special Representative for Cuban Democracy, I met in Miami with the families of the "Brothers to the Rescue" members who were shot down by Cuba. It was an unforgettable experience and one that personalized for me the brutality of the Castro regime. I have also met on several occasions with Mr. Flatow, who lost his daughter Alisa in a bomb attack in Gaza. I was touched by the depth of suffering, as well as impressed by the strength and determination of the families to seek justice for their loved ones. We understand the frustrations that have led the sponsors of this legislation to introduce it. These plaintiffs have suffered grievously at the hands of terrorists and should be compensated by those responsible.

However, it should come as no surprise that the states involved here—states that we have publicly branded as sponsors of terrorism—do not view the United States as a cordial environment to conduct financial transactions. As part of our efforts to combat terrorism, we impose a wide range of economic sanctions against state sponsors of terrorism in order to deprive them of the resources to fund acts of terrorism and to affect their conduct. Because of these measures, terrorism-list states engage in minimal economic activity in the United States. In many cases, the only assets that states which sponsor terrorism have in the United States are either blocked or diplomatic property. Such property is not legally available for attachment and execution of judgments, for very good reasons involving the security and interests of the entire nation, which I will describe in detail.

As much as we join the sponsors of this bill in desiring to have victims of international terrorism compensated, it would be unwise in the extreme to ignore these reasons and forgo the interests of all our citizens for this purpose.

The legislation before the Committee today, though born of good intentions, is fundamentally flawed. The legislation would have five principal effects, all of which would be seriously damaging to important U.S. interests.

First, blocking assets of terrorist states is one of the most significant economic sanctions tools available to the President. This legislation would undermine the President's ability to combat international terrorism and other threats to national security by permitting the attachment of blocked property, thereby depriving the U.S. of a source of leverage, such as was used to gain the release of our citizens held hostage in Iran.

Second, it could cause the U.S. to violate our obligations to protect diplomatic property of other nations, and would put our own diplomatic property around the world at risk.

Third, it would benefit one small group of Americans over a far larger group of Americans. Those with judgments in court since the FSIA amendments of 1996 would benefit over others, many of whom have waited decades to be compensated by Cuba and Iran for both the loss of property and the loss of the lives of their loved ones, and would leave no assets for their claims and others that may follow.

Fourth, it would breach the long-standing principle that the United States Government has sovereign immunity from garnishment, thereby preventing the U.S. Government from making good on its debts and potentially causing the U.S. taxpayer to incur substantial financial liability.

Fifth, it would direct courts to ignore the separate legal status of states and their agencies and instrumentalities, overturning Supreme Court precedent and basic principles of corporate and international law by making state-owned corporations liable for the debts of the state.

As *The Washington Post* observed in a recent editorial, "Victims of terrorism certainly should be compensated, but a mechanism that permits individual recovery to take precedence over significant foreign policy interests is flawed." The proposed legislation would indeed seriously compromise important national security, foreign policy, and other clear national interests, and discriminate among and between past and future U.S. claimants. For the reasons which I will explain in detail during the course of my remarks, the Administration strongly opposes the proposed legislation.

ATTACHMENT OF BLOCKED AND DIPLOMATIC PROPERTY

I want to begin by explaining the Administration's grave concerns with the provisions of the legislation that seek to nullify the President's waiver of last year's Foreign Sovereign Immunities Act amendments and thereby permit attachment of blocked and diplomatic property.

Let us be entirely clear: attachment of blocked or diplomatic property would compromise our national security and would seriously prejudice a number of important national interests. These interests include:

- Our interest in the effective functioning and preservation of our asset blocking programs to combat threats to our national security and to the safety of American citizens abroad;
- Our legal obligation to protect the diplomatic property of foreign states, regardless of the status of our relations with those states, and our clear national interest in upholding the international legal regime that protects U.S. diplomatic property and personnel abroad; and
- Our interest in avoiding laws that would create gross inequities in the amounts of compensation received by similarly situated U.S. nationals with claims against foreign governments.

I will address each of these concerns in turn.

ELIMINATION OF THE EFFECTIVENESS OF OUR BLOCKING PROGRAMS

The ability to block assets represents one of the primary tools available to the United States to deter aggression and discourage or end hostile actions against U.S. citizens abroad. Our efforts to combat threats to our national security posed by terrorism-list countries such as Iraq, Libya, Cuba, and Sudan rely upon our ability to block the assets of those countries.

Blocking assets permits the United States to deprive such countries of resources that they could use to harm our interests, and to disrupt their ability to carry out international financial transactions. By placing the assets of such countries in the sole control of the President, blocking programs permit the President at any time to withhold substantial benefits from countries whose conduct we abhor, and to offer a potential incentive to such countries to reform their conduct. Our blocking programs thus provide the United States with a unique and flexible form of leverage over countries that engage in threatening conduct.

The Congress has recognized the need for the President to be able to regulate the assets of foreign states to meet threats to the U.S. national security, foreign policy, and economy. In both the International Emergency Economic Powers Act and the Trading with the Enemy Act the Congress has provided the President with statutory authority for regulating foreign assets. On the basis of this authority and foreign policy powers under the Constitution, Presidents have blocked property and interests in property of foreign states and foreign nationals that today amounts to over $3.4 billion.

The Supreme Court has also recognized the importance of the President's blocking authority, stating that such blocking orders "permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a 'bargaining chip' to be used by the President when dealing with a hostile country," *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981).

The leverage provided by blocked assets has proved central to our ability to protect important U.S. national security and foreign policy interests. The most striking example is the Iran Hostage Crisis from 1979–1981. The critical bargaining chip the United States had to bring to the table in an effort to resolve the crisis was the almost $10 billion in Iranian Government assets that the President had blocked shortly after the taking of our embassy. This was a decision in which I was involved as President Carter's Chief Domestic Adviser. Because the return of the blocked assets was one of Iran's principal conditions for the release of the hostages, we would not have been able to secure the safe release of the hostages and to settle thousands of claims of U.S. nationals if those blocked assets had not been available. This settlement with Iran also resulted in the eventual payment of $7.5 billion in claims to or for the benefit of U.S. nationals against Iran.

In the case of Vietnam, the leverage provided by approximately $350 million in blocked assets, combined with Vietnam's inability to gain access to U.S. technology and trade, played an important role in persuading Vietnam's leadership to address important U.S. concerns in the normalization process. These concerns included full accounting of POWs and MIAs from the Vietnam War, accepting responsibility for over $200 million in U.S. claims which had been adjudicated by the Foreign Claims Settlement Commission, and moderating Vietnamese actions in Cambodia.

In addition, blocked assets have helped us to secure equitable settlements of claims of U.S. nationals against such countries as Romania, Bulgaria, and Cambodia in the context of normalization of relations. These results could not have been achieved without effective blocking programs.

However, our blocking programs simply cannot function, and cannot serve to protect these important interests, if blocked assets are subject to attachment and execution by private parties, as the proposed legislation would permit. The ability to

use blocked assets as leverage against foreign states that threaten U.S. interests is essentially eliminated if the President is unable to preserve and control the disposition of such assets. Private rights of execution against blocked assets would permanently rob the President of the leverage blocking provides by depleting the pool of blocked assets.

In the Cuban and Iranian contexts, for example, the value of the judgments won by the Brothers to the Rescue families exceeds the total known value of the blocked assets of the Government of Cuba in the United States, and the value of the judgment won by the Flatow family or the former Beirut Hostages exceeds the total known value of the blocked assets of the Government of Iran in the United States. Attachment of blocked assets to satisfy private judgments in these and similar cases would leave no remaining assets of terrorism-list governments in the President's control, denying the President an important source of leverage and seriously weakening his hand in dealing with threats to our national security.

In addition, the prospect of future attachments by private parties would place a perpetual cloud over the President's ongoing control over blocked assets. This would further undermine the President's ability to use such assets as leverage in negotiations, even where attachments had not yet occurred.

Put simply, permitting attachment of blocked assets would eliminate the use of our blocking programs as a key tool for combating threats against our national security.

OUR OBLIGATION AND INTEREST IN PROTECTING DIPLOMATIC PROPERTY

The proposed legislation also could cause the United States to violate our obligations under international law to protect diplomatic property, and would undermine the legal protections for diplomatic property on which we rely every day to protect the safety of our diplomatic property and personnel abroad. Even though the current version of the legislation before the Committee provides protection for a slightly broader range of diplomatic property than previous versions, it is still fundamentally flawed in its failure to permit the President to protect properties, including consular properties, some diplomatic bank accounts, and diplomatic residences, which international law obligates us to protect.

The United States' legal obligation to prevent the attachment of diplomatic property could not be clearer. Protection of diplomatic property is required by the Vienna Convention on Diplomatic Relations, to which the United States and all of the states against which suits presently may be brought under the 1996 amendments to the FSIA are parties. Under Article 45 of the Vienna Convention on Diplomatic Relations we are obligated to protect the premises of diplomatic missions, together with their real and personal property and archives, of countries with which we have severed diplomatic relations or are in armed conflict. This would include diplomatic residences owned by the foreign state.

Likewise, under Article 27 of the Vienna Convention on Consular Relations, the same protection is required for consular premises, property, and archives. Attachment of any of the types of property covered by the Vienna Conventions on Diplomatic and Consular Relations could place the United States in violation of our obligations under international law. The proposed legislation would only permit the President to ensure the protection of a narrow portion of the property covered by the Vienna Conventions, and would thereby place the United States in violation of our legal obligations.

In addition, the proposed legislation as drafted could cause us to breach our obligations to ensure the inviolability of missions to the United Nations, pursuant to the UN Headquarters Agreement and the General Convention on Privileges and Immunities.

Nor could our national interest in the protection of diplomatic property be clearer or more important. The United States owns over 3000 buildings and other structures abroad that it uses as embassies, consulates, missions to international organizations, and residences for our diplomats. The total value of this property is between $12 and $15 billion.

Because we have more diplomatic property and personnel abroad than any other country, we are more at risk than any other country if the protections for diplomatic and consular property are eroded. If we flout our obligations to protect the diplomatic and consular property of other countries, then we can expect other countries to target our diplomatic property when they disagree strongly with our policies or actions. Defending our national interests abroad often makes the United States unpopular with some foreign governments. We should not give those states who wish the United States ill an easy means to strike at us by declaring diplomatic property fair game.

In the specific case of Iran, attachment of Iran's diplomatic and consular properties could also result in substantial U.S. taxpayer liability. Iran's diplomatic and consular properties in the United States are the subject of a claim brought by Iran against the United States before the Iran-U.S. Claims Tribunal. I will say more about the Tribunal later in my remarks. For the moment, let me simply note that, although we are contesting this claim vigorously, the Tribunal could find that the United States should have transferred Iran's diplomatic and consular property to it in 1981. If it does so and the properties are not available because they have been liquidated to pay private judgments, the U.S. taxpayer would have to bear the cost of compensating Iran for the value of the properties. Such an award against the United States would be enforceable in the courts of any country, under the laws of that country.

EQUITY AMONG CLAIMANTS

The proposed legislation would also frustrate equity among U.S. nationals with claims against terrorism-list states. It would create a winner-take-all race to the courthouse, arbitrarily permitting recovery for the first, or first few, claimants from limited available assets, leaving other similarly situated claimants with no recovery at all. In fact, it would take away assets potentially available to them.

As I noted earlier, the value of the judgments held by the families of the Brothers to the Rescue victims exceeds the total value of blocked assets of the Government of Cuba in the United States. Similarly, even if the plaintiffs in the *Flatow* case were to succeed in attaching all of Iran's diplomatic and consular properties in the United States, these properties would be insufficient to satisfy even one tenth of the damages awarded in that judgment. In each case, execution on their judgments would exhaust all of the blocked assets of these governments in the United States.

However, the *Alejandre* and *Flatow* cases do not represent the only claims of U.S. nationals against Cuba and Iran. No other claimants would benefit at all from the proposed legislation; indeed this legislation would seriously prejudice their interests.

In the case of Cuba, the U.S. Foreign Claims Settlement Commission has certified 5,911 claims of U.S. nationals against the Government of Cuba, totaling approximately $6 billion with interest, dating back to the early 1960s. These include the wrongful death claims of family members of two individuals whom the Cuban Government executed after summary trial for alleged crimes against the Cuban state. Other claims relate to the Castro Government's seizure of homes and businesses from U.S. nationals. These claimants have waited over 35 years without yet receiving compensation for their losses. This bill will not help them at all.

The same situation applies with respect to Iran. In addition to the *Flatow* case, the plaintiffs in the Beirut Hostage case—David Jacobsen, Joseph Cicippio, Frank Reed, and their families—collectively have won judgments against Iran totaling $65 million arising from the three men being held hostage in Lebanon. Similar suits against Iran, including one brought by Terry Anderson for damages related to his captivity, are currently pending in the Federal District courts.

Moreover, given the nature of these regimes, it remains possible that in spite of our substantial efforts to combat terrorism, foreign terrorist states will commit future acts in violation of the rights of U.S. nationals, which may give rise to claims against them. If such incidents occur, these claimants will also have an interest in being compensated.

Against this background, in which outstanding claims far exceed available funds, the proposed legislation would permit the first claimants to reach the courthouse to deplete all the available assets of terrorism-list governments, leaving nothing for other similarly situated claimants. Satisfaction of the judgments in the Brothers to the Rescue and *Flatow* cases would come at the expense of all other claimants against Cuba and Iran, both past and future. This would be fundamentally unfair.

Equitable resolution of all outstanding claims of terrorism-list states must be accomplished systematically in order to ensure fairness to all parties, not in the piecemeal fashion envisioned by the proposed legislation.

In sum, permitting the attachment of blocked and diplomatic properties in individual cases, as the proposed legislation would do, would

- Undermine our ability to combat threats to our national security,
- Violate our obligations under international law,
- Place our diplomatic properties and personnel abroad at risk, and
- Lead to arbitrary inequities in the treatment of similarly situated U.S. nationals with claims against foreign governments.

BREACHING THE SOVEREIGN IMMUNITY OF THE UNITED STATES

Let me turn next to the provision of the proposed legislation which would permit garnishment of debts of the United States. This provision would breach the long-established principle that the United States Government has sovereign immunity from garnishment actions. This provision is of particular concern because it would result in the U.S. taxpayer being liable for millions, and perhaps hundreds of millions, of dollars by prejudicing the position of the United States with respect to claims pending before the Iran-U.S. Claims Tribunal in The Hague.

Let me say a few words about the Iran-U.S. Claims Tribunal. The Iran-U.S. Claims Tribunal is an arbitration court located at The Hague in the Netherlands. It was established as part of the agreement between Iran and the United States that freed the U.S. hostages in Iran and resolved outstanding claims that were then pending between the United States and Iran. Pursuant to this agreement and awards of the Tribunal, Iran has paid $7.5 billion in compensation to or for the benefit of U.S. nationals. The Tribunal also has jurisdiction over certain claims between the two governments.

The proposed legislation would prevent the United States from meeting its obligations to pay money to Iran in satisfaction of awards the Tribunal renders against the United States. Instead, the proposed legislation would permit private parties to garnish the funds of the United States Government in order to collect such payments before they reach Iran. Even without this change in the law, there have been efforts in the *Flatow* case to garnish the payment of a $6 million Tribunal award in Iran's favor.

It is important to understand that allowing private litigants to garnish amounts we owe Iran under Tribunal awards would not discharge our liability to Iran to pay such money. For example, if the efforts in the *Flatow* case succeed, the Flatow family will receive $6 million, but the United States will still owe Iran $6 million under the unpaid award. And because the awards of the Iran-U.S. Claims Tribunal are enforceable in the courts of any country, Iran can enforce awards against non-immune U.S. property in other countries if we do not pay them voluntarily.

Permitting garnishment of the payment of such awards would thus result in the U.S. taxpayer paying twice: once when a private claimant garnishes the payment, and a second time when Iran enforces the still unsatisfied award against us abroad. Because the judgments against Iran received by these plaintiffs total in the hundreds of millions of dollars, permitting garnishment of debts owed by the United States to Iran as a means of satisfying these judgments could cost the U.S. taxpayer hundreds of millions of dollars.

You should also know that we face other claims by Iran at the Tribunal totaling billions of dollars. We are vigorously contesting these claims. If we are unable to pay awards against us, our position before the Tribunal in these other claims will clearly be undermined.

ELIMINATING LEGAL SEPARATENESS OF AGENCIES AND INSTRUMENTALITIES

Let me now turn to the provision of the proposed legislation that would change the way the FSIA defines a foreign state's agencies and instrumentalities for terrorism-list countries where there is a terrorism-related judgment against it. This provision would overturn the Congress's own considered judgment when it passed the FSIA in 1976, as well as existing Supreme Court case law and basic principles of corporate and international law. In addition, it would prejudice the interests of U.S. citizens and corporations who invest abroad.

This provision would make corporations that are majority-owned or controlled by a terrorism-list foreign government liable for all of the individual debts of that government. The Congress recognized the danger of this position when it passed the FSIA in 1976. The Conference Report to that bill observed that "If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary."

U.S. citizens and corporations have far more money invested abroad than those of any other country, and thus have more to lose if investment protections such as those provided by the presumption of separate status is eroded. If we saddle the investors of other countries with the debts of foreign governments with which they are co-investors, as the proposed legislation would do, then we can expect U.S. investors to pay a considerably higher price when other governments follow our example.

This hearing has afforded a welcome opportunity to discuss a very important subject involving the fight against terrorism, compensation for victims, and critical na-

tional security interests. Unfortunately, however, the concerns raised here today indicate that the 1996 amendment waiving sovereign immunity and creating a judicial cause of action for damages arising from acts terrorism has not met its purposes of providing compensation to victims and deterring terrorism. In fact, if blocked assets were exhausted to compensate the families, which would be the result of this bill, the leverage to affect the conduct of the terrorist-list states would be lost along with the blocked assets. I hasten to add that we are not happy that these suits have not led to recovery for families who have brought cases under the 1996 amendment. A system that has to date left no recovery option other than one that conflicts with U.S. national security interests is not an acceptable system.

We are anxious to work with the Congress to address this difficult problem. Together, we hope to formulate short and longer-term approaches that will address the concerns—of compensation for terrorist acts and the U.S. national interests and international obligations that we all share—in a much more satisfactory way. Most important, we believe that for a workable and effective longer-term solution we need a careful and deliberative review of the issues, informed by our experience since the 1996 amendment. We suggest that the Administration and Congress commit to a joint commission to review all aspects of the problem, and to recommend to the President and the Congress proposals to find ways to help these families receive compensation, in a way consistent with our overall national interests and international obligations.

This commission's task would differ from previous commissions such as that established under the 1996 Antiterrorism and Effective Death Penalty Act. The "Commission on the Advancement of Federal Law Enforcement" has 10 specific areas of inquiry in its broad law enforcement charter, with capability to investigate and deter terrorism being only one of them.

We believe that the new commission should be one of stature and with the right expertise to confront all the hard issues we have discussed today—including the lack of effective remedies in these cases because of sanctions against terrorism-list countries under U.S. law, which are absolutely necessary to maintain. I would like to pursue this idea in more depth with you and your staffs.

A fundamental principle for this joint commission—by definition—would be the need to inventory outstanding claims and develop an effective and fair mechanism for compensation of victims of terrorism. We believe it should be encouraged to think broadly, including consideration of avenues other than the judicial one created by the 1996 amendment.

Just as important, the commission should be guided by the principle of preservation of blocking programs and protecting diplomatic property, for the important reasons we have addressed here today. In this light, we would suggest that the commission should present alternatives to statutes that would make blocked assets available for attachment, such as last year's amendments to the FSIA and the recent bill presented for consideration by this committee. Just as critical U.S. interests served by blocking must be preserved, so should the commission consider the likelihood that, under the current scheme, foreign countries will take reciprocal actions against U.S. property abroad—both diplomatic and private.

Once again, we are committed to working together with you to find legislative and non-legislative means for addressing these issues. As one critical part of this effort, we look forward to beginning work on a commission so it can be constituted soon and be charged with making its recommendations within 12 months thereafter.

Senator KYL. Would the members of the third panel please come forward. They are Stephen Flatow, Maggie Khuly, Dr. Allan Gerson, Dr. Patrick Clawson, and Leonard Garment.

Leading off the third panel is Stephen Flatow. Mr. Flatow's daughter, Alisa, was murdered by Iranian-backed terrorists in Gaza in 1995, and since that time, he has been an outspoken and persistent advocate of the rights of victims to seek redress against terrorist states in the U.S. courts.

Our second witness on this panel is Maggie Khuly. Ms. Khuly is the sister of Armando Alejandre, a Vietnam veteran and a member of the Brothers to the Rescue, who was murdered by the Cuban air force on February 24, 1996. She is also an advocate for the rights of victims to seek redress against terrorist states in the U.S. courts. I should note that she is accompanied today by Miriam de la Pena,

the mother of Mario Manuel de la Pena, another member of Brothers to the Rescue who lost his life on that same day.

The third witness on the panel is Dr. Allen Gerson, who is a Senior Fellow for International Law and Organizations at the Council on Foreign Relations and former Deputy Assistant Attorney General and Counselor for International Affairs with the Department of Justice. Dr. Gerson has also served as chief counsel to U.N. Ambassadors Kirkpatrick and Walters and also was a resident scholar at the American Enterprise Institute for Public Policy Research.

The fourth witness is Dr. Patrick Clawson. Dr. Clawson is the Director for Research at the Washington Institute for Near East Policy and is the editor of Middle East Quarterly. Dr. Clawson spent 5 years as a senior research professor for the Institute of National Strategic Studies of the National Defense University and has previously served as the senior economist for the Foreign Policy Research Institute, the World Bank, and the International Monetary Fund. He has written extensively on the issue of financial considerations in dealing with terrorist states.

And last but certainly not least is Leonard Garment, the distinguished former counsel to President Richard Nixon and assistant to President Ford. Mr. Garment's illustrious career has also included stints as U.S. Representative to the Commission on Human Rights at the United Nations Economic and Social Council and counselor to the U.S. delegation to the United Nations.

We welcome all of you to the panel today. What I would like to do is ask each of you, if you can, to confine your remarks to 5 minutes. We will assist you by lighting the lights with the green, and then when the amber light comes on, I think that is 30 seconds, I believe, and that will give you an indication of when you are nearing the 5-minute time. We very much appreciate your presence on the panel here, all five of you.

Mr. Flatow, would you like to begin, please.

PANEL CONSISTING OF STEPHEN FLATOW, WEST ORANGE, NJ; MAGGIE ALEJANDRE KHULY, MIAMI, FL; ALLAN GERSON, SENIOR FELLOW FOR INTERNATIONAL LAW AND ORGANIZATIONS, COUNCIL ON FOREIGN RELATIONS, NEW YORK, NY; PATRICK CLAWSON, DIRECTOR FOR RESEARCH, WASHINGTON INSTITUTE FOR NEAR EAST POLICY, WASHINGTON, DC; AND LEONARD GARMENT, WASHINGTON, DC

STATEMENT OF STEPHEN FLATOW

Mr. FLATOW. Thank you, Mr. Chairman. Good morning. My name is Stephen Flatow. My 20-year-old daughter, Alisa, was killed in a bus bombing by terrorists sponsored by the Islamic Republic of Iran. I am not here this morning to mourn Alisa or to even seek anybody's sympathy. I am here instead to prevent future terrorist attacks and to tell you, sir, that what is unseemly is to be led down the primrose path by my government as we attempt to bring to justice those responsible for Alisa's death.

Mr. Chairman, Alisa died on April 10, 1995. Late that evening, as I sat in my hotel room in Israel, I received a long-distance telephone call from a father. He expressed his condolences and wondered aloud with me if he would have the same strength that I

seemed to be displaying. Before we hung up, Bill Clinton also told me that he would help us find those responsible.

A year later, I was invited to the White House to attend the signing of a new law that would help in the fight against terrorism. The law would give our Government new tools in the battle against this scourge. More importantly, for the first time, American citizens would be able to use American courts to sue foreign countries that sponsor terrorist attacks. Not possessing any military might but possessed instead with faith in the American legal system to achieve justice, I was encouraged by the President's oft-stated commitment to use all tools necessary to defeat terrorists and their sponsors. The Anti-Terrorism Act was to be my tool.

As you know, my family has sued the Islamic Republic of Iran for its role as the sponsor of the attack that killed Alisa. In March 1998, we were awarded $247.5 million by the U.S. District Court here in Washington, following a 2-day trial during which we produced 22 witnesses.

We did not take on the responsibility of suing a foreign country lightly. In fact, we might not have done so at all except for some very clear signals from the Clinton administration that it would back us.

Mr. Chairman, on several occasions, I turned to the administration for information and assistance as we prepared our case and began our legal battle, and the administration was with me, so I believe. We were provided with information concerning the group responsible for the attack, the involvement by Iran as its financial and moral sponsor. Our legal papers were rushed through State Department channels to service on the Iranian government. This could not have happened without the administration's assistance and support.

To say that I was encouraged by events would be an understatement. Here I was, an average American citizen receiving the help of his government as he sought to obtain justice for his daughter. However, nothing would prepare me for the letdown that would come on the very day that Judge Lambreth awarded us our judgment. On that day, the State Department spokesman was quoted as saying that the United States does not believe in judgments but rather in negotiations with foreign countries.

The muted satisfaction of our court victory was soon tempered further by the administration's efforts to block our attempts to collect from Iranian assets still located in this country. The Secretary of the Treasury refused to provide information about these assets. The search was, quote, "too burdensome," Treasury's lawyers told me. Our seizure of former Iranian diplomatic property rented out for 20 years by the State Department was opposed in the courtroom by a phalanx of government lawyers.

A 1998 law designed to assist Americans to collect on their awards was waived by the President immediately after it was signed. Yet, at the same time, the President publicly promised to help our family locate commercial assets of the Iranian government. Subsequent meetings with the President and with the State Department have failed to produce any tangible assistance, and when we asked State to come with us to court to say that a property was Iranian, they refused to do so.

Sadly, despite very strong reactions to other terrorist attacks involving Americans, we have become the odd man out, and more than a year after obtaining my judgment, I am still being opposed by the State Department in my efforts to make the Iranians pay the price prescribed by the Anti-Terrorism Act. Somehow, my use of the Federal law has come to be seen as an attack on the foreign policy of the United States.

Am I frustrated and discouraged? Absolutely. Anyone who spent several tens of thousands of dollars, has spent hundreds of hours walking the halls of the Senate and House office buildings, and talking with you, your colleagues and staffers, and has been forced with his family to relive day in and day out a tragedy that tore that family apart would feel nothing else.

Am I going to quit? No, Mr. Chairman, I am not. A father's responsibility to his child does not end with her murder. Even if my country's fight will wobble from time to time, my battle will continue. The memory of Americans killed by terrorists requires us to continue to protest against administration attempts to stifle our efforts to collect that which has been awarded to us. If the administration will not help us, then at least let it get out of our way and stop sending lawyers to court at taxpayer expense to defend the interests of terrorist.

If we do not succeed, Mr. Chairman, killers will be allowed to get away with murder and our Government will be sending a message that those who commit murder will not pay a price. That should be unacceptable to all of us here this morning.

I thank you for the committee's interest in our plight and would be glad to answer any questions if time allows.

Senator KYL. Mr. Flatow, you put a great deal in that 4½ minutes and I appreciate that very, very much. An excellent statement.

Mr. FLATOW. Thank you.

Senator KYL. Maggie Khuly.

STATEMENT OF MAGGIE ALEJANDRE KHULY

Ms. KHULY. I am speaking today for the Costa, Alejandre, and de la Pena families.

The Cuban government murdered Carlos Costa, Armando Alejandre, my brother, Mario de la Pena, and Pablo Morales on February 24, 1996. They were killed over international waters by air-to-air missiles shot from Cuban MiG's. The missiles pulverized the two small unarmed civilian aircraft they were flying while searching for fleeing Cuban rafters. Cuba has publicly stated that the murders were premeditated and accepts responsibility for the killings.

The killings were such a flagrant violation of human rights and of international law that we did not doubt the United States would demand and obtain justice in our case. On February 26, President Clinton asked Congress to pass legislation to provide compensation for the families out of Cuba's blocked assets in the United States On March 6, then-U.N. Ambassador Albright before the U.N. General Assembly decried the fact that Cuba had not yet offered compensation to the families. We met with President Clinton on April 29, 1996, and again he reassured us of the United States' commitment to justice.

On April 24, 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act. This authorized us as Americans to seek redress for the murders through U.S. courts. Congress had empowered us in our request for justice. To file under the Anti-Terrorism Act, we had to meet two conditions, American citizenship and terrorist status for the guilty country. We met both.

Carlos Costa was born in Florida and Mario de la Pena in New Jersey. Armando Alejandre came to the U.S. as a child, later became a Marine, and volunteered for a tour of duty in Vietnam, where he risked his life for his adopted homeland. The three were Americans. The first condition had been met. The second one was met, also. The Department of State has listed Cuba as a state sponsor of terrorism from 1992 up to the present.

We also consulted U.S. Government officials before we sued under this new law. On August 22, 1996, we met with Michael E. Ranneberger and officials from the Department of State at the Office of Cuban Affairs. During this meeting, we discussed possible civil action under the Anti-Terrorism Act and talked about the forthcoming humanitarian payments from the United States to the families. We wanted to make very sure that if we accepted these payments, we were not jeopardizing our ability to file under the Anti-Terrorism Act.

We were assured by Mr. Ranneberger that President Clinton's payments were only a gesture, not compensation, and that we were free to pursue any other avenues in our search for justice. He added that not only was the U.S. Government unopposed to our filing the civil action, but that it encouraged us to do so. President Clinton himself in his letter accompanying the funds called the amounts humanitarian payments. As we clearly explained to Mr. Ranneberger and to all other officials we spoke to, we were looking for justice, not charity, and I would like to add as an aside that I am deeply offended at Mr. Eizenstat's comments repeatedly calling it a race to the court, because we were empowered by the U.S. Government to do so and we acted within our rights.

There was no problem when a Federal judgment in December 1997 called the shoot-down a murder in outrageous contempt for international law and basic human rights. There was no reaction from either the Cuban or the U.S. Government at this condemnation. The problem began when we tried to collect on this judgment and the United States adopted an adversarial position towards us and Cuba then decided to step in.

No words can possibly explain our shock when we went to court and found U.S. attorneys sitting down at the same table as Cuba's attorneys. How can you explain to a mother who has lost her son, to a wife who has lost her husband, to a daughter who has lost her father, that their own government is taking the murderers' side? How can one understand the claim by the United States that the frozen funds are needed to promote civil society and democracy in Cuba and then have our country not take into account basic human rights and justice? What message are we, the United States, sending the Cuban people and its government when we allow a violation of the right to life to remain unpunished?

The Clinton administration has shut its doors to us. We are rebuffed even when we want to talk about other issues, such as

criminal indictments. Secretary of State Albright, for example, will not meet with us on any of our other concerns because, to quote an aide, "we are on opposing sides of this civil action." Are we? We thought we were the victims' families, victims ourselves. We thought we were Americans, entitled to protection from our own country. We thought Cuba was the terrorist, the guilty party.

We would like to know what kind of law the Anti-Terrorism Act is. If it is specifically applicable to terrorist countries only, and all the U.S. assets of terrorist countries are frozen, does this mean that American victims of terrorism will never have access to them? Do we have to depend on an individual Presidential determination of what human rights are and how they are to be defended? And what is Congress's role in all of this, the same Congress who felt so very strongly about defending Americans and punishing terrorism that it passed this law? Who will stand up for the rights of Americans against international terrorism? Thank you very much.

Senator KYL. I was not sure that Mr. Flatow's statement could be topped, but I am sure he would not feel badly if I said your statement has made equally the argument that your U.S. Government needs to act on your behalf, and I appreciate your statement very much.

Dr. Gerson, we are delighted to have you with us today.

STATEMENT OF ALLAN GERSON

Mr. GERSON. Thank you. Good morning, Mr. Chairman. It is an honor for me to appear here today.

I believe that when the history of the 20th century is written, that the efforts of the U.S. Senate to assure that American victims of international terrorism have their day in court, that they be accorded an opportunity to hold accountable in U.S. courts the perpetrators of horrendous crimes against their loved ones, and that they make sure that such judgments are honored, will go into the history books as one of the most important advances in the development of international humanitarian law, consistent with the highest ideals and interests of this Nation.

Mr. Chairman, I am not involved in the representation of the families of the downed Brothers to the Rescue fliers in their action against Cuba, nor do I have any involvement in the actions that have been filed and the judgments that have been awarded against the American families of victims of Iranian-sponsored terrorism. And yet, Mr. Chairman, there is, I believe, an intimate connection that we share with all of these families.

I represent a number of families of the bombing of Pan Am Flight 103, which exploded over Lockerbie, Scotland, on December 21, 1988. Indeed, it was through the efforts of the families of the victims of Pan Am Flight 103, in unison with the efforts of another group of victims of a terrible tragedy, the Oklahoma bombings, which made possible in 1996 the passage of the Anti-Terrorism and Effective Death Penalty Act.

Once that Act was passed, we finally had access to the courts after a very, very long and hard struggle. For three years before that, we argued that the Foreign Sovereign Immunities Act must be read by the court to waive the immunity of states that deliberately engage in terrorism against American citizens. We lost in

the district court, we lost in the court of appeals, and we lost in our appeal to the U.S. Supreme Court. Throughout this process, Libya appeared in the courts and very ably defended its claim to sovereign immunity. It was only after passage of the Act that we finally had an opportunity to seek justice in the U.S. courts.

The point I want to make, Mr. Chairman, is that in securing passage of that Act in 1996, we, that is, the representatives of the families of Pan Am 103, worked very closely to try to have the U.S. Department of State drop their opposition. It was also, I might add, a shock to us when we went into U.S. district court earlier and found that the Justice Department attorneys had appeared in court not on behalf of the families of the victims, but really on behalf of Libya in pursuit of its claim to total sovereign immunity.

We wanted to make sure that, finally, the State Department and the U.S. Government would be on our side. We understood their concerns. Many of those concerns were rearticulated today by Mr. Eizenstat. They dealt with the questions of reciprocity, of the fear that U.S. citizens might be subjected to the jurisdiction of foreign states, and the erosion of maximum flexibility by the executive branch in dealing with terrorist governments.

But at the end of the day, we were able to obtain the end, or so we thought, of State Department opposition to the passage of that Act when we accepted their insistence that the Act provide that it is not the U.S. courts, but rather the State Department, that would be the final determiner of which states are terrorist states or sponsors of terrorism. That gave them enormous flexibility. It gave the executive branch enormous flexibility, and we went along with that provision at a very high price, because we realized that insertion of that provision into the law would cause us a host of problems in the courts, as Libya's lawyers could be expected to challenge the constitutionality of this provision on the grounds of an unconstitutional delegation of power.

In fact, true to our fears, we became tied up for the next 2 years in litigating this particular point before the U.S. district court, the U.S. Court of Appeals for the Second Circuit, and in briefs before the U.S. Supreme Court. Fortunately, in this round, the U.S. Department of Justice appeared on our side. Finally, we were able to prevail.

We assumed, of course, that if we were then able to obtain a judgment once the civil trial was allowed to go forward, that the courts would do everything within its power to honor that judgment. We could not imagine that the U.S. Government would then try to stop collection of that judgment by freezing frozen assets.

Mr. Chairman, I see the yellow light has gone on. I have only about a page left, if I may be allowed to get to my point.

Now, to be sure, the President of the United States is entitled to tremendous flexibility in the conduct of U.S. foreign policy. As a former Deputy Assistant Attorney General for Legal Counsel, my job was to promote the President's prerogative in the realm of foreign affairs. But, Mr. Chairman, I believe that some balance needs to be drawn between the rights of justice by individuals who are the victims of terrorist states and the need for Presidential flexibility in dealing with such governments.

Again, what message about our own sense of morality do we send in saying that frozen foreign assets are mere bargaining chips? Perhaps in other matters of commercial import, but not where the lives of American citizens have been extinguished and their families have exercised their day in court. It has been argued that allowing such judgments to be honored gives them priority over other claims against such governments where no judgment has yet been obtained.

But Mr. Chairman, I submit that when Congress enacted the Anti-Terrorism Act, it gave certain priorities to certain classes of victims precisely because they realize that the national interests of the United States are involved and that national priorities are involved when countries go to war against American citizens. Surely the courts, and surely the legislature, can deal with such issues, as Senator Feinstein suggested earlier, which is about placing caps on available judgments or about instituting provisions that will allow the courts to take into account the needs of similarly situated claimants.

What gives me pause, Mr. Chairman, is the statement of Mr. Eizenstat which suggests in his testimony that there is a need to create other avenues, and he has made clear that creating other avenues encompasses the possibility of creating a new commission. We fear that that may signify the creation of a new commission other than the judicial one which was created by the 1996 amendments, thus, in essence, subverting that terribly important amendment.

One other point, and this is my final point, Mr. Chairman. The government of Libya has seen fit to go into U.S. courts and wage a long and arduous and, indeed, an honorable battle to overcome the imposition of U.S. jurisdiction through the Anti-Terrorism and Effective Death Penalty Act. By contrast, the governments of Cuba and Iran have simply defaulted and have not appeared in court when similar suits under that Act were brought.

Were we today to not honor judgments reached by courts as a result of default, what incentive would there be for countries to wage battles in our courts? They would simply, like Cuba and Iran, thumb their noses at us, adding insult to injury and showing contempt for the U.S. courts.

For this reason, I believe that whether a civil judgment is entered as a result of default or after trial, it is entitled to execution. Placing foreign assets off-limits, which is essentially what this Presidential waiver seeks to do, can render a judgment meaningless and, thus, make a mockery of justice.

It is for this reason that I support the efforts especially of Senators Connie Mack and Frank Lautenberg and others in promoting legislation that would clarify and prevent administration interference in the Federal court's enforcement of judgments that have been validly entered pursuant to the Anti-Terrorism and Effective Death Penalty Act.

American victims of terrorism have earned their day in court. They have earned their day to having their judgments honored. The President of the United States should not be permitted to interfere with the processes of justice accorded to them in a very narrowly-defined range of cases where an exception was delib-

erately and carefully wrought to the normal immunity of foreign states from being sued for damages in the U.S. courts.

Thank you, Mr. Chairman, and thank you for giving me that extra time.

Senator KYL. Thank you, Dr. Gerson.

[The prepared statement of Mr. Gerson follows:]

PREPARED STATEMENT OF ALLAN GERSON

DISTINGUISHED SENATORS: It is an honor for me to appear here today and I thank the Judiciary Committee and its Chairman, Senator Orrin G. Hatch, for the kind invitation to testify on the subject of this hearing: Victims' Access to Terrorist Assets .

When the history of the 20th century is written I have no doubt that the efforts of the US Senate to assure that American victims of international terrorism have their day in court, and be accorded an opportunity to hold accountable in US courts the perpetrators of horrendous crimes against their loved ones, will go into the books as one of the most important advances in the development of international humanitarian law consistent with the highest ideals and interests of this nation.

I am not involved in the representation of the families of the downed Brothers to the Rescue fliers in their action against Cuba. Nor do I have any involvement in the lawsuits that have been filed, and the judgments that have been awarded, against the American families of victims of Iranian sponsored terrorism. My representation, together with the law firm that I am associated with in this litigation—Sonnenchein, Nath & Rosenthal, and my associate, attorney Mark Zaid, is limited to a number of families of the bombing of Pan Am flight 103 over Lockerbie Scotland on December 21, 1988.

And yet, there is between us an intimate connection with all these families—those directly affected by the Brothers to the Rescue bombing, those of former American hostages in Iran, Joseph Cicippio and David Jacobsen, and the family of Alisa Flatow, a student visiting Gaza murdered by Iranian-backed terrorists. We are also co-joined with the families of the victims of the Murrah Federal Office Building bombing in Oklahoma City in 1995. For the suits filed against Cuba and Iran were merely the first progeny of what was made possible through passage of the Antiterrorism and Effective Death Penalty Act of 1996. And that Act was, in many key respects, the fruit of joint action of the families of the victims of the Lockerbie and the Oklahoma bombings. Joined together by fate, they lobbied in pursuit of a common purpose: deterrence of future acts of terrorism through enactment of stringent countermeasures which would open America's civil justice system as a means for accountability through trial and award of compensatory and punitive damages if successful in obtaining a judgment.

In this regard, it may be of some value to the Committee if I recount the genesis of my own involvement in this matter. In July 1, 1992, while a professor of international law and transactions at George Mason University I published an article in the New York Times Op-Ed page entitled "Compensate Libya's Victims". I represented no one at the time, but as someone who had experience with the then newly established UN claims commission through which Iraq was required to compensate victims of its Scud missile attacks and aggression in the Gulf War, I contended that served as a model for claims against Libya with regard to the Pan Am 103 bombing . I noted that: "The White House, despite its UN efforts against Libya, has been reluctant to take the extra step needed to give bite to the UN Security Council resolutions. It should urge the UN Security Council to immediately establish a UN claims commission. However, after initial success in getting the proposal for such a commission endorsed by the State Department—I had in the interim been retained as counsel to one of the Pan Am 103 family members—the proposal foundered at the last moment at the White House.

What followed in the absence of that proposed measure to find some means of accountability and compensation was a long hard struggle of one and then three Pan Am 103 family members. We had to buck the then prevailing wisdom that there was no way, pursuant to international law and the domestic law of the United States, to hold accountable a foreign state that purposefully destroys the civilian aircraft of another and deliberately murders civilian passengers aboard that craft even where it involves the flagship carrier of the United States with 189 American citizens abroad.

The 1976 Foreign Sovereign Immunities Act (FSIA) were cited as an absolute impediment to what we were trying to accomplish. We claimed otherwise and in suits

filed in the US District Court for Washington DC, then in federal court in the eastern district of New York we contended that it was implicit that the FSIA never intended to provide immunity to states engaged in terrorism against American citizens; that sovereign immunity need be viewed as a privilege that could be waived by outrageous conduct unbecoming the behavior of any civilized body. It was an argument we made in vain. At every opportunity Libya's able lawyers who had appeared in court to contest the suit argued that we were precluded by the literal language of the FSIA. Their argument was upheld by the US District Court. Then, before the US Court of Appeals the United States government through US Justice Department attorneys that I had worked with for many years in that distinguished institution appeared on behalf of the position that Libya was espousing. A common interest emerged in evading state responsibility and accountability through the civil courts for the most heinous of crimes. The federal court of appeals upheld that rulings, and the US Supreme Court declined any further review.

That would have been the end of the matter, after three years of struggle. But another national tragedy intervened: the bombing of the federal office building in Oklahoma City. When one of our Pan Am 103 clients went out to Oklahoma on a mission of mercy to cater to the grief of those families, she discovered a common bond. Both group of families believed that justice deferred could be justice denied. The families of the Pan Am 103 disaster had by then waited for nearly seven years for some measure of justice. The Oklahoma bombing families did not want to see the perpetrator of that bombing spend the next 17–18 years on death row—the then national average for convicted killers exhausting appeals. They wanted justice within one to two years of the time a conviction was sustained by the courts. Together their political alliance made possible passage of the historic 1996 Antiterrorism and Effective Death Penalty Act.

I have in my hand, and I ask that it be made a part of the official Congressional Record, the sheet of paper distributed by the Pan Am 103, Oklahoma and other families on that historic day in April 1996 preceding the vote on the bill. It reads, in its simple eloquence: "Give Us Our Day In Court. Families of the victims of Pan Am 103, the Oklahoma City bombing and the family of Leon Klinghoffer ask for your support in favor of H.R. 2703, the Effective Death Penalty and Public Safety Act of 1996 and in particular its 'right to sue' provision. Why deny American victims of terrorism their right to hold terrorist states accountable in US courts of law?"

Securing passage of that Act required working with the U.S. Department of State to secure its cooperation, or at least dropping opposition, to its enactment. Then as today, the concerns were the same: worries about reciprocity, fearing that if foreign governments are subjected to the jurisdiction of U.S. courts, foreign countries will soon start conducting their own trials of Americans; concern that U.S. courts are ill-equipped to pass judgment on foreign legal systems; and perhaps most prominently of all, concern that the Executive Branch's need for maximal flexibility in dealing with terrorist states would be eroded. Mark Zaid and I submitted joint statements at the hearing of the Senate Subcommittee on Courts and Administrative Practice held on June 16, 1994 and in July 1994 to the House Foreign Affairs Subcommittee on International Security, I International Organizations and Human Rights in an attempt to mollify Administration concerns shared by a number of Senators and Congressmen. At the end of the day, State Department opposition effectively ended with acceptance of their insistence that the Act provided that it, not the U.S. courts, should be the final determiner of which states are "terrorist" states or sponsors of terrorism. Reluctantly, we went along with this request, knowing full well that its insertion would likely cause us a host of problems as Libya's team of lawyers could be expected to challenge the constitutionality of this provision on the grounds of an unconstitutional delegation of power. True to our fears, we became tied up for the next two years in litigating this particular point before the U.S. District Court, the U.S. Court of Appeal for the Second Circuit and in briefs in opposition to petitions for certiorari filed by Libya's lawyers before the U.S. Supreme Court.

Fortunately, in this round, with the assistance of the U.S. Department of Justice which appeared on our side, we were able to prevail in the U.S. District Court, the U.S. Court of Appeals and the U.S. Supreme Court. Of course, it was assumed once this massive hurdle had been surmounted that if we went to trial—as we proceeded to do (we are now involved in pre-trial preparations)—and if after a trial we succeeded in obtaining a judgment, that the courts would do all in its power to enforce that judgment. We could not imagine, and indeed still have trouble imagining that the U.S. government through the exercise of a presidential waiver, would seek to forestall or prevent the honoring of a validly entered judgment against the frozen assets of the defendant state. To be sure, there may be other means for collecting a judgment than seeking to untap frozen assets. At the same time, frozen assets

may be the only assets available in a particular case. Beyond that, there is the symbolic aspect: what message would we be sending to terrorist states if the President finds himself in the position of protecting their money against recovery by victims of their violence? How would this accord with President Clinton's declaration on the signing of the Antiterrorism Act that it represented a "mighty blow" against terrorism?

To be sure, the President of the United States is entitled to tremendous flexibility in the conduct of U.S. foreign policy. As a former Deputy Assistant Attorney General for Legal Counsel during the Reagan administration, my job was to protect and promote the President's prerogatives in the realm of foreign affairs. Still, some balance needs to be drawn between the rights of justice by individuals who are the victims of terrorist states and the need for presidential flexibility in dealing with such governments. Again, what message about our own sense of morality do we send in saying that frozen foreign assets are "mere bargaining chips"? Perhaps in other matters of commercial import, but not where the lives of American citizens have been extinguished and their families have exercised their day in court.

It is also argued that allowing such judgments to be honored gives them priority over other claims against such governments where no judgment has yet been obtained. But Congress enacted the Antiterrorism Act precisely because national interests and a sense of national priorities are involved when countries go to war against American citizens. While recognizing that fairness of access by a multitude of claimants, real and potential, to frozen assets is a serious concern, it would seem that this is a problem for courts to administer. Or Congress can attempt to legislate a fair mechanism for fully assuring that only the blocked assets that in fact belong to foreign governments are subject to attachment, that consular property is considered off-limits for reasons having to do with diplomatic niceties, and that some residue of assets be set aside for other claimants that can reasonably be expected to perfect claims in the foreseeable future. There are, to be sure, adjustments and fine tuning that can be made to provide for fairness of access to frozen foreign assets. But great care must be exercised in doing so to assure that the real and symbolic value of allowing suits aimed at holding terrorist states accountable not be stripped of their value by simply giving way to the talisman of presidential discretion.

There is yet another aspect to this matter that requires attention. The government of Libya has seen fit to go into U.S. courts and wage a long and arduous and indeed honorable battle to overcome the imposition of U.S. jurisdiction through the Antiterrorism and Effective Death Penalty Act of 1996. By contrast, the governments of Cuba and Iran have simply defaulted and not appeared in court when similar suits under that Act were brought. Were we today to not honor judgments reached by the courts as a result of default, what incentive would there be for countries to wage battle in our courts? They would simply, like Cuba and Iran, thumb their noses at us, adding insult to injury, and showing contempt for the U.S. courts. For that reason, I believe that whether a civil judgment is entered as a result of default or after trial, it is entitled to execution. Placing foreign assets off-limits can render a judgment meaningless, thus making a mockery of justice.

For this reason, I support the efforts of Senators Connie Mack and Frank Lautenberg and others in promoting legislative clarification to prevent Administration interference in the federal courts' enforcement of judgments that have been validly entered pursuant to the Antiterrorism and Effective Death Penalty Act. American families of victims of terrorism have earned their day in court. The President should not be permitted to interfere with the processes of justice accorded to them in a narrowly defined range of cases where an exception was deliberately and carefully wrought to the normal immunity of foreign states from being sued for damages in U.S. courts.

Senator KYL. Dr. Patrick Clawson.

STATEMENT OF PATRICK CLAWSON

Mr. CLAWSON. Mr. Chairman, thank you for the privilege of appearing before this committee. Permit me to say a few words about financial penalties as a counterterrorism technique. I will particularly address the Iranian case, since the Islamic Republic of Iran is the world's principal state sponsor of terrorism.

Let me offer three theses. First, financial penalties can discourage state sponsorship of terrorism. Countries like Iran or Cuba or North Korea sponsor terrorism as a means to advance their state

interests, not out of spite or blind ideology. They are quite good at calculating the costs and benefits from their behavior. If the world community imposes no penalties for violating the normal rules of international behavior, then the rogues will throw out the rule book. But if there is a price to be paid, they will consider if the cost of violating those rules is too high.

Iran has been particularly sensitive to the price it must pay for terrorism. Clear evidence about this was provided by the 1997 verdict of a German court in the *Mykonos* case, holding Iran's leaders responsible for the murder of four Iranian Kurds in a Berlin restaurant. The German government was concerned that Iran might step up its terrorism in response to such a clear verdict. Quite to the contrary, Iran has not engaged or sponsored a single act of terrorism on European soil or against Europeans since the *Mykonos* verdict.

Second, state sponsors of terrorism do not respect the normal rules of international behavior in economics, just as they do not respect them in politics. It is, therefore, inaccurate to characterize the U.S. counterterrorism financial claim as somehow being a unique roadblock to normal commercial relations with these terrorism-state sponsors.

Some might say that allowing financial claims against state sponsors of terrorism invites retaliation. Indeed, I thought that is what Mr. Eizenstat was saying at times. In fact, the U.S. financial penalties could be seen as a response to the assertive financial measures taken by the terrorism-state sponsors, a way to redress the balance after the terrorism-state sponsors use extraordinary financial claims as part of their campaign against the United States.

For instance, the leaders of the Islamic Republic of Iran regularly castigate the United States for not paying billions of dollars which they say we owe them. To justify their allegations, they have put forward some truly creative claims, such as a lawsuit asking for billions of dollars in damages done to Iranian railways during World War II.

Intriguingly, this stream of assertive Iranian claims against the United States have lessened since the Foreign Sovereign Immunities Act was amended to permit claims against Iranian terrorism. In other words, Iran's actions are not consistent with the theory that the Foreign Sovereign Immunities Act amendments will provoke retaliation.

By the way, I mentioned Iran's creative claims. Iran also has legitimate claims against the U.S. Government, primarily for the return of payments for arms, payments made by Iran before the 1979 revolution. At the end of the day, the U.S. Government will probably have to write a very large check to Iran for those claims. Some have suggested that the amount involved will be over $1 billion.

So there are some substantial assets at stake here. When Mr. Eizenstat spoke about the exhaustion of these assets, I think he was using some creative accounting. He also carefully left out of his account the hundreds of millions of dollars in assets which the Iranians had to put aside in a blocked account in the Netherlands which will be used to pay the U.S. claims that Mr. Eizenstat mentioned. That money, in a Dutch account, can only be used to pay the $500 million which the United States has claimed against Iran.

So I would suggest that the best way to discourage these kinds of politicized claims by the terrorism-state sponsors is to take firm U.S. countermeasures. When the United States takes a compromising stand toward the State sponsors of terrorism, the general response of those state sponsors is to escalate their demands rather than to compromise.

A particularly clear case of accommodation versus a firm stance was provided by the Iranian-sponsored seizure of U.S. citizens in Lebanon. At first, the United States attempted to reach a deal with Iran, shipping to Iran arms in the famous Iran-contra affair. This, Mr. Chairman, was not a success for U.S. foreign policy. Iran released some hostages, but took more hostages. By contrast, when the U.S. Government took a hardline stance, making clear that holding the hostages only brought Iran grief and they were not going to get back any of the money that we were holding, the hostages were released.

Finally, my third point is we need clear rules. Some would argue that the U.S. Government needs flexibility in its dealings with state sponsors of terrorism. To be sure, but U.S. citizens and businessmen also need clear, transparent, and enforceable rules. It would be a most peculiar procedure to permit judgments, but then allow discretion about the execution of those judgments.

Mr. Chairman, the U.S. Government has advised many governments around the world to improve the quality of their governance by enhancing the rule of law as contrasted to the discretion of the ruler. The U.S. Government would be advised to take that advice. The rules about judgments against state sponsors of terrorism should provide clear guidance about what will happen once a judgment has been obtained. Thank you, Mr. Chairman.

Senator KYL. Thank you very much. I was taking a lot of notes on what you said there and I want to specifically go back to the last point that you made.

But first, let us hear from Leonard Garment. Leonard.

STATEMENT OF LEONARD GARMENT

Mr. GARMENT. Thank you. You have my prepared testimony.

Senator KYL. All statements will be entered into the record.

Mr. GARMENT. I will try to summarize it briefly. Mr. Chairman, being here today is a source of both satisfaction and disappointment. The satisfaction lies in realizing that for over 20 years, Congress has moved steadily to expand legal remedies for Americans who have been tortured and otherwise terrorized by foreign states. The disappointment exists because for the same 20 years, a skillful rear-guard action has shot these remedies full of loopholes and incoherence.

The Lautenberg-Mack bill closes some critical gaps, and I am happy to be here at your invitation to support that bill. The committee's attention to this issue makes me hope that we can eliminate still more of these loopholes and lacunae.

In 1976, the Foreign Sovereign Immunities Act attempted to ensure that if a foreign state behaved not as a sovereign but just as another commercial player, it was not immune from the American legal process. In 1993, I acquired two clients who had been victims of state torture. One was Scott Nelson, hired in this country by a

Saudi Arabian hospital to monitor the safety of its facilities, then tortured by Saudi officials for doing his job too well. A divided U.S. Supreme Court barred Mr. Nelson's suit for damages, saying the commercial connection required by the statute was not as strong as the Act required.

But the opinions of the court implicitly invited Congress to provide a remedy, so Congress responded in 1996 by amending the Act to permit American citizens to sue foreign states in U.S. courts for torture and other terrorist acts. But the new provisions have two major loopholes.

First, at the behest of the administration, acting for the State Department, or acting through the State Department, or acting through various spokesmen, the 1996 amendments provide that Americans can sue only the seven foreign states on the Department's own terrorism list—Cuba, Libya, Iraq, Iran, Sudan, Syria, and North Korea.

Second, if a foreign state's assets in this country are frozen pursuant to the International Emergency Economic Powers Act, they are not subject to judicial process.

Congress again amended the Immunities Act in 1998 so that an American with a judgment against a foreign state for torture or other terrorist acts can reach those frozen assets. But the President, after asking for the legislation, and acting again through the State Department, or acting at the initiative of the State Department, construed his authority broadly and preemptively, waived the provisions in toto citing national security but giving no specifics.

So here we are again. The Lautenberg-Mack bill limits the President's waiver authority to case-by-case determinations. The bill closes another loophole by providing that even if assets frozen pursuant to the Economic Powers Act nominally belong to a state-owned entity rather than to the government, they may be used to satisfy a judgment—clear, simple, undeniably correct.

The administration, of course, opposes this bill. My old and good friend, Stuart Eizenstat, has been sent here to present the administration's position. The voice is Mr. Eizenstat's, but alas, the words are those of the State Department again. I must say, I do not envy Mr. Eizenstat's task of spinning verbal gold out of substantive straw.

The administration, through Mr. Eizenstat, claims that it needs leverage over terrorist states. He warns of retaliation. But the spokesmen for the State Department or Treasury or the White House always do, and they do so despite the fact that in the years since 1976, there has been no retaliation, and despite the fact that the State Department surely wields far less deterrent power than does the prospect of being hauled into a U.S. court. I know the committee will give the administration's objections the deference they deserve.

Let me make two suggestions. One is semitechnical. The bill now covers a state-controlled entity's assets in this country that are frozen pursuant to the Emergency Powers Act but does not cover assets that are not frozen. There is no reason for a distinction, and I urge this committee to revise Subsection (b)(4) of the bill to include both categories.

The other suggestion is not technical. It deals with people like my now fairly ancient client, Scott Nelson, whose case began this decade's constructive Congressional activity in this area. Even with the Lautenberg-Mack bill, states that happen not to be on the State Department's terrorist list will escape legal responsibility altogether when they torture or otherwise terrorize American citizens. There is simply no principled reason why an American tortured by Cuba, which is on the list, can obtain redress, while an American tortured by China, for example, which is not on the list, is without a legal remedy. If a country does not provide cognizable, effective legal remedies for such atrocity, a victim should be able to seek redress in a U.S. court.

A bill has been drafted to that effect, with safeguards to prevent abuse, that recognize that the State Department has legitimate areas of institutional concern. That bill in 1998 was killed by the administration with the same arguments, acting through the State Department, at the last moment, and absolutely without public scrutiny. The fact of these hearings is, I hope, a sign that the issue of redress will henceforth be discussed, examined, and cross examined in public.

It is a horrible world that we live in, filled with barbarism, and that is precisely the reason why the rule of law is central to civilized life, the point, Mr. Kyl, that you make so clearly, emphatically, and eloquently. It is as simple as that. We must apply due process in the service of decency where and when we can. The committee, I think, understands this imperative, and for this, we should all be grateful. Thank you very much.

Senator KYL. Thank you very, very much.

I am reminded of the business meeting of the Appropriations Committee held just a few weeks ago in which I offered the amendment which is now the Mack-Lautenberg bill, and it was a closed meeting, not open. The objection to the amendment was, well, of course, this means that since the administration has signaled that it would veto our legislation if your amendment is adopted, this means we have to defeat your amendment, and my amendment was, in fact, defeated, all behind closed doors, the point you made, Mr. Garment.

I appreciate the fact that we are now in open hearing and we can discuss this openly, and I suspect that the public reaction to what the administration has done here will help persuade the administration that it will need to work with us to get meaningful legislation passed, so I appreciate that last point you make.

Mr. GARMENT. If I may, I think I omitted it, but the bill that was presented these many years ago is before the committee again, in my prepared testimony. Thank you very much.

Senator KYL. You remind me to take a look at that and see if we can move that into public light, as well.

Mr. GARMENT. I will, indeed.

[The prepared statement of Mr. Garment follows:]

PREPARED STATEMENT OF LEONARD GARMENT

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Thank you for inviting me to present my views on the Mack/Lautenberg bill. That bill would amend the Foreign Sovereign Immunities Act ("FSIA") by making it clear that American citizens who

are the victims of terrorist acts have a right to obtain redress by attaching the frozen assets of the state responsible for such acts. This legislation will provide a significant deterrent to states that commit or might be responsible for the commission of terrorist acts, and will ensure that American citizens are not left without a remedy if such acts do occur.

In 1976, Congress enacted the FSIA to ensure that our citizens would have access to American courts to resolve ordinary legal disputes involving foreign states. The FSIA codified the restrictive theory of sovereign immunity, under which foreign states are immune from the jurisdiction of the courts of another state only when they commit public or sovereign acts, but not when they commit private or commercial acts. While the focus of the FSIA was on commercial disputes, the Act also provided an important exception to the general principle of immunity in cases involving personal injury and death as a result of the tortuous conduct of a foreign state occurring in the United States. The courts have construed this "non-commercial tort" exception to sovereign immunity as applying to gross abuses of human rights such as political assassination perpetrated by foreign states on U.S. territory. *See, e.g., Letelier* v. *Republic of Chile,* 488 F. Supp. 665 (D.D.C. 1980); *Liu* v. *Republic of China,* 892 F.2d 1419 (9th, Cir. 1989).

The FSIA did not, however, provide a remedy in U.S. courts for abuses of American citizens' human rights committed outside the United States, unless those abuses were somehow linked with a foreign state's commercial activities in the United States. In *Nelson* v. *Saudi Arabia,* 507 U.S. 49 (1993), the Supreme Court interpreted this FSIA's requirement of a commercial nexus to bar, as a practical matter, any suit in a U.S. court by an American citizen who was the victim of state-sponsored terrorism. In that case, my client, Scott Nelson, brought suit against Saudi Arabia for acts of torture by Saudi officials that left him permanently disabled. Despite Mr. Nelson's allegation that his torture was retaliation for his performing the job that the Saudi Government recruited him in the United States to perform, the Supreme Court regretfully held that the link to commercial activity was too weak to justify the assertion of jurisdiction over Saudi Arabia.

In response to a suggestion implicit in the Supreme Court's decision in Nelson, Congress amended the FSIA in 1996 to permit American citizens to sue certain foreign states when those states commit terrorist acts against American citizens. Two critical loopholes in the 1996 amendments left most American citizens who have been victims of such acts without any effective remedy. First, at the insistence of the Clinton Administration responding to State Department concerns, the legislation was restricted in the final night's Conference to allow suit only against those foreign states placed by the State Department on its terrorism list, which now includes only Cuba, Iraq, Iran, Libya, North Korea, Sudan and Syria. As a result, foreign states that are not on the terrorism list can continue to torture and otherwise terrorize American citizens without fear of being held accountable in American courts. Second, even with respect to those states that are on the terrorism list, the legislation failed to take into account the fact that the assets of most of these states had been frozen pursuant to the International Emergency Economic Powers Act ("IEEPA") and were, by the terms of the Act, not subject to judicial process.

In response to this problem, Congress again amended the FSIA in 1998 to permit American citizens who are victims of state-sponsored terrorism to enforce any judgment they may obtain by executing against the blocked property of a foreign state. However, the President, even as he signed the legislation containing these amendments, announced his intention to nullify them. Invoking reasons of "national security," he simply "waived" the provisions relating to execution against frozen assets, relying upon legislative language that he broadly construed as giving him such authority. The proposition that the President could turn the 1998 amendment to the FSIA into a nullity by making a sweeping and unsupported assertion that those provisions endanger our "national security" is not only illogical, but outrageous. The words are those of the President, but the voice, again, is that of this State Department bureaucracy. The Mack/Lautenberg bill properly rejects this constitutionally dubious construction of the President's waiver authority by expressly limiting that authority to determinations relating to particular assets used for diplomatic purposes on an "asset-by-asset basis."

The Mack/Lautenberg bill would also erase another ambiguity in the 1998 amendments that can impair the ability of American victims of state-sponsored terrorism to obtain redress. This ambiguity first surfaced in *Alejandre* v. *Republic of Cuba,* a case involving the killing of two American citizens who private aircraft was shot down over international waters by the Government of Cuba. In a decision rendered this summer, a U.S. Court of Appeals held that the family members of the deceased American citizens could not enforce the judgment they had obtained against Cuba by attaching Cuban assets frozen pursuant to IEEPA, because those assets were

owned not by the Cuban Government outright, but by a Cuban-owned commercial instrumentality. The vast majority of assets in this country that are owned by foreign states are held in the name of commercial instrumentalities of the state rather than in the name of the state itself. Accordingly, the practical effect of the court's decision is to deny American citizens the right to an effective remedy when they have been injured by an act of terrorism.

The Mack/Lautenberg bill would prudently address this problem by making clear that for purposes of enforcing a judgement based on the commission of a terrorist act, "all assets of any agency or instrumentality of a foreign state" that have been frozen pursuant to IEEPA "shall be treated as assets of that foreign state." This is as it should be. In giving the President the authority to attach the assets of a foreign state that represents a threat to our national security, IEEPA draws no distinction between the assets of a foreign state and the assets of its majority owned and controlled agencies and instrumentalities. A foreign state that disregards the most basic precepts of international law by committing an act of terrorism against our citizens sacrifices any privilege it might otherwise have to protect its assets from attachment by invoking a legal fiction that those assets belong to a state-owned commercial instrumentality, rather than to the state itself.

As presently drafted, however, the Mack/Lautenberg bill would permit the assets of an agency or instrumentality of a foreign state to be treated as the assets of the foreign state itself only when those assets have been frozen pursuant to IEEPA. There is no reason to treat frozen and unfrozen assets differently in cases in which a foreign state has been held liable for committing acts of terrorism against our citizens. Accordingly, I would strongly urge this Committee to revise the language of subsection (b)(4) of the Mack/Lautenberg bill to make clear that even the unfrozen assets of an agency or instrumentality of a foreign state will be subject to execution in the case of any judgment relating to a claim for which that foreign state is not immune by virtue of its involvement in terrorist activity.

The Department of State can be expected to oppose the Mack/Lautenberg bill on the ground that it would impede the administration's ability to use the frozen assets of a foreign state as leverage by offering to return those assets if the state agrees to refrain from engaging in the type of conduct that resulted in the freezing of its assets in the first place. Under no circumstances, however, should the United States release the frozen asset of a foreign state when there remain uncompensated injuries suffered by American citizens who have been murdered, tortured or otherwise terrorized by that state. Indeed, as set forth in the legislative history of the Trading With The Enemy Act, IEEPA's predecessor, a principal purpose of IEEPA is to conserve assets of a foreign state so that they can be made available to satisfy the claims of U.S. citizens. *See Chas. T. Main International Inc.* v. *Khuzestan Water and Power Authority*, 651 F.2d 800, 810 (1st Cir. 1981) (citing H.R. Rep. No. 85, 65th Cong., 1st Sess. 1–4 (1917)). Accordingly, there is no sense in which the legitimate leverage of the executive branch would be compromised by legislation authorizing American terrorist victims to attach the frozen assets of a foreign state.

The Mack/Lautenberg bill closes one important loophole in the FSIA by ensuring that effective remedies are available to American citizens who are victims of terrorist acts perpetrated by foreign states on the State Department's terrorism list. Still left open, however, is the loophole that several colleagues and I have for years been trying to close over skillful State Department resistance. That loophole allows states that are not on the Department's list to evade legal accountability altogether when they torture and terrorize our citizens. There is, of course, no logical reason, nor, more important, any principled reason for providing redress in our courts for American citizens who are tortured by officials of foreign states such as Cuba, Libya and Iran because they are on the State Department list, but, then, denying such redress to Americans who are tortured by officials of countries such as Saudi Arabia and China because those countries are on the list. So long as those countries do not provide cognizable, adequate and available remedies in their courts for American victims of state terrorism, those victims should be able to seek redress in our courts. The legislation we drafted and then revised to meet practical concerns presented by Congressional members and their staffs, deals with this problem in a prudent and effective way.

For years, the State Department has resisted such legislation on the ground that it would trigger retaliatory measures against the United States, including bogus lawsuits in which U.S. law enforcement authorities would be hauled into the courts of foreign states to answer for their activities. This fear is unfounded. Since the enactment of the FSIA in 1976, foreign states have been subject to suit in the United States for human rights abuses perpetrated by their intelligence and law enforcement agencies within this country. No retaliatory measures have ever been taken against the United States as a result of such suits. Similarly, before the FSIA was

amended in 1996 to permit American citizens who were victims of terrorism to bring suit against states on the Department's terrorism list, the Department issued its familiar warning of adverse foreign policy consequences. Since that time, suits have been filed against Libya, Cuba and Iran. Again, none of the adverse foreign policy consequences about which the Department warned have materialized.

In the meantime, however, the cases of American citizens who have been tortured by foreign states that do not happen to be on the Department's terrorism list have been left out in the legal cold. Two of those cases involve clients I have represented for nearly a decade. One of them is Scott Nelson, a systems engineer whose case inspired the 1996 amendments authorizing suits against foreign states that commit acts of terrorism. But Mr. Nelson, ironically, has not been able to take advantage of those amendments because Saudi Arabia is not on the State Department's terrorism list. The other case is that of Jim Smrkovski. Like Mr. Nelson, Mr. Smrkovski—a Woodrow Wilson scholar working in Saudi Arabia—was brutalized by Saudi officials who subjected him to electric shock torture and extracted six of his toenails. Yet, like Mr. Nelson, Mr. Smrkovski has been unable to obtain redress because Saudi Arabia is not on the terrorism list. This is Catch-22 with a vengeance.

The time has come—it is, indeed, long overdue—to close the critical loophole in the FSIA that distinguishes between acts of terrorism against American citizens when they are committed by foreign states on the Department's list and acts of terrorism committed by foreign states that are not on the list. The issue is not what list the offending state happens to be on, but whether that state affords any recognizable legal remedy for the wrongful injuries caused by the state. American citizens who are the victims of terrorism for which a foreign state is responsible should have a remedy. And it is vitally important that every state that may contemplate committing such acts against our citizens realize that they cannot do so with the impunity that our laws now afford them.

DOCUMENTS IN SUPPORT OF THE PROPOSED AMENDMENT TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

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EXECUTIVE SUMMARY OF THE PROPOSED AMENDMENT TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

- When it enacted the Anti-Terrorism Act three years ago, Congress amended the Foreign Sovereign Immunities Act to give a remedy in U.S. courts to American citizens who are the victims of acts of torture and terrorism when such acts are perpetrated by foreign countries that have been designated by the State Department as terrorist countries.
- Congress should expand this remedy with a very narrowly drawn amendment in recognition of the fact that acts of terrorism and torture are sometimes perpetrated against American citizens by countries that are not on the State Department's list.
- When such countries torture an American citizen, there is no remedy in our courts because the Foreign Sovereign Immunities Act provides a shield from suit.
- There is no reason for this distinction. If an American is the victim of an act of terrorism or torture perpetrated by a foreign country, he or she should be permitted to seek legal redress, regardless of whether or not the country responsible for such an act is on the State Department's list.
- The proposed amendment would permit an American citizen who is tortured by agents of a foreign country to seek redress in United States courts when the legal system of the foreign country does not have remedies or procedures consistent with the basic rudiments of due process.
- Under this amendment, suit can only be brought against countries whose legal system provides no adequate means of redress. As additional safeguards, a case can only be considered by U.S. courts after the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim and provided the

claimant complies with the detailed service of process requirements provided for under the Foreign Sovereign Immunities Act.

- This amendment will give American citizens who have suffered the most inhumane forms of mistreatment a day in court.

Equally important, the legislation will send a clear and strong message to foreign states who might commit such crimes against our citizens that they can not do so with impunity. The prospect of accountability in a U.S. court will serve as a powerful deterrent against future extralegal violence against American citizens.

A BILL

To amend title 28, United States Code, to grant jurisdiction to the courts of the United States in certain cases involving acts of terrorism committed by foreign states that do not afford adequate and available remedies for the injuries cased by such acts.

1 *Be it enacted in the Senate and House of*
2 *Representatives of the United States of America in*
3 *Congress assembled.*

4 **Section 1. Exception To Foreign Sovereign Immunity**
5 **For Certain Terrorist Acts Committed By**
6 **Foreign States In Which Adequate And**
7 **Available Remedies Do Not Exist.**

8 (a) JURISDICTION OVER FOREIGN STATES--
9 Section 1605(a)(7) of title 28, United States Code is
10 amended--

11 (1) in subparagraph A, by inserting "(i)" after
12 the words "if the foreign state" and adding at the end

1 the following: "(ii) affords the claimant adequate and
2 available remedies; and"
3 (2) in subparagraph B, by adding after the
4 words "was so designated" the following "and does
5 not afford the claimant adequate and available
6 remedies as set forth in subparagraph A(2) above".
7 (3) EFFECTIVE DATE--The amendments
8 made by this section shall apply to any cause of action
9 arising before, on, or after the date of enactment of
10 this Act.

JAMES E. SMRKOVSKI

James E. Smrkovski is 53 years old and an American citizen. On the evening of August 22, 1985, Mr. Smrkovski, who was then working as an English language instructor for Saudi Airlines, was arrested at his home and taken to a detention facility somewhere in Jeddah, Saudi Arabia.

During the next several weeks, Mr. Smrkovski was interrogated about various acquaintances and accused of spying for Israel, trafficking in weapons, and smuggling alcohol with the Mafia. Handcuffed and often blindfolded during the interrogations he was brutally beaten, forced to do deep-knee bends until he collapsed from pain and exhaustion, repeatedly beaten on the soles of his feet, and subjected to electric shock torture. At one point, after his interrogators discovered a photograph of his son wearing a small Star of David, six of Mr. Smrkovski's toenails were slowly torn from his body, causing unbearable pain.

For the first six months following his arrest, Mr. Smrkovski was held in a tiny isolation cell that was only six feet long and three feet wide. There was no mattress or furniture and he was denied reading and writing material. His only contact with the outside world were his monthly visits from the U.S. Consulate which itself was denied access to him during the first month of his detention.

After six months in solitary confinement, Mr. Smrkovski was transferred to various other prisons. In all but one of these, he was forced to endure conditions of extreme overcrowding, filth, inadequate ventilation and excessive noise. His hands and feet were often shackled, sometimes so tightly as to cause bleeding. Five months later, Mr. Smrkovski was again placed in solitary confinement and again subjected to brutal interrogations, including repeated beatings. For 76 days, contact with the U.S. Consulate was cut off and he was kept in total isolation.

On October 6, 1986, more than year after his arrest, Mr. Smrkovski was brought before an Islamic Court and sentenced without trial to two years imprisonment for conspiracy to sell alcohol. The only evidence against him was a confession he had signed one year before under threat of further torture. Finally, on November 19, 1986, after 454 days in captivity, he was released from imprisonment by order of the King of Saudi Arabia.

In the years since his release, a number of physicians and psychiatrists specializing in the treatment of torture victims have diagnosed Mr. Smrkovski as suffering from Post Traumatic Stress Disorder resulting from his torture in Saudi Arabia. Despite physical and psychological treatment, he continues to suffer from chronic pain in the right knee and both feet, as well as from the emotional scars which he will be forced to live with every day for the rest of his life.

BACKGROUND PAPER: SCOTT J. NELSON

Scott J. Nelson is a forty-three year old United States citizen. In March 1984, in the course of performing his duties as a Monitoring Systems Engineer at the King Faisal Specialist Hospital ("KFSH") in Riyadh, Saudi Arabia, Nelson discovered that rather than being connected to sterilized valves as they should have been, the Hospital's oxygen and nitrous oxide lines were connected to grease valves. Because these valves could post a fire hazard as well as a danger of contamination to patients, Nelson reported this discovery to his superiors at KFSH and recommended that immediate corrective action be taken. Nelson's superiors instructed him to "forget about the problem." Instead, he brought the issue to the attention of the highest officials at the Hospital and eventually to an independent commission of the Saudi Government.

On September 27, 1984, KFSH officials summoned Nelson to the hospital's security office where he was picked up by four unidentified Saudi agents and taken to an office somewhere in Riyadh. Upon arrival, Nelson was brought to a small room where the Saudis proceeded to beat and torture him. They strapped a rod tightly behind Nelson's knees and forced him to do deep knee bends until his knees snapped and his legs buckled beneath him. They then pulled off his shoes and, holding his ankles down with the rod, proceeded to beat the bottom of his feet with a bamboo cane. After a brief respite, Nelson was brutally beaten all about his body until he fell unconscious.

Nelson spent the next four days alone locked in a room infested with rats and swarms of insects. On October 1, he was briefly visited by U.S. consular officials who were unable to secure his release. Two days later, Nelson was transferred to a filthy cell in the Malaz Prison. The cell was so overcrowded that prisoners had to sleep side by side and in shifts on a concrete floor. On November 5, 1984, following the intervention on his behalf by Senator Edward Kennedy, he was finally released. At no time during the 39 day period of his detention was he ever advised of the reasons for his arrest, formally charged with any crime or brought before a judge or other competent judicial authority.

Immediately after returning to the United States, Nelson sought medical treatment and, on November 27, 1984, he underwent surgery on his left knee. Since that time, he has had five more surgical procedures performed on his two knees and a laminectomy on his back, been under constant medication for chronic pain in the knees and lower back, and been diagnosed as suffering from diffuse nerve injury and post-traumatic stress disorder with symptoms rated as catastrophic. Following an evidentiary hearing before the Social Security Administration in 1989, an administrative law judge determined that Nelson has been permanently and totally disabled as of September 27, 1984 – the date he was tortured in Saudi Arabia.

All of the physicians and psychologists who have examined Nelson and/or reviewed the medical history are unanimous in their judgment that the severe physical and psychological injuries from which he suffers are entirely consistent with his allegations of torture.

Nurse's Murder Throws Britain and Saudi Arabia Into Crisis

By YOUSSEF M. IBRAHIM

LONDON, Sept. 24 — The sentencing of one British nurse to eight years in prison and 500 lashes, and the possibility that another British nurse accused of murder in Saudi Arabia may be beheaded, have set off the most serious diplomatic crisis between Saudi Arabia and Britain in years.

The two nurses were arrested in December in the death of a fellow nurse from Australia who was found stabbed 13 times, bludgeoned and suffocated. But the international issue exploded today when the British press reported that the nurses lost their first appeal in a religious court late Tuesday.

The British people, led by the press, are protesting not only the sentences but the way the trials were conducted and the validity of the verdict itself in the cases of Deborah Parry, 38, who was sentenced to death, and Lucille McLauchlan, 31, who was charged as an accomplice in the killing of Yvonne Gilford, 35. The charges and sentences were confirmed by Saudi officials and lawyers for the nurses.

The nurses' lawyers disputed the entire procedure, which has gone on for nine months, as highly unorthodox. They said the court often deliberated in private, that no witnesses were cross-examined by the defense and that much of the evidence consisted of confessions the two women signed and later retracted. They also said no forensic evidence was submitted to establish guilt.

Both women have yet to exhaust all appeals. Saudi officials said, but in a defiant mood fed by brutal criticism of the Saudi justice system, several senior Saudis asserted today in interviews that the sentences would be carried out if the religious courts upheld the convictions and sentences. If the sentences are upheld, Ms. Parry would become the first Western woman to be executed by the Saudis.

The British Foreign Secretary, Robin Cook, vowed he would do everything possible to prevent an execution. Mr. Cook warned the Saudis of a serious backlash if the judgments were not rescinded.

The charges, trial and sentencing in the case have fleshed out in a most dramatic way the fundamental differences between Islamic and Western civilizations, arousing ugly chauvinistic sentiments in Britain, where substantial numbers of immigrants are Muslims.

Photographs by Associated Press

Deborah Parry, left, may be beheaded for the murder of Yvonne Gilford, center. Another woman, Lucille McLauchlan, was charged as an accomplice in the killing. All three are shown here in undated photographs.

The Islamic system of justice is highly secretive, and its details are little known, even inside the Arab world, where most countries have legal systems based on Western codes of justice.

The case has handed the Labor Government of Prime Minister Tony Blair its first diplomatic scuffle. Saudi Arabia is a major trading partner of Britain and was an ally in the Persian Gulf war.

The conflict is complicated by long-simmering Saudi complaints that Britain gives safe haven to vocal opponents of the Saudi regime and the extreme sensitivity over any appearance on the part of the Saudis of applying different standards of justice to Western expatriates. Saudi Arabia imposes death by beheading in cases of conviction for murder and drug smuggling.

So far this year, 107 people have been beheaded in Saudi Arabia, including at least two women.

But public pressure here is mounting. Indeed, all British newspapers, including the conservative Financial Times, carried news of the sentences on their front pages today. The tabloid Daily Mail appeared to sum up widespread sentiment, at least in the media, when it commented above a full page picture of two Saudi soldiers flogging someone, "Can Blair Let This Happen?"

A spokesman for the Foreign Office in London said today that Mr. Cook had requested a meeting with his Saudi counterpart, Prince Saud al-Faisal, on Friday in New York, where both men are attending the United Nations General Assembly session. Saudi officials declined today to say whether Prince Saud had agreed to the meeting.

Saudi Arabia's Ambassador to Britain, Ghazi Alghosaibi, took a defensive as well as defiant position today. "We are not going to change our system of our customs to appeal to journalists of bleeding-heart liberals in the media all over the world," Dr. Alghosaibi said.

The crisis has been brewing for some time, but until now both sides were striving to keep matters calm.

Since their arrest in the oil town of Dhahran in eastern Saudi Arabia, where they worked, Ms. Parry, who comes from the south of England, and Ms. McLauchlan, of Dundee, Scotland, were visited by their families and some British consular officials who engaged a prominent Saudi lawyer, Salah al Hegelan, to defend them. The Saudis used the full sweep of their complicated religious justice system with its multiple appeals in a way that is not normally granted in cases of less notoriety.

Britain strove to give diplomacy a chance in the months since the two women were charged with stabbing the Australian nurse to death on Dec. 12, and using her credit card to withdraw money from her bank account the following day. The diplomatic tiptoeing ended today. Now the sentence has to go to a still higher court of five judges. If it is confirmed it goes to the King for final approval.

The slain nurse was found in her room at the King Fahd military medical complex in Dhahran where all three nurses worked. Ms. Gilford was widely known as a generous person who willingly lent money to other nurses.

Ms. McLauchlan had been charged in Dundee with stealing a terminally ill patient's credit card and using it, according to the British press. She denied the charge and was due to appear in court in Scotland to contest it a few weeks after she was jailed in Saudi Arabia.

The drama was further heightened by the insistence of the victim's brother in Australia, Frank Gilford, through his lawyers, that the two nurses should be punished if found guilty. Today Reuters reported from his home, Jamestown, 120 miles north of Adelaide, that he had not changed him mind despite the fact that the nurses' lawyer, Mr. Hegelan, asserted the brother was willing to accept compensation.

Under Islamic law, if relatives of the victim are willing to relent or demanding a death sentence, and accept instead financial compensation, the death sentence is then rescinded.

The Washington Post

MONDAY, OCTOBER 28, 1996

Leonard Garment

Redress for American Torture Victims

Almost 10 years ago, after working on the torture issue as U.S. representative to the U.N. Human Rights Commission, I acquired two American clients who had been tortured by a foreign regime.

One, Scott Nelson, had worked as an engineer in a hospital in Saudi Arabia, where he blew the whistle on superiors who had failed to correct a major hazard. He was arrested by Saudi police, imprisoned and tortured in a manner that left him permanently crippled. After 39 days he was released with the help of Sen. Edward Kennedy. The other American, James Smrkovski, a language instructor in Saudi Arabia, was arrested on a false charge of smuggling alcohol. He was confined in a cell the size of a large coffin. Six of his fingers were pulled out. After 454 days of confinement, he was released with the help of Sen. Bob Dole.

The reader is left to imagine the physical and emotional scars Nelson and Smrkovski took away with them.

Because the torture took place in Saudi Arabia, which lacks a judiciary independent of the rest of government, it is not possible to bring the torturers to justice by suing them in the country where the torture occurred. So my colleagues and I tried to sue in American courts.

We faced a large obstacle: the Foreign Sovereign Immunities Act generally prohibits suits in the United States against foreign governments. But there are exceptions—for instance, in situations involving commercial transactions by foreign governments in this country. The question went to the Supreme Court.

By the spring of 1996, we had a bill passed by the House and under consideration in the Senate. The State Department objected: There would be frivolous lawsuits. Other countries would retaliate. The Senate passed a bill with its heart cut out. In it, American citizens could sue in the United States for acts of state violence against them—but only if the crime occurred in a country on the State Department's "terrorist state" list. The designated countries were Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria—places so unappetizing that few Americans venture there at all, and therefore few have been in need of protection. The riskier places, palatable enough to attract U.S. citizens for work and trade but repressive enough to pose dangers, were let off. Vertebrae broken by North Korea, it seemed were morally distinct from those pulverized by the unlisted Uganda.

This fall we were back on the Hill. The new version of our measure answered the State Department's professed objections. It allowed a suit only if the foreign regime in question had no extradition treaty with us; that is, it aimed the amendment only against countries whose legal systems provided no adequate remedies. The new version also guarded agains frivolous claims, saying that people who wanted to sue must first offer to have their claims arbitrated.

The House again passed the measure. Sens. Arlen Specter and Daniel P. Moynihan introduced it in the Senate as part of the Foreign Operations Appropriation bill; it passed without audible objection. The State Department, whose opposition efforts last time around had been highly visible, was nowhere in sight. We overlooked this warning signal.

On the day the measure was accepted by the House-Senate conference committee, I called my colleague Ralph Oman, who had worked hard on the project, to congratulate him. "Not so fast," he said. He explained that the administration could now list the conditions under which President Clinton would sign the bill—what provisions could stay and what had to go. Because Congress was anxious to get a bill though and go home, the White House had the whip hand.

White House and State Department representatives went to the conference committee's leaders, Sen. Mitch McConnell (R-Ky.) and Rep. Robert Livingstone (R-La.), and demanded deletions. Our amendment was high on the administration hit list so it was scrapped.

When we began our efforts to get relief for Americans tortured by foreign governments, President George Bush was in office. His administration opposed the idea, and we were not surprised. But why did the avowedly idealistic Clinton administration treat this amendment as such a threat, especially after it had been re-drafted with care to meet reasonable objections?

In part it did so because this administration, like many of its predecessors, takes its sense of foreign and diplomatic threats from the State Department. For years State has been known to harbor an institutional urge to maintain stable relations with its foreign "client" states, including unappetizing ones, not infrequently at the expense of Americans at odds with these governments. The fate of the torture amendment demonstrates that this country faces the new post-Cold War world with the same old foreign policy apparatus, which will, if unchecked, generate the same old problems.

More interesting, the power of foreign money in this debate was more pervasive than even a fairly cynical observer would have expected. In this round, because Saudi cases were at issue, it was mainly the Saudis doing the buying. At every step of the process we had to contend not just with the power of Saudi Arabia as an oil-producing ally, which is large enough, but with Saudi resources of a different sort.

The Saudis purchase billions of dollars' worth of aircraft, munitions and services in the United

BY MARGARET SCOTT

States. Saudi diplomats and lobbyists do not let American officials, whether elected or appointed, forget this. The Saudis also spend millions providing employment to influentials on the Hill, like ex-staff aides to important members of Congress. In addition, U.S. companies that depend heavily on the Saudi trade are enlisted to lobby on the behalf of Saudi political goals.

At the beginning of the next legislative term, Sens. Moynihan and Specter will reintroduce the amendment to protect Americans abroad from violence by foreign governments. This time the light of public debate and political exposure will be brighter, and we will see how the torture measure fares in these changed circumstances.

The writer, a lawyer, was a special presidential assistant in the Nixon administration.

Workers' Tales of Torture Strain U.S.-Saudi Ties

Bush Administration Sides With Mideast Ally Against Citizen in Supreme Court Case

By Thomas W. Lippman
Washington Post Staff Writer

When two Americans and a Briton told a House subcommittee recently how they had been tortured in Saudi Arabian jails, their harrowing tales of chains, beatings, filth and degradation exposed a painful irritant that has plagued U.S.-Saudi relations for years.

By publicizing their charges and enlisting the support of several members of Congress, they have put the Bush administration in the politically delicate position of having to balance its valued relationship with a vital Mideast ally against the rights of U.S. citizens.

Both the administration and Saudi Arabia—a theocratic state ruled according to a religious legal system antithetical to American standards—would prefer that the issue go away.

But far from fading, the issue of how U.S. citizens are treated in Saudi Arabia is receiving new attention because of the alleged victims' efforts to publicize their stories and because the Bush administration is supporting Saudi Arabia in one such case that has reached the U.S. Supreme Court.

The case involves Scott J. Nelson, 38, who says he was jailed, beaten, starved and held in solitary confinement in a rat-infested cell for 39 days in 1984 after he refused to keep silent about safety violations at King Faisal Hospital in Riyadh, where he was an engineer. As with many other foreigners arrested in Saudi Arabia, he was never tried or even formally accused before any tribunal and was released only after the intervention of a prominent person—in this case, Sen. Edward M. Kennedy (D-Mass.).

Nelson, one of the three men who testified before the House Judiciary subcommittee on international law on May 13, said the Saudis had been trying to silence him. Saudi officials have said Nelson was arrested because they discovered he had submitted a phony diploma from Massachusetts Institute of Technology with his job application; Nelson admits he did.

The Bush administration has asked the Supreme Court to reverse a lower court ruling that would allow Nelson to sue Saudi Arabia for damages in a U.S. court. The government's brief is the tip of a legal iceberg that has been growing for years because Saudi Arabia is not part of the worldwide system for resolving commercial disputes, and some foreigners working and doing business there have seen soured business deals end in harassment or imprisonment.

Human rights experts say there are no reliable figures on the number of such cases, but they use words such as "fairly common" and "legion" to describe the frequency.

The Saudi Embassy issued a statement last week saying "the kingdom totally rejects the allegations of mistreatment and torture" and calling them "groundless" and apparently "motivated by objectives other than truth or justice."

Several members of Congress, including Sens. Daniel Patrick Moynihan (D-N.Y.), Terry Sanford (D-N.C.) and Patrick J. Leahy (D-Vt.) and Rep. Lee H. Hamilton (D-Ind.), chairman of the House Foreign Affairs subcommittee on Europe and the Middle East, had urged the Bush administration not to join Saudi Arabia in asking the Supreme Court to reverse the Nelson ruling because it would appear to be siding with a foreign country against an aggrieved U.S. citizen.

But in asking the Supreme Court to review the Nelson case, U.S. government lawyers said a Supreme Court ruling is needed because several federal courts have issued inconsistent interpretations of a 1976 law regulating suits against foreign governments. The administration lawyers played down foreign policy considerations, but State Department officials have acknowledged that the case has potentially serious implications for relations with an ally whose feelings bruise easily—and happens to sit atop the world's biggest reserve of oil.

Nelson has said he got no help from the State Department in his quest for compensation for what he describes as permanently disabling injuries. After he lost a case before

See SAUDI, A9, Col. 1

Hill Support Enlisted in Grievances Following Saudi Business Disputes

SAUDI, From A8

the Saudi Board of Grievances because he refused to go back to Saudi Arabia to testify, he and his wife filed suit in the United States against the Saudi government-owned hospital and a Saudi purchasing company that does business in the United States.

The 1976 Foreign Sovereign Immunity Act bars such suits except when the alleged injury is directly related to a foreign government's business activities in the United States. A federal district judge ruled that Nelson's claim did not meet that test because his grievance is against the Saudi police.

But the U.S. Court of Appeals for the 11th Circuit, based in Atlanta, reversed the lower court, holding that "the recruitment and hiring of Nelson in the United States" by a U.S. company under contract to the hospital was a " 'commercial activity' of the Saudi government, and that Nelson's . . . detention and torture were 'based upon' " his hiring in the United States. The definition of "based upon" is what the Supreme Court has been asked to review.

Nelson's story, stark as it was, was by no means the most nightmarish of those the Judiciary subcommittee heard earlier this month.

Keith Carmichael, a British businessman, tried to flee Saudi Arabia without an exit visa when, he said, his Saudi business partner demanded payment of illegal "commissions." Captured by border police in neighboring Qatar, he was forcibly returned to Saudi Arabia, where he said he was held without any formal charge for 2½ years, suffering repeated beatings, sexual assaults, near-starvation and a broken back.

James E. Smrkovski, a U.S. citizen and former employee of Saudia, the national airline, said he was held in solitary confinement and tortured repeatedly for 454 days, accused by his jailers of selling alcohol and spying for Israel.

"Senior State Department officials have raised these issues with the Saudi government."

—U.S. comment on complaints

He testified that he was beaten, deprived of food and water and subjected to electric shocks, and that his toenails were pulled out with pliers.

The State Department, he said, "has done nothing to help me in my efforts to obtain some small measure of justice."

Asked for comment, a State Department official said the department "fully supports the effort of the Commerce Department and our embassy in Saudi Arabia to resolve disputes in which a U.S. company is an aggrieved party. Senior State Department officials have raised these issues with the Saudi government."

But members of the House Foreign Affairs subcommittee on Europe and the Middle East complained at a hearing last week that the administration has not done nearly enough to protect American citizens caught in the often-baffling web of commercial disputes with Saudi Arabia.

Deputy Assistant Secretary of State David L. Mack acknowledged to the House Foreign Affairs subcommittee that Saudi Arabia's internal system of commercial dispute resolution is sometimes slow and frustrating. But he added that "more than 450 U.S. companies maintain offices in Saudi Arabia and hundreds of others conduct business through local agents . . . . Almost all of these firms report that doing business in Saudi Arabia is profitable."

"None of the individuals charging mistreatment has chosen to take advantage of the Saudi legal system," the statement last week from the Saudi Embassy added, explaining that the Saudi system is based on Islamic law and "prohibits the mistreatment in any way, shape or form of individuals in custody."

Senator KYL. Let me just make one quick comment or question with respect to each of you. We had hoped to conclude this at noon, but your testimony is so compelling that I want to at least go back and reflect on one point that each of you made.

Mr. Flatow, I was stunned, I guess, by your testimony that you were invited to the signing of the bill which gave you the right to pursue these blocked assets in court, immediately following testimony by Mr. Eizenstat that the administration really objected to that provision, though the President was willing to sign the legislation, notwithstanding his objection to that provision. But they immediately set out to undercut the legislation, as Mr. Garment pointed out, the rear-guard action to shoot loopholes in the law.

But I am struck by the fact that notwithstanding the fact that they must have known at that time that they did not intend to permit you to execute on any judgment that you might obtain, they still called you down to the White House to attend this bill signing ceremony and encourage you to proceed with your litigation.

Did the administration ever signal to you that they would oppose your efforts to execute on a court judgment if you obtained such a judgment?

Mr. FLATOW. No, sir. You see, I think that the weakness in the original bill was intended to be blown by the victims' families. The original bill had no teeth. It did not define damages. It did not set venue. It did not give us a course of action. It was the amendment that was advanced that summer and in the early fall by Senator Lautenberg that put real teeth into the Anti-Terrorism Act, and it was from that bill that we were then able to actually file our lawsuit. But at no time did the administration ever pull us aside, especially after I met with the President, and say, look, we have a severe problem here. We may have made a mistake.

I know the President was disappointed in the Anti-Terrorism Act, but only that it was not strong enough for him, that it did not go far enough in dealing with certain aspects of terrorism. But as far as I knew, we were under the blessing of the United States of America.

Senator KYL. Thank you. You will all have to excuse my lack of a voice today.

Maggie Khuly, I was impressed by the fact that you said you were looking for justice, not charity, and in seeking justice in court, which the law provided, you never viewed yourself as trying to win a race to the courthouse. I appreciate the point that you made there.

It seems to me that the message that the United States intended to send to terrorist states with the adoption of this law has now become very muddied because of the fact that we are precluding the execution of judgments obtained pursuant to that law. Is there any doubt in your mind as to the message that the Cuban government was trying to send when it shot down those airplanes?

Ms. KHULY. There was no doubt in my mind, or to any of the families. The Cuban government was really ridiculing the U.S. Government and saying, we have got you here and there is nothing you can do to us. And I think all the way throughout the lawsuit, by their lack of interest, their not showing up, their allowing a default judgment, not even commenting, not caring when they were

called murderers in court and convicted, they really thought they were going to get away with it.

What I am concerned is that they knew they were going to get away with it and we, the families, did not know. Somehow, they understood that the United States was not going to enforce this law, and here we were, asking everybody along the way and committed to the one action that we had control of. There is no way we can get criminal indictments. There is no way we can go to Cuba and face these people in court. We know the names of the murderers. We know their faces. We have their photographs. Everybody knows who they are. They have admitted their guilt. There is nothing we can do.

But here we were given this tool and we took it, and we took it with the blessing of our Government. Apparently, everybody but us knew that it was not for real. It is really distressing and disgusting as Americans to be left alone, unprotected.

Senator KYL. I must say that many of us in Congress were in the same position that you were in. I think you have seen that we are going to try to remedy that.

Dr. Gerson, you made a very important point, I think, when you said that Congress surely was mindful of national priorities when it passed this legislation and knew that there could be judgments which would be available for execution above other judgments. Obviously, that is what results when you create causes of action, and numerous parties have those causes of action.

Because of your expertise in international law, let me ask you to comment on the critique of the law by Mr. Eizenstat, specifically, that U.S. foreign policy interests would be threatened if we were to allow an execution of a judgment that had been obtained in this case.

Mr. GARMENT. Mr. Chairman, I think there are two points to your question. The first is the nature of our negotiations with the State Department at the time that the 1996 Act was being enacted, and second, international law as it pertains to this issue.

With regard to the first question, the 1996 Act was passed only after a very, very long period of deliberations in which the position of the White House and the State Department were fully stated. The State Department wanted to make sure that there was maximum flexibility by the administration in dealing with terrorist states. The concession that was made was that they would be the determiner of which countries practice terrorism.

It is for the reason that Mr. Garment—the problem has been the problem that Mr. Garment pointed out, that it would not be based on a judicial determination but rather a determination by the State Department. We went along with that interpretation and it almost cost us the Act itself because its very constitutionality was challenged on that ground, and we finally succeeded in sustaining its constitutionality.

Now, with regard to international law, I have a doctorate in international law. I was a professor of international law and transactions for many years. It seems to me that the first rule of international law is the protection of innocent civilians against massive human rights deprivations. As in all areas of the law, we try to create categories, even among different outrages. But certainly at the

top of that list is the outrage of terrorism, the deliberate infliction of death or bodily harm on innocent civilians. That falls within the realm of what we call in international a use cogence, which is a norm of law which is obligatory upon all governments.

So in pursuing this legislation, it appears to me that what the U.S. Senate is doing, both in giving life to the initial 1996 Act and in making these further clarifications, is really promoting that cardinal rule of international law that international terrorism cannot be accepted and that all remedies need to be pursued, and the remedy that we have fashioned today is the remedy of opening up the civil courts for judgment, but a judgment is meaningless if it cannot be enforced.

Senator KYL. But is there any per se prohibition in international treaties, to which Mr. Eizenstat referred, from executing a judgment on frozen assets in the United States?

Mr. GARMENT. I am not aware of such a provision in any treaty, but even if there were such a provision, just as any law which is passed by the U.S. Congress must pass muster, it must be in accordance with the U.S. Constitution, so, too, any provision of a treaty that says that would have to be in accordance with international law as it has been generally interpreted. Thus, the constitutionality under international law of such a provision, if one existed, would be suspect.

Senator KYL. I was perplexed by the assertion and I perhaps should have asked Mr. Eizenstat if he thought it was a per se inhibition. If that is, in fact, what he was arguing, then it seems to me totally inconsistent with the President's call for legislation to permit compensation from blocked assets. I mean, either you can or cannot do it. But if there is an international prohibition to that, then the President should have never called for Congress to establish it. I suspect that your point is valid, namely that there is no per se prohibition on that.

Dr. Clawson, I think the last point you made, and I was writing it down as you were finishing, is the one that I wanted to emphasize again, and that is that while obviously a government always needs some flexibility in dealing with other countries, in particular when you are dealing with terrorist states, the principles that you laid out need to be kept clearly in mind. We also need very clear rules, and that there is something very unclear, very inconsistent with providing a remedy in court which cannot be executed, that that is totally inconsistent and sends the wrong message.

Are you aware of any inhibition in international law to execution on a judgment properly obtained under the provisions of the 1996 law?

Mr. CLAWSON. I am not an international lawyer, so my opinion may not be worth very much on this subject, I am afraid to say, but I would certainly suggest that I am not aware of any such provision, and indeed, it would seem to me that had there been any such provision, it would have been forcefully brought to the attention of this committee at the time that the original legislation was enacted back in 1996.

Mr. Eizenstat's objections do not seem to be overwhelmingly objections to the original law, or the original set of provisions in 1996, and that, indeed, that would have been the appropriate time for

him to raise these arguments. But once this has been enacted into law, that really his job should have been to implement that law, even though he may not particularly appreciate that set of rules.

In the field that I work in most closely, in economic development, there has been an explosion of research and work in the last decade showing that there are few things more important than having a clear, transparent, law-based set of rules so that everyone knows what are the rules of the game here. It seems to me that what Mr. Eizenstat was doing was offering objections to a law once passed while trying to hide this by saying that he was just objecting to the enforcement of the judgments obtained under the law. I do not think that is good for the rule of law in this country.

Senator KYL. I think that is a key point to this entire hearing.

Mr. Garment, might I conclude by asking you, in effect, the same question. You made the point that, of course, the State Department always wants leverage, but that being hauled into court and having a judgment rendered against you and being subject to the execution of that judgment might be maximum leverage.

Mr. GARMENT. Yes; we are not exactly a small player in the world of economics.

Senator KYL. If we enforce the judgment——

Mr. GARMENT. The enforcement is the most powerful kind of deterrent. But, of course, Stuart Eizenstat is an able lawyer and what he was compelled to do was to offer, in a very lawyerly way, sophistries, and he may not like it, but it is double-talk, and it is double-talk that has a very specific institutional purpose, which is to say to the world and to say to the Congress, separation of powers notwithstanding, collegiality notwithstanding, this is our business. You stay out of it. This is our business. Flatow, you stay out of it. Everybody stay out of it.

The sophistry is the creation of a terrorist list of nations. The argument that we made when we presented legislation to provide that the nonexistence of a remedy in an offending state should be the test was not acceptable because it took away their power to create a list and to juggle the list, despite its inherent constitutional infirmities.

So that is what is at play here. They have their responsibilities. They have people of good faith trying to carry out their responsibilities. You have yours. The people who are injured by terrorist acts of terrorist states or by other states that have no system of redress for injured persons, particularly American citizens, should come before a tribunal. The injured person should have a right of redress and the statute should not only provide a day in court, but the satisfaction that comes with a successful day in court, namely the ability to have satisfaction.

Senator KYL. I thank you. I think each one of you have made very important points.

Let me be clear that I interrupted Mr. Eizenstat a couple of times and I did use the phrase double-talk, and I think you have to call a spade a spade here. He has been required to defend the indefensible. That is the bottom line. He is a good lawyer and he has tried to present some arguments, but they are all after the fact. If they were legitimate, they could have been presented before

the fact, at a time when we could have fashioned the legislation in a different way. But that was not done.

Now, discovering that, in effect, this does limit to some extent the ability of the State Department people to limit their range of actions, there is no objection raised. But it seems to me that it is raised too late. Once these judgments have been obtained, it is the responsibility of a sovereign nation of the status of the United States of America to see that they enforced, especially when the President of the United States, no less, has asked the U.S. Congress to pass precisely this kind of legislation authorizing precisely these kinds of judgments.

The failure of the President to back the Congress in the legislation at this time is a dereliction of his responsibility, not only to the families who have obtained these judgments pursuant to that law, but to the cause against terrorism which this country is so committed to, and that the President need to say, I am going to cut through all this legal gobbledy-gook and all of the State Department arguments about leverage and flexibility and I am going to do what is right, and what is right is to let these people execute on the judgments.

And to the families of others who also may obtain judgments, we will find a way to exert our power on countries like Cuba and Iran and other countries to ensure that before they are admitted into the family of nations, one of the prices they will have to pay is the satisfaction of those judgments, as well, not to argue that no one is going to be satisfied, because after all, there just is not enough money.

So it seems to me that we have created a record here that enables us to move forward, based on these principles. We could not have done it without the personal testimony of those of you who have suffered, and we appreciate your willingness to come forward again to share your stories with us.

I know that I share the views of Senators Mack and Lautenberg and Senator Feinstein when I say that we will pursue this with all vigor and do what we can to achieve both objectives, the satisfaction of the claims that specifically have been made in this case pursuant to law, and second, the fight against terrorism, to send a very clear, not a muddled message, but a very clear message that acts of terror will not be sanctioned by the United States of America.

We thank you all very much for attending, and this hearing is now concluded. I will mention that the hearing record will be kept open for one week to accept written statements by other interested parties, as well as statements or questions by members of the committee who could not join us today. Thank you very much.

[Whereupon, at 12:24 p.m., the committee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

Jersey City, NJ, November 13, 1999.

Re: Committee's October 27, 1999 Hearing "Terrorism: Victims' Access to Terrorist Assets"

Hon. ORRIN HATCH, Chairman,
U.S. Senate Committee on the Judiciary,
Attention: Joelle Scott, Deputy Chief Clerk,
Dirksen Senate Office Building, Washington, DC.

DEAR MS. SCOTT: I am responding to Senator Hatch's letter of November 4, 1999. In answer to the Senator's questions, I respond as follows:

RESPONSES OF STEPHEN M. FLATOW TO QUESTIONS FROM SENATOR HATCH

Meeting with Mr. Berger. My 1998 meeting with National Security Advisor Sandy Berger took place in the West Wing of the White House. I was accompanied by Senator Frank Lautenberg. When we sat down in Mr. Berger's office, I was quite surprised that his first remark to me was substantially that he was unfamiliar with my case and that I should please bring him up to date. I was surprised at the comment because the purpose of the meeting was an attempt by Senator Lautenberg to help us overcome the Treasury's reluctant to assist us with information regarding Iranian assets and I was certain that Mr. Berger would have been briefed before the meeting.

It was my impression that Mr. Berger was hiding behind this veil of innocence as to the specific status of our case, Senator Lautenberg stressed much better than I was able the importance of this issue because I had obtained a judgment under a Federal Law. While Mr. Berger did not have to explain the Administration's "about-face" because he wasn't aware of its details, he promised Senator Lautenberg and me that he would look into it and have someone get back to us as soon as possible.

Within a week, Senator Lautenberg called me, with some excitement in his voice I might add, to indicate that he had received a telephone call from Mr. Berger and that my attorney, Steven Perles, should not hesitate to contact James Baker at Mr. Berger's office. Mr. Perles, did so and was surprised to find out that Mr. Baker had no idea why Mr. Berger had given his name.

I have not had any further direct meetings with Mr. Berger since 1998.

Treasury Department. By way of background, let me tell you that our request to Treasury for information regarding Iranian assets was, we thought, the most logical place to begin our search for assets. Knowing the government's penchant for categorizing, labeling, identifying and tagging everything within its purview, I believed the Treasury Department would have no problem in providing the requested information.

Our first request was initiated by us through the offices of Senator Lautenberg. We received no response. This led us to issue a subpoena to the Treasury Department.

On June 19, 1998, my attorney, Thomas Fortune Fay, received the attached letter which straight forwardly indicates that Treasury had objections to the information we requested and states that "the subpoena is unduly burdensome and overly broad." If we wanted information, we are told, we would have to be more specific and narrow the scope of our request.

I cannot accept the Treasury Department's explanation at face value. How could we narrow the scope of our request? We had no idea what to ask for. How could Treasury possibly believe that an American citizen and his attorneys, without access to diplomatic information in the possession of his government, have idea as to what information we should ask to see? And, if I somehow was able to narrow my request, I visualize information being kept from us because we didn't know it existed and could not, therefore, ask for it. Treasury put us in a classic "Catch-22." In essence, Treasury is saying, "be specific with what you ask us, and don't blame us if you didn't ask for the right thing."

Instead of our request being too burdensome for a response, I believe that Treasury's refusal to provide information was an attempt to delay us, if not to prevent us, from collecting on our judgment. If that was its goal, Treasury has been successful.

I trust the foregoing is responsive to your questions. I very much appreciate the opportunity to testify before the Senate Judiciary Committee and am grateful for the Committee's interest.

Sincerely yours,

STEPHEN M. FLATOW.

U.S. DEPARTMENT OF JUSTICE,
CIVIL DIVISION,
Washington, DC, June 19, 1998.

Re: *Flatow* v. *Islamic Republic of Iran,* et al., Case No. 97–396 (D.D.C.)

THOMAS FORTUNE FAY, Esq.,
Law Offices of Thomas Fortune Fay, PC, Washington. DC.

DEAR MR. FAY: I represent the Department of the Treasury (the "Department") with respect to the third party subpoena you served on the Department on June 5, 1998, in connection with the above-referenced care. Attached to that subpoena are five document production requests. Any response by the Department, to the subpoena is subject to 31 C.F.R. § 1.11. In addition, in accordance with the provisions of Federal Rule of Civil Procedure 45(c)(2)(B), I am writing to state the Department's objections to production as called for by the subpoena.

First, the subpoena is unduly burdensome and overly broad. For example, request number one requests all documents pertaining to any assets in which any of the named defendants, including the Islamic Republic of Iran, has asserted or alleged any interest. This request is not limited to any period of time, and thus calls for the production of an enormous number of documents, even including those concerning the Iranian hostage crisis, dating back to 1979 and before. An even wider net is cast by request number five, which calls for a list of documents pertaining to assets of any of the named defendants in the possession of "any agency or department of the United States." This fifth request amounts to a demand for a government-wide search for documents regarding Iranian assets and is not properly served on this or any Department, or made of the government as a whole. Locating potentially responsive documents to requests one and five alone would require a search of a massive number of files going back in time indefinitely, a burden made heavier by the omission of any definition of generic terms' used in the requests, such as "asset" or "ownership right." Requests number 2, 3 and 4 are similarly over broad and unduly burdensome.

Even if potentially responsive documents could be identified, the process of reviewing them to determine what information can be released would impose an onerous burden on the Department and take a great deal of time. This is especially so in light of the short return time set by your subpoena. Federal Rule of Civil Procedure 45(c)(3)(A)(iv) says that a court "shall" quash a subpoena if it "subjects a person to undue burden."

Nonetheless, the Department is attempting to locate and categorize documents that might be responsive to your subpoena. While we obviously have not had time to review even the categories of documents, it is likely that a substantial number will be subject to claims of privilege, including the state secrets, law enforcement, deliberative process, attorney-client and any applicable statutory privileges as well as the attorney work product doctrine. The foregoing objections are not exclusive, and the Department reserves the right to accept these and other privileges and defenses after it has located and categorized responsive documents. I will send you a second letter containing a list of categories of documents that are generally responsive to your subpoena as soon as the Department has completed identifying such categories. In the meantime, I ask that you consider a significant narrowing the scope of your subpoena.

For all the above reasons, the Department objects to the subpoena served on the Department on June 5, 1998. Pursuant to Fed. R. Civ. P. 45(c)(2)(B), the requester "shall not be entitled to inspect and copy the materials * * * except pursuant to an order of the court by which the subpoena is issued." Therefore, the Department will not produce the requested documents at the date, time, and place specified on the subpoena. That said, the Department nevertheless is willing to discuss its concerns, and to confer on the production of a much narrower category of non-privileged, relevant documents. I am available to discuss this matter at your convenience.

Sincerely,

JOHN R. NIEMEYER,
Trial Attorney, Civil Division,
U.S. Department of Justice.

RESPONSES OF DR. ALLAN GERSON TO QUESTIONS FROM SENATOR HATCH

In response to questions posed in connection with proposed legislation curtailing the use of a presidential waiver to preclude attachment of frozen foreign assets, I should like to make three points:

1. The "proper balance of power" between the rights of individual victims or the families of such victims of state-sponsored terrorism to appropriate remedies versus the rights of the Executive Branch to maximal flexibility in the conduct of foreign affairs is struck by respecting the authority of Congress when it has acted to assure an appropriate balance, especially where the constitutionality of Congressional action has been expressly upheld by the federal courts. To permit legislation validly enacted to be disrespected by Presidential action which renders meaningless that legislation erodes the Constitutional division of powers. While the President may ask the Courts to defer to his authority in exceptional situations involving the national interest to forego enforcement of judgments, he has no authority pursuant to legislation or common law principles which mandates non-enforcement of judgments;

2. Moreover, any effort to prevent enforcement of judgments entered pursuant to valid legislation is probably, and should be, a taking of property under the Fifth Amendment of the Constitution requiring fair compensation;

3. The enactment of the 1996 and 1997 Amendments to the FSIA, and the President's signing of those Amendments into law, cannot be reversed without "remedial legislation." Otherwise the President is either exercising an unconstitutional "line item veto" or using an insupportable claim to Executive Branch authority to impede Congress's lawful invocation of its exclusive authority under the foreign commerce clause, under Article 1, § 8 cl. 10's grant of authority to define and punish violations of the Laws of Nations, and Article III's grant of authority to define and establish the jurisdiction of the federal courts.

While I am an International Law scholar and not a Constitutional Law expert, I have had familiarity with the scope of Presidential executive authority over foreign policy in my former capacity as a Deputy Assistant U.S. Attorney General for Legal Counsel. I believe, based on that experience and my own reading of the law, that the legislative proposal to allow Anti-Terrorism Act judgments to be satisfied through execution against blocked foreign government assets does not interfere with the President's prerogatives in the conduct of foreign affairs.

First, the Constitution provides no express Executive Branch authority over foreign government assets. That power rests, under the Constitution, totally with Congress, which has exclusive power over foreign commerce, and has invoked that power through enactment of the Trading with the Enemy Act ("TWEA") and the International Emergency Economic Powers Act ("IEEPA"). The President's power to freeze foreign government assets derives from those statutes. If Congress chooses to enact other statutes to address such blocked assets, this is within Congressional authority.

Second, there is an international law component here. The enactment of the Anti-Terrorism Act and the corollary legislation to allow enforcement against blocked assets falls within the express Constitutional grant of authority to the Congress under Article 1, section 8 clause 10 "To define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations." By its very essence, the legislation under consideration defines and punishes offenses against international law. The President can, of course, exercise his veto power to prevent legislation punishing violators of international law. Here, however, the President's attorneys went to U.S. federal courts to defend the constitutionality of the Anti-Terror-

ism Act. The U.S. District and Appellate Court upheld the constitutionality of the law and the U.S. Supreme Court declined further review.

Third, once the decision to place a matter of defining, identifying, and punishing violations of the laws of nations within the judicial authority established under Article III, the President is duty-bound to assure enforcement of any resulting judgment. This is the meaning, for example, of the Supreme Court's decision in *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948), "Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned, or refused faith and credit by another Department of Government" (emphasis added). Although the President has no Constitutional prerogative to disregard or interfere with a valid exercise of the judicial authority, he is nevertheless free to appeal to the Court's discretion to not honor a judgment in particular cases where it can be demonstrated that implementation of foreign policy would severely jeopardize the security interests of the United States. This is my reading of the provision for presidential waiver "in the interest of national security" provided in the 1998 amendment to the FSIA known as the Treasury Dept. Appropriations Act, 1999. *But the 1998 amendment to the FSIA was surely not intended to override existing limitations on presidential power or to give unlimited scope to "national security" arguments to void on a blanket basis enforcement of judgments against frozen foreign assets.* There is nothing in the legislative history that would lead to such a conclusion, and indeed such an interpretation runs counter to the efforts of Congress in enacting meaningful legislation for citizens to directly attack foreign governments implicated in the sponsorship of terrorism.

As Justice Jackson explained in this famous and often cited passage in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 637–8 (1952), the President can ask that the Courts defer to his judgment, but he can not override them.

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

In this particular case, the President's position confronts not only the "equilibrium" established by our constitutional system but constitutional rights of the families of victims of terrorism which the Anti-Terrorism Act's provisions seek to protect. Under the Fifth Amendment, the federal government cannot "take" property interests—including those represented in court judgments—without compensation to the owner. For these purposes, a "taking" includes indefinite delays in the realization of the value of a judgment. And as a long line of cases makes clear, the President's authority to settle claims of U.S. nationals against foreign governments which rise to the level of "Fifth Amendment property interests" is conditioned on provision of some alternative method of recovery, and that without such alternative, Executive Branch interference with execution exposes the federal government to liability for an unconstitutional taking without compensation. See, e.g., *Dames & Moore* v. *Regan,* 453 U.S. 654, 690–91 (1981) (Powell, J., concurring and dissenting); *In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1310–13 (9th Cir. 1982); cert. denied sub nom Pan American World Airways, Inc.* v. *Cause,* 493 U.S. 917 (1989), *Gray* v. *United States,* 21 Ct. Cl. 340, 392–93 (1886) (Executive Branch action to extinguish claim against foreign government may give rise to right to compensation against U.S.); *Chas. T. Main Int'l. Inc.* v. *Khuzestan Water & Power Authority,* 651 F.2d 800, 813, n.20 (1st Cir. 1981) ("of course, neither the President nor Congress may exercise their powers [to settle claims against foreign governments or to block foreign government assets] so as to contravene the protections of the Bill of Rights, even when acting in the sphere of international relations.")

Finally, it has been said that opening frozen foreign assets to execution of judgments obtained against states-sponsors of terrorism would be unfair to other claimants against blocked assets whose potential recovery would be reduced by this early access. This is, however, a different matter than the right to an unlimited scope for presidential invocation of "national security" to place frozen foreign assets off-limits to such claimants. I myself believe that priority should be accorded to families of victims of international terrorism over ordinary commercial claims insofar as the US national interest in deterring terrorism is furthered in giving priority to such claims. In any event, however, the issue of priorities among different sets of claimants is one that courts routinely address and lack of clarity on this issue should not

serve to justify a blanket presidential waiver against enforcement of any judgments frozen foreign governmental assets.

In sum, Congressionally enacted means for enforcement of Anti-Terrorism Act judgments against frozen foreign government assets does not interfere with President's constitutional prerogatives in the area of foreign policy. Rather, it represents a valid invocation of clear Congressional authority to define and punish violations of the Laws of Nations, and gives meaning to our own legislation. It does so while honoring the President's prerogatives in unusual cases involving US national security interests to ask the courts' indulgence in not honoring otherwise valid claims against frozen foreign assets. But the Congress also recognized that attachment of frozen foreign assets may be the only way of honoring a judgment pursuant to the Act, and that closing off that avenue by a blanket invocation of "national security" would mock Congressional intent. For these reasons, any further Congressional clarification aimed at clearly defining the limits of a Presidential waiver of remedies under the 1996 Antiterrorism Act are to be commended.

I trust that these observations will be helpful to the Committee.

RESPONSES OF PATRICK CLAWSON TO QUESTIONS FROM SENATOR HATCH

Question 1. Has the Administrations's retention of Iranian assets as leverage led to any real concessions by the Iranians? Put another way, we have held Iranian assets for approximately 20 years. During that time, has the Iranian regime's support for terrorist actions diminished in any appreciable manner?

Answer 1. Iran takes a much more expansive view of the assets question than the narrow legalistic interpretation favored by the U.S. government. Iranian leaders and the Iranian media have regularly and repeatedly referred to all the assets in dispute, not simply the small amounts that are technically frozen. In particular, the Iranians are interested in the fate of the hundreds of millions of dollars—possibly over a billion dollars—at stake in the disputes at the Hague Tribunal set up in 1981 under the Algiers Accord which ended the embassy hostage affair. It is these assets to which Iranian leaders repeatedly refer.

At times, the United States has agreed to release large sums to Iran as part of the resolution of the disputes dating back to 1981. Indeed, the United States released to Iran $285 million on November 27, 1991. That date was less than a month after the release of two American hostages in Lebanon (Jesse Turner and Thomas Sutherland) and six days before the release of the three remaining American hostages (Joseph Cicippio, Alann Steen, and Terry Anderson). The release of funds was presented as a technical legal matter rather than as part of the hostage release negotiations. Perhaps so, but the timing was most interesting. One could be tempted to view this as a concrete example of what President George Bush has said in his inaugural address about relations with Iran, namely, "Good will begets good will."

The question can be asked: how much leverage did this release of assets gain the United States? Perhaps the best answer comes from the detailed account of the hostage release negotiations by the principal intermediary involved, Giandomenico Pico, the UN hostage negotiator (*Man Without a Gun,* New York: Times Books, 1999). Pico goes through the many factors raised by the Iranians in the negotiations, but not once does he mention the frozen assets or the release of the $285 million. Indeed, a major theme of his book is that the United States did not follow through on President Bush's offer of good will and that the Iranians were bitterly disappointed about this. From his analysis, it would appear that the release of the assets brought the United States no leverage.

The Iranian regime's support for terrorist actions in Europe did diminish in an appreciable manner after 1996. The reason for this change is almost certainly the actions—limited though they were—taken by the European Union governments in the aftermath of the verdict by a German court in the Mykonos case, holding Iran's political leaders responsible for the murder in Berlin of Iranian Kurdish dissidents.

The Iranian regime's support for terrorism aimed against the Middle East peace process continues unabated, as reported by the Palestinian Authority and Israeli sources.

Question 2. In your statement, you declare that "intriguingly, the stream of inventive Iranian claims against the United States has lessened since the Foreign Service Immunities Act was amended to permit claims against Iranian terrorism." What evidence, if any, do you have to support the notion that this "effect" is related to the amendment of the FSIA?

Answer 2. Little if any evidence is available about the causes for Iranian actions. The cautious observor will only observe what Iran has done. The alternative is to offer speculation, based on statements by Iranians leaders—which may be disingen-

uous—and on interpretations of Iranian motivations and behavior patterns. A good story can be told about why the FSIA amendments are independent of the lessening Iranian claims; after all, there have been many other factors influencing Iranian behavior, especially the election in 1997 of a new, less confrontational president. However, another good story can be told about why the two are connected; Iran has at times responded to tough actions by backing off, while it may regard friendly gestures as concessions which show weakness that can be exploited. We do not have solid evidence which of these two stories is more true.

Question 3. Mr. Garment has recommended the further expansion of the FSIA to include the torious acts of other, non-terrorist nations. Would you support the expansion of the FSIA to include tortious conduct of any foreign nation against U.S. citizens in any part of the world?

Private suits to recover damages for tortious actions by foreign governments is an extraordinary step which should only be authorized in extraordinary circumstances. Any expansion of the FSIA should be confined to outrageous actions by governments that repeatedly violate the rights of Americans. It is hard for me to imagine circumstances under which a government would meet this test yet not be included on the State Department list of terrorism-supporting states. It is appropriate to rely on that list for FSIA suits. The list has great integrity, that is, it has been prepared with considerable care by professionals who do not appear to be influenced by overall U.S. foreign policy objectives. For instance, the list has included Syria for years while the United States was trying to induce Syria into more cooperative stances on the Middle East peace process; not once has the U.S. government been willing to consider dropping Syria from the list before it met the technical criteria required to get off the list.

That said, U.S. citizens certainly do suffer tortious acts by governments not on the State Department list of state sponsors of terrorism. This is a problem which may grow as Americans travel and work abroad more, as the economy undergoes globalization. This is an issue which could be appropriately considered by the sort of commission that Under-Secretary Eizenstat proposed. For instance, it might be worthwhile negotiating an international convention on this matter.

To: Senator Orrin Hatch, Chairman,
c/o Joelle Scott, Deputy Chief Clerk
U.S. Senate Committee on the Judiciary

From: Leonard Garment

Re: RESPONSES OF LEONARD GARMENT TO QUESTIONS FROM SENATOR HATCH

Date: November 19,1999.

Question 1. Do you agree that Saudi Arabia should not be considered a terrorist state?

Answer 1. Yes. But officials of Saudi Arabia, like officials of certain other states that are not on the State Department's terrorism list, have from time to time committed egregious violations of human rights, including acts of torture against U.S. citizens. It is our position that American citizens who are victims of the terrorist acts that are enumerated in 28 U.S.C. § 1605(a)(7)—namely torture, extra-judicial killing, hostage-taking and aircraft sabotage—should be allowed to pursue their claims in U.S. courts in cases in which no adequate and available remedies exist in the country in which those acts occurred.

Question 2. What do you believe would be the foreign policy consequences of opening the FSIA to include tortious acts by all states of the world?

Answer 2.At the outset, we would note that we do not advocate expanding the FSIA to permit suit in the United States against any foreign state for any tortious act committed anywhere in the world. Rather, we advocate amending 28 U.S.C. § 1605(a)(7) to permit suits against a foreign state only when it commits one of the four universally condemned acts specified therein (torture, extra-judicial killing, hostage-taking and aircraft sabotage) and only when: (1) it can be established that there are no adequate and available remedies existing in that foreign state; and (2) that state has been afforded a reasonable opportunity to arbitrate the claim in accordance with international law and has rejected that opportunity.

With these limitations, we doubt that there would be any adverse foreign policy consequences resulting from the proposed amendment. We would note in this connection that foreign states have been subject to suit for acts of torture, assassination and other gross abuses of human rights when those acts are committed in the United States since the FSIA was enacted in 1976. Yet, despite that fact and despite the fact that suits have been brought against states that are not on the Depart-

ment's terrorism list for such conduct (including Chile and Taiwan), no foreign state has ever retaliated against the United States. We would note that the State Department warned of adverse foreign policy consequences resulting from the 1996 amendments to the FSIA that permitted suits to be brought against countries on the State Department's terrorism list. Yet, no such adverse consequences ever materialized.

Question 3. Considering the malleability of the definition of terrorism, are you concerned about the ability of nations to manipulate that definition in their courts to seek unfair actions against the United States?

Answer 3. We agree that owing to the absence of any international consensus on what constitutes "terrorism," this would be a concern if 28 U.S.C. § 1605(a)(7) were expanded to apply to any act of terrorism. Instead, however, § 1605(a)(7) was prudently drafted to limit its reach to four enumerated acts that are specifically defined in widely-subscribed international agreements and that are universally condemned. The amendment we are advocating would not expand the acts for which a foreign state could be sued to acts other than those that are already enumerated.

Question 4. What's to prevent specious suits by the Belgrade authorities against NATO nations?

Answer 4. While it is theoretically possible that frivolous suits could be brought against the United States, experience demonstrates that this is not a realistic risk of the proposed legislation. As set forth above, foreign states have been subject to suit for gross abuses of human rights when those acts are committed in the United States since the FSIA was enacted in 1976. Yet, no foreign state has filed a retaliatory suit against the United States based on the conduct of U.S. officials in their territory. In particular, the bombing of Serbia took place, of course, on Serbian territory. Yet, the Belgrade authorities did not attempt to use the FSIA as a justification for bringing a frivolous retaliatory suit against the United State on the basis of the NATO bombing of Serbia. Moreover, no frivolous retaliatory suits have been brought against the United States in any country on the Department's terrorism list since the FSIA was amended to allow suits against such states in 1996.

Question 5. What redress is there, should we expand the FSIA in the way you suggest?

Answer 5. If Americans who are victims of torture and other specified acts of terrorism are permitted to bring suit, they will have their claims heard by an impartial tribunal. Having obtained such a judgment, they may be able to obtain payment through attachment of the assets of the foreign state responsible or through other means, such as with State Department intervention. There will continue to be no redress for U.S. citizens, however, if the FSIA is not appropriately amended.

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF RONALD W. KLEINMAN

I am pleased to have this opportunity to present to the Senate Judiciary Committee the background to proposed legislation to address the extent of Presidential authority to impede enforcement of Anti-Terrorism Act judgments against the assets of foreign governments blocked under Treasury Department regulations implementing the Trading With the Enemy Act. I am one of the counsel for the families of four members of the Brothers to the Rescue murdered by the Cuban Government while flying humanitarian missions over the Straits of Florida searching for rafters seeking to escape the tyranny of Cuba. As my colleagues and the representatives of the families have testified, while flying in two small civilian aircraft, these four men were obliterated by air to air missiles shot by Cuban Air Force MIGs at the instruction of Fidel Castro himself. In the words of President Clinton,

> We must be clear: this shooting of civilian aircraft out of the air was a flagrant violation of international law. It is wrong and the United States will not tolerate it.

The President went on to state that his Administration was imposing unilateral sanctions and would seek multilateral sanctions through the United Nations. With respect to multilateral sanctions, he had instructed Ambassador Albright to make sure that those sanctions would remain in place "until it [Cuba] compensates the families of the victims." With respect to unilateral, U.S. sanctions, he stated:

> First, I am asking that Congress pass legislation that will provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States. If Congress passes this legislation, we can provide the compensation immediately.

Despite the President's condemnation of Cuba and his commitment to providing compensation from blocked Cuban assets, the Families have been impeded in enforcing the judgment—either with respect to the compensatory or punitive elements of the award—by fiat from the State and Treasury Departments, which have intervened to defend Cuba and have asserted expansive and insupportable interpretations of existing Treasury Department regulations. Let me give you one example. The Administration has argued before the Federal courts that all assets subject to the Cuban Assets Control Regulations are "immune" from execution of judgments, even when those assets are licensed for payment—and being paid—to a judgment debtor. This claim, however, flies in the face of the express language of the Foreign Sovereign Immunities Act which provides (and has provided since 1996) in connection with Anti-Terrorism Act judgments that "any property in the United States of an agency or instrumentality of a foreign state * * * shall NOT BE IMMUNE from attachment in aid of execution or from execution, upon a judgment. * * *"

Treasury's interpretations of its regulations fail to comply with the explicit language of the Foreign Sovereign Immunities Act, and are illegal and unenforceable for these reasons. But more importantly, these interpretations fly in the face of the President's statements of total support for the Families and the commitment of U.S. policy to assure compensation under international law standards. Neither the State, Treasury nor Justice Departments have ever submitted a clear and comprehensive justification for this reversal of policy. We can, however, identify from their many statements four basic themes asserted to rationalize their opposition to further compensation from the blocked assets. As explained below, on detailed review, each of these arguments turns out to be based on erroneous facts and fallacious legal policies.

Before addressing the Administration's four "policy arguments," it is important to note that the whole purpose of the Foreign Sovereign Immunities Act—as drafted and proposed by the Justice and State Departments—is to eliminate any such political or foreign policy considerations from interfering with issuance and enforcement of judgments against foreign governments and their agencies and instrumentalities where—as here—consistent with international law. As the legislative history of the Foreign Sovereign Immunities Act states:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing foreign policy implications of immunity determinations and *assur-*

> *ing litigants that these often crucial decisions are made on purely legal grounds.*[1]

And, both before and after the murders of the four Brothers to the Rescue and of Alyssa Flatow, this President has signed at least four separate pieces of legislation amending the Foreign Sovereign Immunities Act to allow the victims of terrorism, torture and extra judicial murder to proceed in Federal Court to obtain and enforce judgments against the terrorism-sponsoring governments responsible for their suffering. See, Torture Victims Protection Act, Pub. L. 102–256 (signed March 12, 1992); Anti-Terrorism Act, Pub. L. 104–132 (signed Apr. 24, 1996); Civil Liability for Acts of State Sponsored Terrorism, Pub. L. 104–208 (signed September 30, 1996); and Section 117 of the Treasury Postal Appropriations Act for Fiscal Year 1999. Under the structure of the law as established since 1992 with the active support of this President, the types of "policy" issues now invoked by the Administration to impede enforcement of these Foreign Sovereign Immunities Act judgments have no role and should be rejected out of hand.

Nor does international law support the Administration's position. Enforcement of these FSIA judgments is no different than enforcement of any other FSIA judgments—and since at least 1954 it has been the unqualified view of the United States (including the State and Justice Departments) that enforcement of FSIA judgments does not violate international law. If there were any doubt here, it is eliminated by the issuance of the report of the OAS's Inter-American Commission on Human Rights, which has ruled that, under international law, Cuba is obligated to provide "adequate and timely compensation" for its murders of the four Brothers to the Rescue, "including complete satisfaction for the human rights violations, * * * as well as payment of a just compensatory indemnification for [full economic damages and pain and suffering] and moral [i.e., punitive] damages." In other words, Cuba has no basis to challenge enforcement of any award—such as the award of the United States District Court for the Southern District of Florida—which is based upon these elements of damages.

Turning to the Administration's four arguments, none withstands scrutiny on the merits. First, the Administration argues that any legislation to require payment from the blocked diplomatic assets infringes on the President's Constitutional authority over foreign affairs, arising particularly under Article II section 3 (which authorizes the President to receive "Ambassadors and other public Ministers"). The District Court has addressed this issue, holding that, as is clear from the text of this Constitutional provision, it does not empower the President to immunize foreign government property from enforcement of federal court judgments; to the contrary, that power is exercised by Congress under Article III, as reflected in enactment of the Foreign Sovereign Immunities Act and the Foreign Missions Act. Even more explicitly, Congress has the exclusive power under Art. 1, Section 8, clause 10 to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."

Second, the Administration argues that the proposal enacted last year could place the nation in violation of international law obligations because it allows enforcement against diplomatic property of terrorism-sponsoring governments. This is not an issue for my clients, who have waived in open court any claim to enforcement against Cuba's diplomatic assets. Nor is this a valid claim at this time, since the proposal presently before this Committee provides a broad authority for the President to protect diplomatic property from execution, but not the proceeds of commercial use of former diplomatic property. In any event, the Administration is incorrect in asserting that execution of Anti-Terrorism Act judgments, even against diplomatic property, would violate treaty obligations. To the contrary, this represents a proper remedy available to the United States under international law as a unilateral countermeasure to assure the enforcement of judgments issued under the Anti-Terrorism Act. By definition, every judgment under the Anti-Terrorism Act involves a violation of customary international law of human rights, and, in its judgment in this case, the District Court specifically found that Cuba had violated the norms of international law in murdering the Brothers to the Rescue. And this has been confirmed by the OAS report. As observed by the *Restatement of Foreign Relations Law of the United States (3d)* at Section 703(2), "any state may pursue international remedies against any other state for a violation of the customary law of human rights." As recognized by the *Restatement* in Section 905, these include unilateral remedies, including "countermeasures that might otherwise be unlawful, if such measures (1)

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[1] H.R. Rep. No. 1487, (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (emphasis added).

are necessary to * * * remedy the violation; and (2) are not out of proportion to the violation and the injury suffered."[2] Where, as in this case,

- A terrorism-sponsoring foreign government violates the internationally protected rights of American citizens,
- A federal court determines the proper level of compensation to remedy that injury, and
- The terrorism-sponsoring state refuses to provide that compensation,

the United States is fully within its recognized international rights to allow execution against treaty-protected diplomatic property, or for that matter, any other property, even if that were otherwise illegal under international law or inconsistent with treaty obligations.[3]

Third, the Administration argues that these assets must be held in order to provide leverage to induce Cuba to pay historical claims by Americans arising during the Cuban Revolution. It is true that there are 5,911 such claims that were certified by the Foreign Claims Settlement Commission in 1976 (none of which represent a judgment or any other type of enforceable property interest). However, it is demonstrably false that the blocked accounts are being held as some form of collateral against which these 5,911 claims are to be paid or that these claimants have any legal expectation of payment from these assets. That was explicitly considered and rejected by Congress (after a study by the Treasury and State Departments) at the time the Cuban Claims Program was established by and through legislation enacted by Congress in 1964. See, Final Report of the Cuban Claims Program, issued by the Justice Department's Foreign Claims Settlement Commission as its 1972 Annual Report to Congress, at 70.[4]

Moreover, the Executive Branch cannot credibly assert that it has any intention to use these blocked funds as leverage to induce Cuba to pay these claims. The Treasury Department has blocked these funds for 37 years without ever achieving a settlement of even one of the 5,911 outstanding claims (indeed, there is no public evidence that Cuba has ever been willing to engage in negotiations over any of these claims). At the same time, under this Administration, the Treasury Department has allowed far larger amounts to be paid to Cuba since 1994 (over $300 million in all) without attempting to use those funds to leverage a settlement of these 5,911 claims.

Congress has, however, already provided a separate statutory process for immediate compensation for many of the 5,911 claimants through Title III of the Helms-Burton Act, Pub. L. No. 104–785. However, based on recent reports, none of these claimants has sought immediate compensation through these procedures. See, Shamberger, "The Helms-Burton Act: A Legal and Effective Vehicle for Redressing U.S. Property Claims in Cuba and Accelerating the Demise of the Castro Regime," 21 B.C. Int'l. & Comp. L. Rev. 497, 505 (1998). In part, the failure of the Helms-Burton Act to achieve immediate compensation for these 5,911 claimants from funds other than the blocked assets is the President's unilateral actions in suspending operation of the sanctions authorized by that Act.[5]

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[2] In this respect, the *Restatement* is fully consistent with the widely respected and oft-cited 1979 Report of the United Nations International Law Commission to the General Assembly, U.N. GAOR 34th Sess., Supp. No. 10, at 311, which was drafted to reflect global consensus on international law principles. As confirmed in the ILC's draft articles on state responsibility: "The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of a wrongful act of that other State."

[3] The United States has often invoked this doctrine to justify its conduct which arguably violated international law principles, including in response to terrorism, as for example in connection with the open violation of international air space to apprehend the terrorists responsible for the Achille-Lauro incident. See, Gurule, "Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad," 17 Hastings Int'l. & Comp. L. Rev. 457, 495 n. 727 (1994); see also the opinion of the Justice Department set forth in "Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163 (1989) (opining that the FBI could legally violate customary international law and UN Charter art. 2(4) while engaging in extraterritorial abductions).

[4] In this connection, it is important to note that NONE of the assets were the properties of the FCSC claimants. Indeed, more than 90 percent of the blocked assets came into existence AFTER the FCSC completed its operations in 1972. These are royalty payments made by U.S. telecommunications company into blocked accounts between 1976 and 1992, and have no relation to the property expropriated by Cuba from the U.S. nationals who were ultimately allowed to submit claims for certification by the FSCS.

[5] In some statements, the Administration has argued that payment of these claims from blocked assets or satisfaction of some claims against Cuba before other such claims were satis-

Fourth, the Administration argues—inconsistently—that these blocked funds must be retained to provide leverage over Cuba to comply in the future with its obligations under international law. The funds cannot be both committed to pay past claims arising in 1962 and to induce future compliance with international law. The credibility of this is further undermined by the very words of the NSC staffers who, in briefing the press after the President's February 26, 1996 statements, announced that these funds would never be seen by Cuba again. In any event, the proposal that continued holding of these funds will somehow deter Cuba from sponsoring terrorist attacks against U.S. citizens (or any other internationally prohibited conduct) is belied by the fact that, in murdering the Families' relatives while these funds were already in U.S. control, Cuba has demonstrated that it is willing to violate international law by killing Americans regardless of whether the U.S. is imposing sanctions or not.

Beyond the inadequacy, inconsistency and hypocrisy which characterize the Administration's arguments against execution of Anti-Terrorism Act judgments against Cuba's blocked assets, this Committee should recognize four additional factors.

First, deferring efforts to satisfy the judgment would be illogical. The judgment is final and non-appealable. If it is not satisfied during the Castro Regime, it will still be the responsibility of any successor regime, or any successor government. If a Democratic Cuba emerges, this judgment will still have to be satisfied, and will remain an impediment to improved bilateral relations. This Administration's policy can be summed up in one phrase: "not on my watch." But this just means that the issue will have to be addressed during the next Administration's watch.

Second, if the Administration is allowed to successfully interfere with enforcement, this will expose the U.S. government to a claim under the Fifth Amendment for a "taking." This creates the incongruous situation that the U.S. Treasury could become liable to pay to the Families the damages (including punitive damages) lawfully imposed on the terrorism sponsoring governments. The budget impact would be significant, and must be avoided. See, e.g., *Dames & Moore* v. *Regan,* 453 U.S. 654, 690–91 (1981) (Powell, J., concurring and dissenting); *In re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1310–13 (9th Cir. 1982); *cert. denied sub nom Pan American World Airways, Inc.* v. *Causey,* 493 U.S. 917 (1989), *Gray* v. *United States,* 21 Ct. Cl. 340, 392–93 (1886)(Executive Branch action to extinguish claim against foreign government may give rise to right to compensation against U.S.).[6]

Third, the Administration's interpretation of existing law—and in particular the scope of the "national security" waiver enacted last year—presents a significant Constitutional issue by transforming the waiver provision into a "line item veto," allowing the President to simultaneously sign the Treasury Department Appropriations Act into law while nullifying one of its provisions. Just last year in *Clinton*

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fied, would be unprecedented. To the contrary, the Executive Branch has allowed—indeed, facilitated—satisfaction of Citibank's claim through judgments enforced in BANCEC, and has granted numerous licenses allowing withdrawals by one major U.S. telecommunications company from the blocked assets to reimburse it for its claims against Cuba, including at least one claim under the FCSC program. And, of course, the Administration has assisted IT&T in obtaining more than $27 million from STET in partial compensation for its FCSC claim for expropriation of its telephone company properties in Cuba.

[6] A court would not have to conclude that the President lacked Constitutional or statutory authority to block the assets in order to conclude that the attempted invocation of that authority would create a cognizable and potentially valid claim for just compensation under the Fifth Amendment. See, e.g., *Chas. T. Main Int'l. Inc.* v. *Khuzestan Water & Power Authority,* 651 F.2d 800, 813, n.20 (1st Cir. 1981) ("of course, neither the President nor Congress may exercise their powers [to settle claims against foreign governments or to block foreign government assets] so as to contravene the protections of the Bill of Rights, even when acting in the sphere of international relations.") Moreover, the facts of this case are distinguishable from the line of cases arising from the Iranian Hostage Crisis suggesting that neither the blocking of foreign government assets from *pre*judgment attachment nor the reference of an international claim to an international forum for resolution is a taking within the meaning of the Fifth Amendment. Here, the interference is with the enforcement of a judgment (in which the Plaintiffs have a cognizable interest not present in connection with *pre*judgment attachments) and the President is effectively destroying the enforceability of Plaintiffs' judgment without providing an alternative source of financial satisfaction of the claim. Thus, AT&T and the President cannot validly rely on such decisions as *Chas. T. Main* supra. Similarly, the President's actions in nullifying Plaintiffs' judgments against a foreign government do not arise from any negotiations which benefited the Plaintiffs directly, and therefore distinguishes this case from such cases as *Abrahim-Youri* v. *United States,* 139 F.3d 1462, 1467 (Fed. Cir. 1997) (finding no taking of claims because "though the choses in action were extinguished, the Government provided an alternative tailored to the circumstances which produced a result as favorable to plaintiffs as could reasonably be expected.") *cert. denied sub nom Gurney* v. *United States,* 118 S.Ct. 2366 (1998).

v. *New York*, 118 S.Ct. 2091 (1998), the Supreme Court held that this violates the Constitution's "presentment clause," Art. 1, § 7, cl. 2. To date, the Justice Department has suggested no valid basis to distinguish Section 117 from the provisions declared unconstitutional in *Clinton*. Enactment of the proposal presently pending before this Committee would eliminate this issue while providing the President with Constitutionally-appropriate authority to exclude diplomatic property if deemed necessary.

And fourth, the Administration is claiming the authority to defeat enforcement of a valid, final and enforceable judgment of an Article III Court based on its assessment that there are other claimants "no less worthy" than the Plaintiffs to receive priority payment from the blocked assets.[7] No court (or for that matter any administrative agency) has ever determined whether those claimants are "as worthy" of receiving payment from blocked assets. Certainly, no one in the Executive Branch is authorized to make this assessment. However, the Plaintiffs are judgment creditors under a judgment issued by an Article III court, which is not true of any of those claimants. And the Plaintiffs' judgment includes punitive damages awarded because of the heinous nature of the crimes committed by Cuba against their families, which is not true of any of those other claimants. And enforcement of the Plaintiffs' judgment against Cuba is essential to reinforce U.S. anti-terrorism policy, which is not true of any of those other claims.

PREPARED STATEMENT OF ANDREAS F. LOWENFELD

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I am honored by your invitation to present my views on the proposal sponsored by Senators Mack and Lautenberg to amend the Foreign Sovereign Immunities Act to authorize attachment and execution on frozen assets of foreign states in order to satisfy judgments obtained against such states in United States courts.

I am sorry that I was not able to present my views in person and answer your questions, but I am grateful for the assurance that my views will be entered into the record and will be seriously considered. In brief, I am opposed to the legislation as introduced, but I have a suggestion that may to some extent—though not completely—meet the concerns of the Senate on behalf of the victims of terrorist acts or their families.

I. QUALIFICATIONS

I am the Herbert and Rose Rubin Professor of International Law at the New York University School of Law, where I have been a Professor since the Fall of 1967. Prior to becoming a Professor of Law I served for more than five years in the Office of Legal Adviser in the United States Department of State, holding the position of Deputy Legal Adviser at the time I left government service.

While in the State Department I was actively involved in drafting and administering economic controls against Cuba, the Soviet Union, China, North Korea, and other states considered inimical to the United States. In particular I worked on a variety of problems involving the Foreign Assets Control Regulations and the Cuban Assets Control Regulations, both of which relied in important respects of freezing of assets of designated states and their nationals.

Among my twelve books on various aspects of international economic law is a major volume on *Trade Controls for Political Ends* (1st ed. 1977. 2d ed. 1983) which (inter alia) discusses in detail the administration of asset freezes in the context of relations with Cuba, China, and Iran under the Trading with the Enemy Act (TWEA) and the International Economic Emergency Powers Act (IEEPA). When Congress considered repeal or reform of the TWEA in 1977, I was the first witness called by then Chairman Bingham of the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, and my testimony was cited both by the majority and by the dissenting opinion in the leading Supreme Court case on the scope of the regulations issued with respect to Cuba under the TWEA. *Regan* v. *Wald*, 468 U.S. 222 at 239 (majority opinion by Rehnquist, J.); id. at 245, 246, 249, 250 (dissenting opinion by Blackmun, J.) (1984).

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[7] Compare *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.* 333 U.S. 103, 111 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, *may not lawfully be revised, overturned, or refused faith and credit by another Department of Government.*") (emphasis added). The Administration's interpretation asserted would deny full faith and credit to a judgment expressly submitted to the jurisdiction of this Court under the Anti-Terrorism Act and the Foreign Sovereign Immunities Act. In defense of the Judicial Powers established pursuant to Article III, this Committee should reject this argument.

I have also written several articles and a chapter in my book on *International Litigation and Arbitration* (1993) on the United States and international law concerning sovereign immunity, and I was responsible for the relevant sections both on asset freezes and on suits against foreign states as Associate Reporter of the *Restatement (Third) of the Foreign Relations of the United States* (1987).

II. THE PROPOSED LEGISLATION

As I understand it, the legislation would build on the 1996 amendments to the Foreign Sovereign Immunities Act in three significant ways. First, the bill would make judgments obtained in U.S. courts by victims of terrorist acts as defined in § 1605(a)(7) enforceable against agencies or instrumentalities of foreign states even if these agencies or instrumentalities were separately established and had no part in the terrorist acts on which the claim was based. This amendment to present § 1603, the definition section of the FSIA, would reverse recent decisions such as *Flatow* v. *The Islamic Republic of Iran*, 1999 U.S. Dist. Lexis 13759 (U.S. Dist. Ct. Md. Sept. 9, 1999), which rejected enforcement of a judgment previously secured by plaintiff against Iran arising out of a terrorist act against an independent foundation belonging to the government of Iran; *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 P.3d 1277 (11th Cir. 1999), reversing an order of attachment and execution issued by the District Court in favor of families of the victims of the deadly assault by the Cuban Air Force against civilian aircraft flying over international waters on search and rescue missions, and an earlier decision in *Letelier* v. *Republic of Chile*, 748 F.2d 790 (1984), cert. denied, 471 U.S. 11 25 (1985), reversing an order of attachment and execution against an aircraft of the state-owned airline of a judgment rendered in favor of families of persons murdered in the United States by the order of the Chilean government.

Second, the bill would make available for attachment and execution funds due from or payable by the United States to any state against which an anti-terrorism judgment had been entered, in the same manner as if the debtor were a private person.

Third, the 1998 Amendment to the FSIA, which added present § 1610(f) and thereby made frozen assets of states against which an anti-terrorism judgment had been issued available for attachment and execution, and also provided for the first time for punitive damages against foreign states in actions arising out of terrorism, contained abroad waiver provision, which the President utilized on the same day that the amendments entered into force. *Presidential Determination No. 99–1,* Oct. 21, 1998, 63 Fed. Reg. 59201 (Nov. 2, 1998). The proposed legislation would limit the President's waiver authority to protecting from attachment the premises of foreign diplomatic missions and funds necessary to operate such missions. Apparently no authority would remain in the President to prevent attachment and execution against assets frozen under the Trading with the Enemy Act or the International Emergency Economic Powers Act, as is expressly permitted by § 1610 (f).

III. APPRAISING THE PROPOSED AMENDMENTS

A. Corporations owned by terrorist countries

I am least troubled by the first proposal, provided it can be properly confined and does not signal a wider abandonment of the separate entity approach to corporations owned by governments. The proposal would adopt what used to be referred to in the context of the Iranian Hostage Crisis as the "Big Mullah" theory. See e.g., *Revolutionary Days: The Iran Hostage Crisis and the Hague Claims Tribunal,* pp. 66–67 (Lowenfeld, Newman, Walker, eds. 1999). The idea is that a corporation owned by a state is an asset of the state, and should be available in limited cases—i.e. in cases arising out of terrorism—to be used to satisfy the debts of the state. Government corporations should not be treated as interchangeable defendants. Thus, for instance, a claim or judgment against a state-owned corporation should not be able to be satisfied by execution on assets of the state-owned airline. But in a case such as *Letelier* or *Alejandre*, in which the liability of the state (i.e., the apex of the pyramid) is clearly established, it is not unreasonable and not against any overriding principle of international law to permit execution against assets of corporations owned by the guilty state.

I should add, however, that I found subsection (a)(1) of the Bill extraordinarily difficult to understand, with all the strike-outs and cross-references. If the Senate is anxious to make a statement that can serve as an expression of the outrage of the United States and as a warning to those who might consider state sponsorship of terrorist acts, the message should be communicated clearly and unequivocally.

Further, while I accept the idea of executing against state-owned assets, I would be opposed to extending the authorization to garnishment of debts, in reliance on

footnote 36 of the Supreme Court's decision in *Shaffer* v. *Heitner,* 433 U.S. 186 at 210 (1977), which seems to preserve in the case of enforcement of judgments the otherwise discredited technique upheld in *Harris* v. *Balk,* 198 U.S. 215 (205). The device of garnishment of intangible assets is sufficiently controversial, both within the United States and under international law and practice, that it seems to me unwise to burden what would in any event be a departure from internationally accepted practice with such a remedy. Thus while executing on a foreign state's direct assets may be accepted, searching for debts to the state unrelated to the act of terrorism seems to me an unattractive, if not unlawful step. In particular, debts incurred by American telephone companies acting under specific license issued pursuant to the Cuban Assets Control Regulations to a Cuban telephone company located outside the United States would not seem to be suitable for levy under legislation designed to assist victims of terrorism.

B. Debts of the United States

In addition to garnishment against private parties who may have debts to terrorist states, the bill would permit garnishment of debts owed by the United States to terrorist states. Generally, garnishment of debts owed by the United States is not permitted, on the ground that the United States has not waived its immunity from such proceedings. See, e.g. *Simon* v. *Montgomery (Garnishee: United States of America),* 54 P. Supp. 2d 673 (M.D. La. 1999). Congress could, of course, waive the immunity of the United States, but I believe such a move would be unwise, and might well involve the United States in breach of its international obligations. As I believe the Committee has been informed, the Iran-U.S. Claims Tribunal has issued an award holding the United States responsible for an award to an Iranian entity which the Iranian party has been unable to collect. See *Iran Aircraft Industries* v. *Avco Corp.,* 980 F.2d 141 (2d Cir. 1992); *Islamic Republic of Iran* v. *United States of America,* Case No. A–27, June 5, 1998. The Award in Case A–27 is now a debt of the United States, and arguably therefore an asset of Iran. Although I disagree with the decision of the Claims Tribunal in Case A–27 (indeed I was of counsel to the U.S. government in the case), I believe the United States should now pay the award, without interference through garnishment or attachment.

The United States has a great stake in observance of international dispute settlement generally, and in the Iran-United States Claims Tribunal in particular. The creation of the Claims Tribunal, as the Committee will recall, was essential to resolving the Hostage Crisis, and its continuing success is of great importance both to the foreign relations of the United States and to the closure of the many disputes involving claims of United States disputes involving claims of United States citizens and corporations. I am not suggesting, of course, that these claims are entitled to greater respect than the claims of victims of terrorism. I believe it would be bad policy, bad law, and bad precedent, however, to permit garnishment and execution against the United States of the debt arising from an award of the Claims Tribunal.

C. The frozen assets

The United States has used blocking or freezing of assets as a major tool of foreign policy since World War I—and indeed (in somewhat different form) since the presidencies of Jefferson and Madison. A freeze of assets, often combined with a trade embargo, is a highly useful technique, poised between "business as usual" and the use of force, for a country to express its disapproval of the actions of another state. The assets freeze a few days after the seizure of the American Embassy in Teheran was essential to the return of the hostages. Their detention was longer than anyone expected, but the hostages came out essentially unharmed. As is well known, a significant portion of the frozen Iranian Assets went into the pool from which claims of U.S. citizens against Iran could be paid in implementation of the awards of the Iran-United States Claims Tribunal. More important, all the evidence indicates that without the frozen assets as an element for bargaining, the fate of the hostages might well have ended in tragedy.

The assets freeze against Libya, I believe, was at least a contributing factor in the extradition of the two principal suspects in the bombing of Pan Am Flight 103. We were able to negotiate resumption of relations with China, and more recently with Vietnam, in part in the context of relaxing the Foreign Assets Controls. A similar development may be foreseen—I do not say expected—in relations with North Korea and Cuba.

In upholding the so-called Algiers Accords of January 1981, the U.S. Supreme Court, despite some misgivings, understood that judicial attachments could not be allowed to stand in the way of a major policy decision involving frozen assets. *Dames & Moore* v. *Regan,* 453 U.S. 654, esp. at pp. 673–74 (1981). I believe the same rationale applies today. While it is impossible to foresee how the foreign assets

that remain blocked will fit into a future negotiation or claims settlement (see below), it is clear to me that programs of freezing or blocking assets in emergency situations cannot be properly implemented if private creditors are permitted to attach and even execute on such assets, I believe, therefore, that Congress was wise in last year's legislation to provide a Presidential waiver authority, and that President Clinton was justified in exercising that authority in the interest of national security. It would be extremely unwise, in my judgment, to withdraw that waiver authority now.

IV. IMPROVING THE OPPORTUNITIES OF THE VICTIMS OF TERRORISM

Before closing, I would like to make a suggestion that may bring same relief to the victims of terrorist acts and their families. As I understand it, the assets blocked under the Cuban Assets Control Regulations are being held for an eventual settlement with a Cuban government, with a view to at least partial satisfaction of claims brought before the Foreign Claims Settlement Commission by former owners of expropriated property. Claims for compensation for disability or death are also included in this program, but only if they were submitted within a limited period in the 1960's. See 22 U.S. § 1643b(b) . It seems to me that recent victims of terrorism and their families, such as the victims of the downing of the planes of the Brothers to the Rescue, should also be included as claimants in whatever assets are eventually made available. Further, I would submit that claims arising out of personal injury or death by terrorist acts should be granted some kind of priority over claims on behalf of persons and companies that have suffered only economic loss. Of course the holders of the recent judgments are not the only victims of terrorism; I submit that Congress should amend the International Claims Act to provide for registration of all such claims, with a view to fair apportionment.

I have not had the time—or indeed the required information—to work out this suggestion in detail. The aim, however, is clear. Victims of terrorism should be compensated, whether or not they were the first in the court house. However, major foreign policy tools of the United States—including the means to normalize future relations with states now considered terrorist—should be preserved. Foreign asset controls under the TWEA and IEEPA have always permitted large areas of discretion for the President. While some direction by the Congress is justified, subordinating the President's discretion in this area to the vagaries of individual litigation would be an unwise, and I believe ultimately counterproductive step.

Senator Kyl

STATEMENT
OF
ROBERTO MARTINEZ

I am pleased to have this opportunity to appear before the Senate Judiciary Committee in connection with proposed legislation to address the extent of Presidential authority to impede enforcement of Anti-Terrorism Act judgments against the assets of foreign terrorist governments blocked under Treasury Department regulations implementing the Trading with the Enemy Act. I am one of the lawyers for the families of three members of the Brothers to the Rescue humanitarian organization murdered by the Castro Government while flying rescue missions over the Straits of Florida searching for rafters seeking to escape the tyranny of the Castro dictatorship.

I would like to talk to you briefly about the legal proceedings brought by the families against the Government of Cuba for the murders of their family members. These proceedings involved the first lawsuits brought pursuant to recent Congressional enactments stripping foreign states of immunity for certain acts of terrorism.

The Trial[1]

The Complaint Against the Government of Cuba

On October 31, 1996, the families of Armando Alejandre, Carlos Alberto Costa, and Mario M. de la Peña, filed their complaints in federal court in Miami, Florida, against the Republic of Cuba and the Cuban Air Force (collectively "the Government of Cuba") to recover monetary damages for the murders of their relatives. The plaintiffs, all citizens of the United States, brought their claims pursuant to the authority granted by Congress on April 24, 1996, in response to these acts of murder, by the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "Anti-Terrorism Act"), which amended the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 – 11, to permit suits against foreign governments and their political subdivisions which engage in acts of extrajudicial killing, aircraft sabotage or other prohibited acts against a United States national, when such states are designated by the United States as a state sponsor of terrorism. The plaintiffs' cause of action was based upon the Civil Liability for Acts of State Sponsored Terrorism ("Civil Liability Act"), enacted into law on September 30, 1999, 28 U.S.C. § 1605 note, creating a private cause of action against foreign states and their agents for the terrorist acts specified in the Anti-Terrorism Act.

The complaints were served on the Government of Cuba through registered mail and diplomatic channels as required by 28 U.S.C. § 1608 (a). The Government of Cuba did not defend the lawsuit, but, instead, asserted through a diplomatic note that no "United States court has competent authority to judge either the Republic of Cuba or its

[1] Most of the facts set forth herein are derived from the published opinion in Alejandre, et. al, v. The Republic of Cuba, et. al, 996 F.Supp. 1239 (S.D. Fl. 1997), and from the Report of the International Civil Aviation Organization (ICAO) Fact-Finding Investigation, issued in June, 1996, titled "The Shooting Down of Two U.S.-Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996."

institutions, much less in relation as to the events which occurred on February 24, 1996 [the killings of the Brothers to the Rescue volunteers]."(Republic of Cuba, Ministry of Foreign Relations, No. 1054) The presiding judge, the Honorable United States District Judge James Lawrence King, found the Government of Cuba in willful default and proceeded to trial requiring the plaintiffs to establish their right to relief by evidence satisfactory to the Court. 28 U.S.C. § 1608(e).

A trial before Judge King was held on November 13th and 14th, 1997, wherein evidence provided through witnesses and documents was received by the court. Judge King made substantial findings of facts and conclusions of law, some of which are set forth below.

The Victims

The victims of these murders were all young men[2].

Armando Alejandre was forty-five years old when he was killed by the Government of Cuba. Although born in Cuba, he made Miami, Florida his home at an early age and became a naturalized U.S. citizen. Armando served an active tour of duty for eight months in Vietnam, completed his college education at Florida International University, and worked as a consultant to the Metro-Dade Transit Authority at the time of his death. He is survived by his wife of twenty-one years, Marlene Alejandre, and his daughter Marlene, a college student.

Carlos Alberto Costa was born in the United States in 1966 and resided in Miami. He was only twenty-nine years old when the Cuban Government ended his life. Always interested in aviation and hoping to someday oversee the operations of a major airport, Carlos earned his bachelor's degree at Embry-Riddle Aeronautical University and worked as a Training Specialist for the Dade County Aviation Department. He is survived by his parents, Mirta Costa and Osvaldo Costa, and by his sister, Mirta Mendez.

Mario Manuel de la Peña was also born in the United States and was a mere twenty-four years old at the time of his murder by the Cuban Government. Mario was on his last semester at Embry –Riddle Aeronautical University, working towards his goal as an airline pilot, at the time he was killed. He is survived by a younger brother, Michael de la Peña, and his parents, Mario T. de la Peña and Miriam de la Peña.

The Shootdown

Armando, Carlos and Mario were all members of a humanitarian organization known as Hermanos al Rescate, or Brothers to the Rescue. The organization's principal mission was to search the Florida Straits for rafters, Cuban refugees who had fled the island nation on precarious inner tubes or makeshift rafts, often perishing at sea. Brothers

[2] Photographs of the four young men killed by the Government of Cuba are included in the Appendix attached to this Statement as Exhibit 1. All exhibits included in the Appendix were introduced as exhibits at the trial. The exhibits are numbered to correspond to the numbers assigned to them during the trial.

to the Rescue would locate the rafters and provide them with life-saving assistance by informing the U.S. Coast Guard of their location and condition.

On the morning of February 24, 1996, two of the Brothers to the Rescue's civilian Cessna 337[3] aircraft departed from Opa Locka Airport in South Florida. Carlos Alberto Costa piloted one plane (N2456S), accompanied by Pablo Morales, a Cuban national who had once been a rafter himself. Mario de la Peña piloted the second plane (N5485S), with Armando Alejandre as his passenger.[4] Before departing, the planes notified both Miami and Havana traffic controllers of their flight plans, which were to take them south of the 24th parallel. The 24th parallel, well north of Cuba's twelve-mile territorial sea, is the northernmost boundary of the Havana Flight Information Region. Commercial and civilian aircraft routinely fly in this area, and aviation practice requires that they notify Havana's traffic controllers when crossing south through the 24th parallel.[5] Both Brothers to the Rescue planes complied with this custom by contacting Havana, identifying themselves, and stating their position and altitude.

While the two planes were still north of the 24th parallel, the Cuban Air Force launched two military aircraft, a MiG-29 and a MiG-23,[6] operating under the control of Cuba's military ground station. The MiGs carried guns, close range missiles[7], bombs, and rockets and were piloted by members of the Cuban Air Force experienced in combat.[8] Excerpts from radio communications between the MiG-29 and Havana Military Control detail what transpired next:

MiG-29 OK, the target is in sight; the target is in sigh

[3] Exhibit 4 is a photograph depicting the Cessna 337 aircraft (N2456S) piloted by Carlos Alberto Costa. The Cessna 337 is an all-metal four/six seat business aircraft powered by two reciprocating engines, with a two-blade metal propeller and capable of maximum speed upwards of 210 mph.

[4] A third Brothers to the Rescue Cessna 337 aircraft (N2506) also departed on the mission. That plane escaped destruction and returned safely to the United States.

[5] Exhibit 6 depicts the actual flight of aircraft N2456S and N5485S.

[6] Exhibits 7 and 8 are drawings depicting a MiG-29 and MiG-23, respectively. The MiG-29 is a Soviet designed and built two-seat combat trainer, powered by two turbo fan jet engines and capable of maximum speed upwards of Mach 2.3. It has one 30mm gun, infra-red sensor, laser range-finder and under-wing pylon for six close-range air-to-air missiles. The MiG-23 is a Soviet designed and built single seat combat fighter, powered by one turbojet with afterburner and capable of maximum speed of Mach 2.35. It has one 23 mm gun and pylons for air-to-air missiles, bombs, rocket packs and other external stores.

[7] The MiG-29 carried six R-73 air-to-air missiles. The R-73 is a close-range solid propellant air-to-air missile with infra-red homing guidance. It is 2.90 m long, 17 cm in diameter, has a mass of 105 kg and a maximum range of 20 km. The missile has a 7.4 kg explosive charge that creates a ring shape of shrapnel that moves upward and outwards. Exhibit 10 is a drawing depicting a comparison between the R-73 missile and the Cessna 337.

[8] The pilot of the MiG-29 was Lt. Col. Lorenzo Alfonso Perez Perez. He was 44 years of age, held the rank of Lieutenant Colonel in the Cuban Air Force, had been flying for 19 years and had participated in three international assignments, including 74 combat missions. The co-pilot of the MiG-29 was Lt. Col. Francisco Perez Perez. He was 44 years of age, held the rank of Lieutenant Colonel in the Cuban Air Force, had been flying for 26 years and had participated in international assignments, including over 30 combat missions. The pilot of the MiG-23 was Major Emilio Palacios. He was 35 years of age, held the rank of Major in the Cuban Air Force, had been flying for 15 years and had participated in two international assignments, including some combet missions. The commander of the Cuban Anti-Aircraft Defense and the Cuban Air Force, General Ruben Martinez, was personally at the military control center. Exhibit 11 include photographs of the these military officers.

	It's a small aircraft. Copied, small aircraft in sight.
MiG-29	OK, we have it in sight, we have it in sight.
MiG-29	The target is in sight.
Military Control	Go ahead.
MiG-29	The target is in sight.
Military Control	Aircraft in sight. MiG-29 Come again?
MiG-29	It's a small aircraft, a small aircraft.
MiG-29	It's white, white.
Military Control	Color and registration of the aircraft?
Military Control	Buddy.
MiG-29	Listen, the registration also?
Military Control	What kind and color?
MiG-29	It is white and blue.
MiG-29	White and blue, at a low altitude, a small aircraft.
MiG-29	Give me instructions.
MiG-29	Instructions!
MiG-29	Listen, authorize me ...
MiG-29	If we give it a pass, it will complicate things. We are going to give it a pass. Because some vessels are approaching there, I am going to give it a pass.
MiG-29	Talk, talk.

MiG-29	I have it in lock-on, I have it in lock-on.
MiG-29	We have it in lock-on. Give us authorization.
MiG-29	It is a Cessna 337. That one. Give us authorization, damn it!
Military Control	Fire.
MiG-29	Give us authorization, damn it, we have it.
Military Control	Authorized to destroy.
MiG-29	I'm going to pass it.
Military Control	Authorized to destroy.
MiG-29	We already copied. We already copied.
Military Control	Authorized to destroy.
MiG-29	Understood, already received. Already received. Leave us alone for now.
Military Control	Don't lose it.
MiG-29	First launch.
MiG-29	We hit him! Damn! We hit him! We hit him! We retired him!
MiG-29	Wait to see where it fell.
MiG-29	Come on in, come on in! Damn, we hit. F-----s!
MiG-29	Mark the place where we took it out.
MiG-29	We are over it. This one won't mess around anymore.
Military Control	Congratulations to the two of you.

MiG-29 Mark the spot.

....

MiG-29 We're climbing and returning home.

Military Control Stand by there circling above.

MiG-29 Over the target?

Military Control Correct.

MiG-29 S--t, we did tell you, Buddy.

Military Control Correct, the target is marked.

MiG-29 Go ahead.

Military Control OK, climb to 3200, 4000 meters above the destroyed target and maintain economical speed.

MiG-29 Go ahead.

Military Control I need you to stand by ... there. What heading did the launch have?

MiG-29 I have another aircraft in sight.

MiG-29 We have another aircraft.

Military Control Follow it. Don't lose the other small aircraft.

MiG-29 We have another aircraft in sight. It's in the area where (the first aircraft) fell. It's in the area where it fell.

MiG-29 We have the aircraft in sight.

Military

Control	Stand by.
MiG-29	Comrade, it's in the area of the event.
MiG-29	Did you copy?
MiG-29	OK, this aircraft is headed 90 degrees now.
MiG-29	It's in the area of the event, where the target fell. They're going to have to authorize us.
MiG-29	Hey, the SAR isn't needed. Nothing remains, nothing.
Military Control	Correct, keep following the aircraft. You're going to stay above it.
MiG-29	We're above it.
Military Control	Correct ...
MiG-29	For what?
MiG-29	Is the other authorized?
Military Control	Correct.
MiG-29	Great. Let's go Alberto.
MiG-29	Understood; we are now going to destroy it.
Military Control	Do you still have it in sight?
MiG-29	We have it, we have it, we're working. Let us work.
MiG-29	The other is destroyed; the other is destroyed. Fatherland or death, s--t! The other is down also.

Both airplanes were destroyed by the missiles fired by the MiG-29, killing their occupants instantly.[9] The wreckage impacted the sea and sank. As stated by Judge King:

[9] Exhibit 12 is a Timeline Chart of the Shootdown.

> The Cuban Air Force never notified or warned the civilian planes, never attempted other methods of interception, and never gave them the opportunity to land. The MiGs' first and only response was the intentional and malicious destruction of the Brothers to the Rescue planes and their four innocent occupants. Such behavior violated clearly established international norms requiring the exhaustion of all measures before resort to aggression against any aircraft and banning the use of force against civilian aircraft altogether. [10]

The Final Judgment

On December 17, 1997, Judge King issued the Final Judgment against the Government of Cuba. Judge King concluded that the record of the trial clearly established all of the requirements of the Anti-Terrorism Act and the Civil Liability Act. The murders were extrajudicial killings that occurred in international waters outside of Cuban territory[11], caused by the Cuban Air Force acting as an agent of the Government of Cuba at a time in which the Government of Cuba was designated by the United States as a state sponsor of terrorism, and each one of the plaintiffs and the victims were U.S. citizens at the time of the shootdown. In a powerfully worded opinion, Judge King found that:

> Cuba's extrajudicial killings of Mario T. de la Peña, Carlos Alberto Costa, and Armando Alejandre violated clearly established principles of international law. More importantly, they were inhumane acts against innocent civilians. The fact that the killings were premeditated and intentional, outside of Cuban territory, wholly disproportionate, and executed without warning or process makes this act unique in its brazen flouting of international norms. There appears to be no precedent for a military aircraft intentionally shooting down an unarmed, civilian plane.[12]

Judge King concluded the Final Judgment by awarding the plaintiffs total compensatory and punitive damages against the Government of Cuba in the amount of "$187,627,911, for which sum execution may issue forthwith against the Defendants Cuba and the Cuban Air Force and against their assets wherever situated."

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[10] These norms have been codified in various international instruments. See, e.g., Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (both the United States and Cuba are parties to the Convention). The proscription on using force against civilian planes attaches even if they penetrate foreign airspace. See, e.g., Kay Hailbronner, Freedom of the Air and the Convention on the Law of the Sea, 77 Am. J. Int'l L. 490, 514 (1983) ("Even if an order to land is deliberately disregarded, a civil unarmed aircraft that intrudes into foreign airspace may not be fired upon."). Common sense dictates that the negligible threat civilian planes may pose does not justify the possible loss of life.

[11] Exhibit17 is a chart depicting the location of the shootdown in international waters.

[12] 996 F.Supp. 1239, 1253.

The Administration Repeatedly Impeded Enforcement of the Final Judgment Against the Government of Cuba

The Clinton Administration's position and approach to the plight of the families have been inconsistent and hypocritical.

Initially, the President publicly expressed strong and unequivocal support for compensation to the families. In the words of President Clinton,

> First, I am asking that Congress pass legislation that will provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States. If Congress passes this legislation, we can provide the compensation immediately.

Regrettably, however, the Administration repeatedly impeded enforcement of the Final Judgment against the Government of Cuba. As Judge King has stated:

> The Court notes with great concern that the very President who in 1996 decried this terrorist action by the Government of Cuba now sends the Department of Justice to argue before this Court that Cuba's blocked assets ought not be used to compensate the families of the U.S. nationals murdered by Cuba. The Executive branch's approach to this situation has been inconsistent at best. It now apparently believes that shielding a terrorist foreign state's assets is more important than compensating for the loss of American lives.[13]

Prior to the filing of the lawsuit against the Government of Cuba, the families met with Michael E. Ranneberger, Coordinator, Office of Cuban Affairs, United States Department of State. At that meeting, arranged primarily to discuss the humanitarian payments from the United States Government to the families, Mr. Ranneberger repeatedly reassured the families that accepting the humanitarian payments did not make them incur any obligations, and that they were free to pursue any other avenues in their search for justice. Specifically, Mr. Ranneberger stated that the United States Government did not oppose the anticipated filing of the Anti-Terrorism Act complaint against the Government of Cuba, and further told the families that the United States Government encouraged them to seek justice through U.S. and international courts.

These words of support and encouragement quickly gave way to successive obstacles placed by the United States Government in the way of the families' quest for justice.

[13] Omnibus Order, March 18, 1999, at n.16.

The OFAC Flip-Flop

Shortly after Judge King rendered the Final Judgment, on February 5, 1998, counsel for the families attended a meeting in Washignton, D.C., with R. Richard Newcomb, the Treasury Department's Director of the Office of Foreign Assets Control ("OFAC"), and other members of the Treasury and State Departments. [14]

In response to our request for an explanation of the procedures to obtain an OFAC license to execute the Final Judgment against the frozen Cuba assets, the Treasury Department officials stated that the situation was unprecedented and that there were no specific procedures for requesting a license for our unique situation. However, we were told by Mr. Newcomb that we could satisfy and execute the Final Judgment, without obtaining any license from OFAC or any authorization from the Treasury Department, against the payments which eight U.S. telecommunications carriers were licensed to make to the Government of Cuba.

The families held-off pursuing Mr. Newcomb's suggestion to proceed against the telecommunications payments until December, 1998, after President Clinton invoked his waiver to Section 117 in Presidential Determination 99-1 and the Administration began to aggressively oppose the families' efforts to execute against the frozen Cuban assets. .

In January 27, 1999, in the ongoing post-judgment garnishment proceedings before Judge King, Mr. Newcomb submitted declaration testimony supporting the position taken by the Cuban telephone company, and opposing the families' pursuit of Mr. Newcomb's own suggestion to proceed against the telecommunications payments. Contrary to his statements at the February 5th meeting, Mr. Newcomb took the position that the payments were being made to a company named ETECSA, and not the Cuban Government, and that the payments could not be garnished "to satisfy the Plaintiffs' judgment."

To this date, the evidence presented by the families to Judge King that Mr. Newcomb was the very source of the idea to pursue the telecommunications payments to Cuba has remained uncontroverted and undisputed.

President Clinton's Waiver of the New Anti-Terrorism Law and the Administration's Refusal to Achieve a Negotiated Resolution

Having been told on February 5th by the Treasury Department that the families' case was unprecedented and that there were no procedures for requesting a license in our unique situation, the families began working with members of Congress to amend the Foreign Sovereign Immunities Act to permit execution of an Anti-Terrorism Act judgment against terrorist assets frozen in the United States.

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[14] Also representing the United States Government were: Steven Pinter, Loren Dohm, Bill Hoffman, and David Sullivan from OFAC, and Glenn Griffin and David Kaye from the Department of State.

On October 21, 1998, Congress passed and President Clinton signed into law Section 117 of the Treasury and General Government Appropriations Act of 1999 amending Section 1610 of Title 28, United States Code so as to allow for the execution of Anti-Terrorism Act judgments against assets of terrorist foreign nations blocked in the United States. However, only moments after President Clinton signed into law Section 117, he issued Presidential Determination No. 99-1 seeking to waive through executive *fiat* the entire law which Congress passed only a few hours earlier.

The President's waiver and the Department of Justice five "Statements of Interest" filed on behalf of the Administration in federal court since December, 1998, opposing the families' efforts to execute against blocked Cuban assets, have completely defeated the families' efforts to date to satisfy their judgment. At each significant hearing in federal court the Department of Justice has appeared, seated next to the lawyers representing the Cuban Government, to oppose the families.

Although the Government of Cuba declined to appear to before Judge King to defend their actions in shooting down and killing these four young men, they have regularly appeared in court during the garnishment proceedings, through their surrogates and lawyers, in order to aggressively protect their assets in the United States. Regrettably, at each critical step in the garnishment proceedings the Department of Justice lawyers have appeared side-by-side with the lawyers representing the Cuban Government entities to shield Cuba's blocked assets against execution of a valid judgment rendered pursuant to the Anti-Terrorism Act.

Since October 1998, counsel for the families have attempted on several occasions to discuss a negotiated resolution of their claims with various members of the Administration, including The White House, the State Department and the Department of Justice. Some of these overtures have been made by members of the United States Senate seeking to assist these victims of terrorism. Unfortunately, each one of these efforts has been rebuffed.

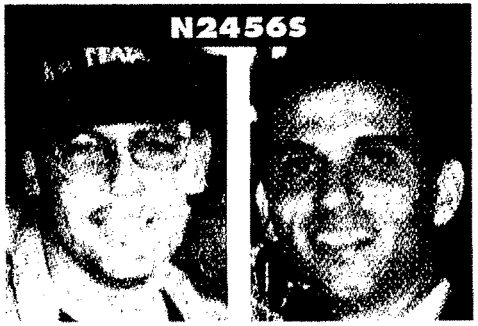
Conclusion

Unless new legislation is enacted to address the extent of Presidential authority to impede enforcement of Anti-Terrorism Act judgments against the blocked assets of foreign terrorist governments, U. S. victims of terrorism will not be able to satisfy and execute their judgments. Terrorist states are by definition rogue states. They hide their assets and maintain themselves removed and insulated from the jurisdiction of the U.S. courts. Without this legislative enactment to permit victims of terrorism to execute against the assets blocked in the United States, Congress' efforts in 1996 to punish and deter terrorism through the enactment of the Anti-Terrorism Act's private right of action will amount to no more than a mere paper tiger. Experience in this case shows that the threat of financial loss, as opposed to merely the legal condemnation of a judgment, will get the attention of the foreign terrorist nation, and has the potential to serve as a real deterrence to terrorist conduct.

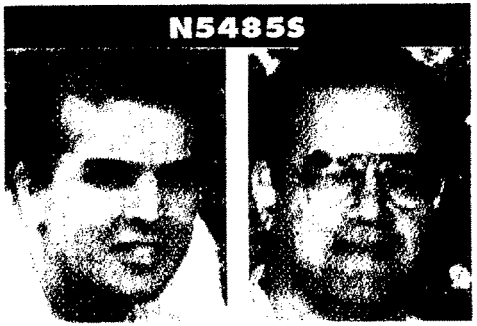
EXHIBITS

Exhibit 1: Photographs of Plaintiffs' Decedents;
Exhibit 4: Photo of Cessna N2456S;
Exhibit 6: Chart, Flight Route;
Exhibit 7: Drawing, MiG-29;
Exhibit 8: Drawing, MiG-23;
Exhibit 10: Drawing, Comparisons of Cessna and Missile;
Exhibit 11: Photos of Cuban Military;
Exhibit 12: Timeline; and,
Exhibit 17: Chart, Composite, Location of Shoot Down.

These exhibits are taken from Alejandre, et al. v. The Republic of Cuba and The Cuban Air Force, Case Nos. 96-10126-CIV-KING; 96-10127-CIV-KING; 96-10128-CIV-KING.

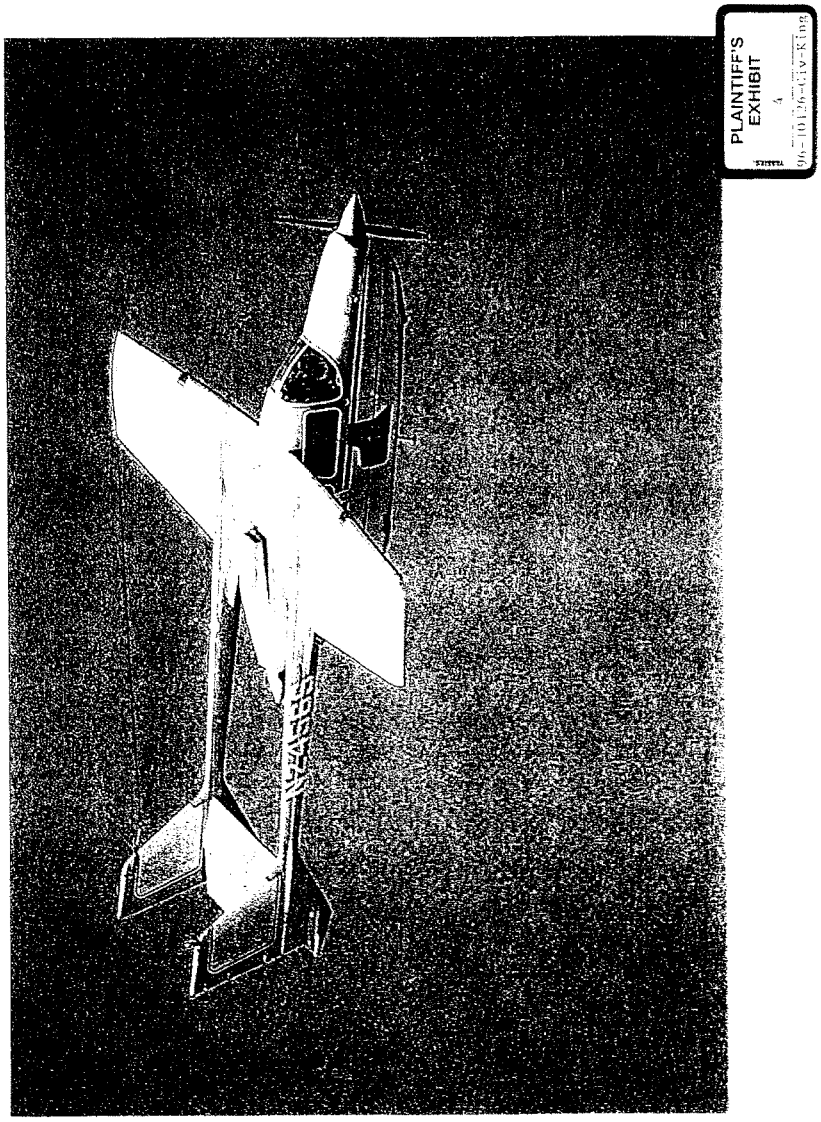


CARLOS A. COSTA PABLO MORALES



MARIO DE LA PEÑA ARMANDO ALEJANDRE

PLAINTIFF'S
EXHIBIT
I
96-10126-Civ-King



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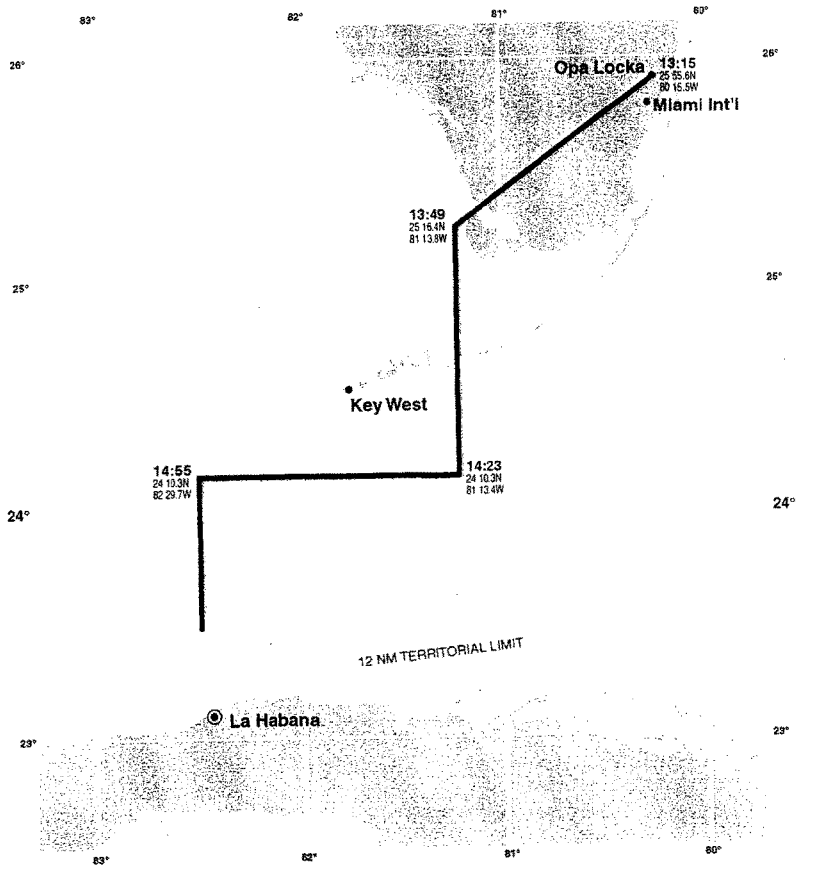
96-10126-Civ-King



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96-10126-Civ-King

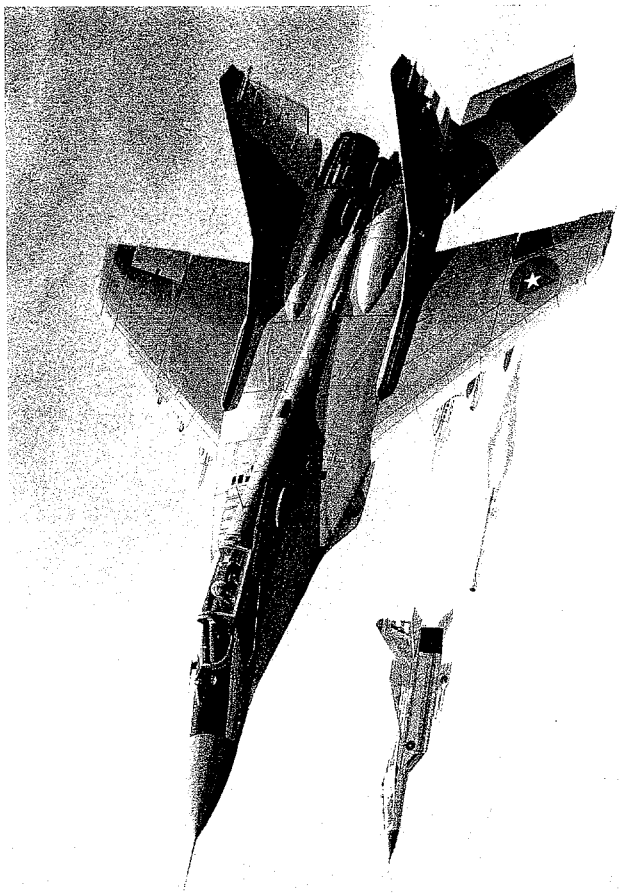

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EXHIBIT
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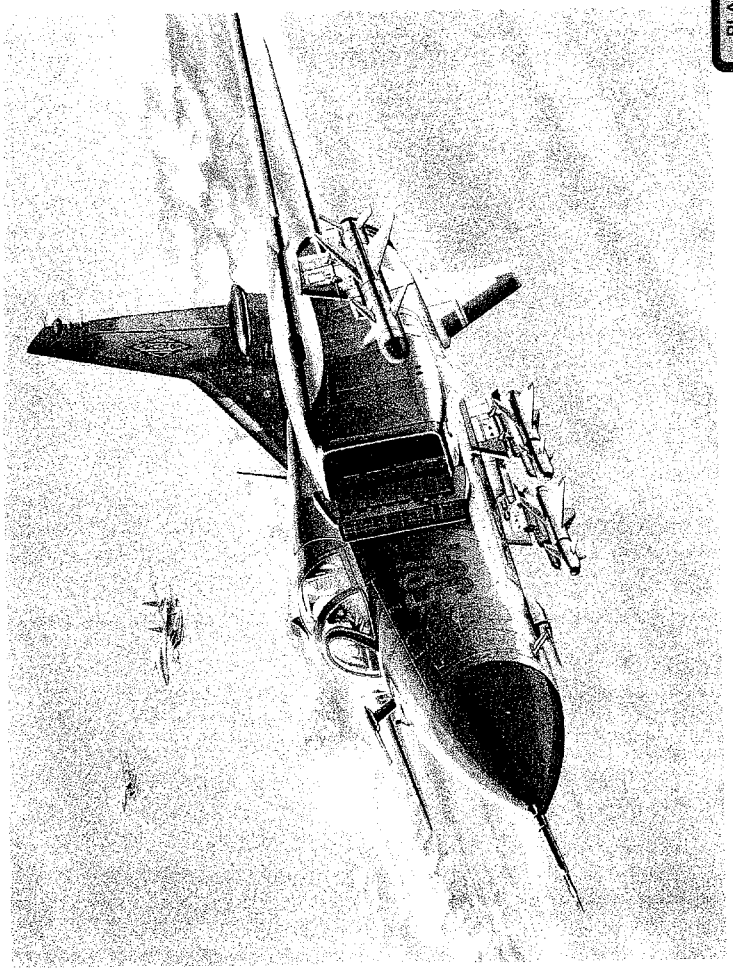
96-10176-Civ-King



PLAINTIFF'S
EXHIBIT
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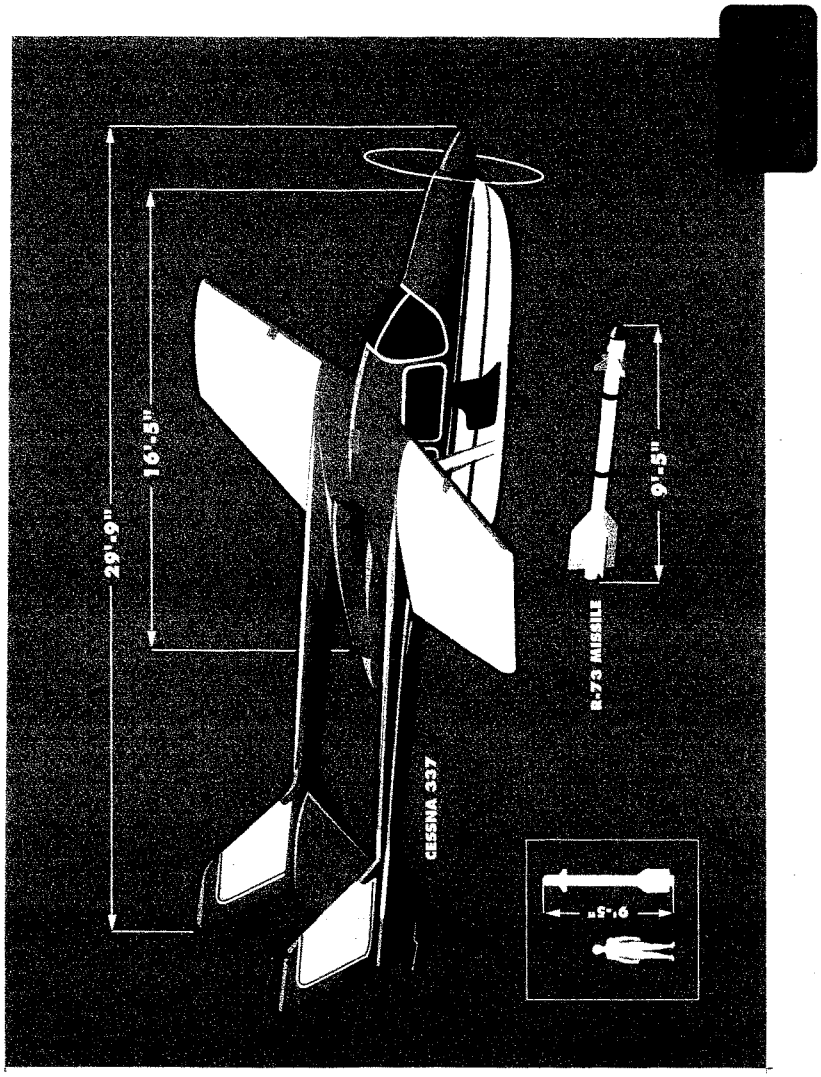
96-10126-CIV-King


29'-6"
16'-5"
CESSNA 337
R-73 MISSILE
9'-5"
5'-6"

CUBAN MILITARY

Rubén Martínez Puente
DAA-FAR Chief

MIG-29

Francisco Pérez Pérez
Lieutenant Colonel

Lorenzo Alberto Pérez Pérez
Lieutenant Colonel

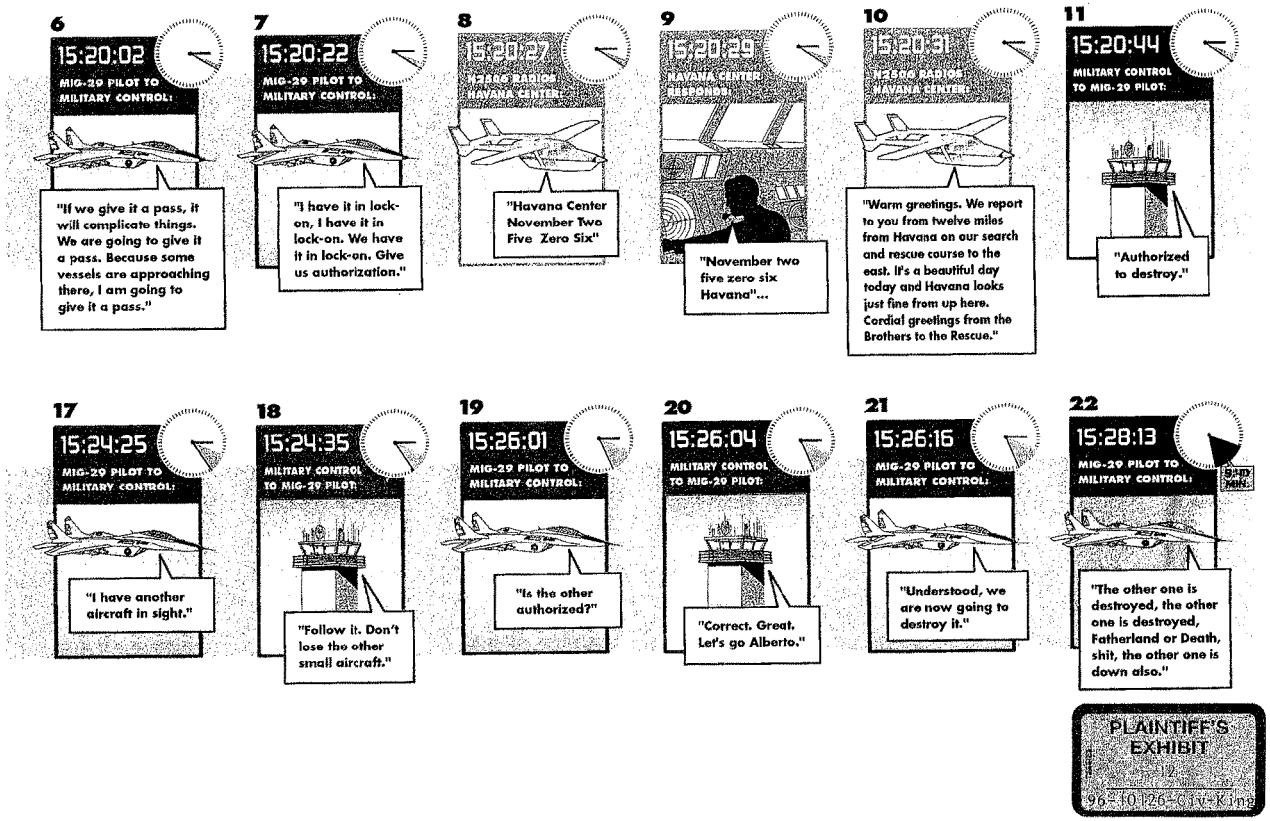
MIG-23

Emilio Palacios
Major

SOURCES: El Nuevo Herald; CBS; *Cuba: Las Estructuras del Poder* by Manuel Sánchez Pérez

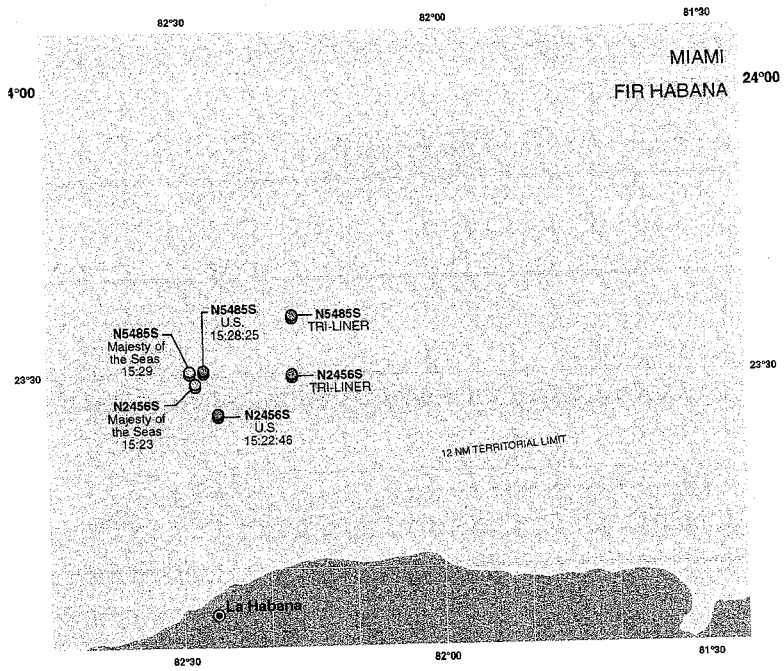
PLAINTIFF'S
EXHIBIT
96-10126-Civ-King

1
14:39:00
THREE CESSNA AIRPLANES APPROACH THE 24TH PARALLEL
2
14:43:00
CUBAN MILITARY INTERCEPTORS BROUGHT TO READINESS
3
14:55:00
TWO MILITARY INTERCEPTORS LAUNCHED
4
5
15:18:33
MIG-29 PILOT TO MILITARY CONTROL:
"OK, the target is in sight, the target is in sight. It's a small aircraft. Copied, small aircraft in sight."
12
15:20:50
HAVANA CENTER
"Havana roger."
13
15:21:32
MIG-29 PILOT TO MILITARY CONTROL:
"First launch."
14
15:21:37
MIG-29 PILOT TO MILITARY CONTROL:
"We hit him! Damn! We hit him! We hit him! We retired him!"
15
15:21:59
MIG-29 PILOT TO MILITARY CONTROL:
"We are over it. This one won't mess around anymore."
16
15:22:01
MILITARY CONTROL TO MIG-29:
"Congratulations to the two of you."



PLAINTIFF'S EXHIBIT

96-10126-Civ-King



PLAINTIFF'S
EXHIBIT