

**BENEFITS FOR U.S. VICTIMS OF INTERNATIONAL
TERRORISM**

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS

UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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JULY 17, 2003
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BENEFITS FOR U.S. VICTIMS OF INTERNATIONAL TERRORISM

THURSDAY, JULY 17, 2003

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m. in room SD-219, Dirksen Senate Office Building, Hon. Richard G. Lugar (chairman of the committee), presiding.

Present: Senator Lugar.

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee is called to order. Today the committee meets to hear testimony on policy related to compensation for American victims of international terrorism. The administration has put forward a proposal to establish a comprehensive Federal program to provide benefits to terrorism victims. In the interest of stimulating congressional deliberations, I've introduced that proposal at the administration's request as Senate bill 1275.

I'm pleased to welcome this morning Mr. William H. Taft, Legal Adviser to the State Department, who will explain the administration's proposal and the analysis behind it. I'm also pleased to welcome two distinguished lawyers and experts on compensation issues, Stuart Eizenstat and Allan Gerson, who will offer their perspectives on the administrations proposal.

Members of our committee have been very interested in developing a workable terrorism compensation policy for United States citizens. Senator Allen, a member of our committee in particular, has been active in this area and we welcome his thoughts and those of all members on the subject before us.

This hearing acknowledges an unfortunate reality. Many Americans have been the victims of international terrorist attacks during the last quarter century, and such attacks are unlikely to end, unhappily, in the near future. Our policies must account for the needs of those who have been victims of past attacks while preparing rationally for an uncertain future.

I believe that all Senators are committed to ensuring that the United States has in place the most effective tools possible to combat terrorism and to promote the security of the United States. I also know that Senators are unified in their sympathy for American victims of terrorism and in our desire to see that these victims and their families receive compensation for their losses. The questions we must consider are what laws and policies will most effectively achieve those goals and how do we ensure that policies

aimed at compensating victims of terrorism are consistent with broader United States national security interests.

In recent years, Congress has addressed issues related to compensation for victims of terrorism through several pieces of legislation. Often such legislation has been attached to larger bills, sometimes late in the legislative process. This hearing is intended to provide our committee with an opportunity to examine the issue of terrorism compensation in a deliberative, timely, and detailed fashion.

It's an important issue, one that deserves our careful consideration. Therefore, we are indebted to the witnesses who have come before us this morning and we look forward to their testimony. The first panel will be, in fact, Mr. William H. Taft, IV, Legal Adviser, Department of State, Washington, DC, and following his testimony and questioning by Senators, we will call upon the second panel, Mr. Eizenstat and Dr. Gerson.

Mr. Taft, it's great to have you again before us this morning and we look forward to your testimony. Your entire statement will be made a part of the record in full and I'll ask you to proceed as you wish.

**STATEMENT OF WILLIAM H. TAFT, IV, THE LEGAL ADVISER,
DEPARTMENT OF STATE, WASHINGTON, DC**

Mr. TAFT. Thank you, Mr. Chairman, and I appreciate your putting my complete statement, which has been provided to the committee, in the record, and I will summarize it here.

I'm honored to appear before you and to testify in support of the bill, S. 1275. Let me begin, as you did, by expressing the administration's and my own personal sympathy to the victims of international terrorism. Over the last 25 years, we have all seen how Americans and our embassies and facilities abroad have become the targets for the most dreadful attacks. We all remember the sight of our embassy personnel being paraded before the cameras during their captivity in Iran for 444 days, and we can not begin to imagine their suffering. Additional Americans were taken hostage in Lebanon and held for years in the most deplorable conditions. Others were killed while yet others have died in attacks by suicide bombers and acts of airline sabotage and in attacks on our embassies abroad.

All of these victims and their families have suffered unspeakable injuries and pain. Congress has passed numerous pieces of legislation to make clear its intent that victims of international terrorism should receive some compensation. First, in 1996, Congress provided that civil suits against the terrorist parties including state sponsors of terrorism would hold them responsible. It passed an amendment to well established rules of sovereign immunity embodied in the Foreign Sovereign Immunities Act that removed immunity from suit for states designated as sponsors of international terrorism. This legislation opened the courts to suits against the state sponsors of terrorism and judgments were rendered against those states. It was, however, difficult for plaintiffs to actually collect on their judgments.

In most cases, in fact, the defendant states have not even appeared in the suits, nor do these states typically have very many

assets in the United States against which a judgment may be executed. What property is here is frequently blocked and often subject to competing claims of ownership.

To address this situation, in the year 2000 Congress passed additional legislation. This act made blocked assets of Cuba available to pay certain outstanding judgments against that country. It also provided that certain plaintiffs with judgments against Iran could be paid out of funds from the U.S. Treasury, which were supplemented by a small portion of blocked Iranian funds. In all, approximately \$377 million was paid by the Treasury to 13 victims or their families.

Other plaintiffs with judgments against Iran as well as plaintiffs with judgments against other state sponsors of terrorism, however, received no payments as a result of the new legislation. Subsequently, Congress added two more plaintiffs to the list of those eligible for payments. As a result, one additional judgment holder against Iran received compensation. The other additional plaintiff is still awaiting that judgment in that case. This brought the total of payments from the Treasury for 14 victims to \$386 million.

Following the tragic events of September 11, 2001, Congress acted swiftly to address the immediate needs of the victims and families of those most terrific acts of terrorism by passing title IV of the Air Transportation and Safety Stabilization Act. It established a special master within the Justice Department who determines the appropriate amount to be paid in each individual case. The payments come from the Treasury.

As we all know, while many have welcomed and benefited from this program, there has also been significant criticism of it. Last year, Congress addressed this subject yet again and passed the Terrorism Risk Insurance Act. This statute made additional judgment holders eligible for payments. It also made some of the blocked assets of terrorist parties, including those of state sponsors of terrorism and their agencies and instrumentalities available to satisfy some judgments.

Congress has previously passed similar provisions in 1998. However, the bill in which those provisions were included also permitted the President to waive the attachment provisions, the provisions that provided that there could be attachment of blocked assets. President Clinton issued a waiver at the time he signed the amendment into law.

With passage of the Terrorism Risk Insurance Act, judgment holders began to attach blocked assets of terrorist list states but with uneven results. Some who had received judgments against Iraq were able to satisfy their judgments from some \$100 million in blocked Iraqi assets. All other Iraqi assets, however, have now been vested by the President in the United States, and are not available to compensate judgment holders.

Plaintiffs with judgments against Iran are also attempting to attach Iranian blocked assets, but Iran has very few blocked assets in the United States, about \$23 million, according to the Treasury's most recent report to Congress, and the largest amount of these assets are diplomatic and consular properties, which are subject to obligations under the Vienna Convention on Diplomatic and Consular Relations, and thus not subject to attachment under the new

statute. So there is very little money or property available to satisfy these judgments against Iran.

Thus, while it was Congress' intent to address the suffering of victims of international terrorism, the legislation it has passed piecemeal over the years has proven unsatisfactory in several respects. The current litigation-based system of compensation is inequitable, unpredictable, occasionally costly to the U.S. taxpayer, and damaging to the foreign policy and national security goals of this country.

First let me address the inequitable and unpredictable nature of the current system. While some U.S. victims have been successful in obtaining large default judgments, others who may not be able to prove who was responsible for the terrorist act of which they were a victim are not able to obtain court judgments. Yet others are barred by international agreement from even bringing suit. Some judgment holders have been able to satisfy judgments against the particular state sponsor of terrorism because at the time their judgments were rendered, there happened to be sufficient blocked assets that they could attach. But others have not been able to do that because the defendant state in their cases has few blocked assets in the United States.

In addition, plaintiffs have had to compete against each other for satisfaction, hoping that their writs were served before others for attachment of the very same assets. Yet others have been eligible to receive payments directly from the U.S. Treasury, but many have received and can expect to receive nothing under the current system. And those victims or families who have received payments have received drastically varying amounts for similar injuries.

Second, the current system has been costly to the U.S. taxpayer and will continue to be so, whether or not the funds come directly from the U.S. Treasury. Under the Victims of Trafficking Act, payments totaling, as I said earlier, \$386 million have been made from the U.S. Treasury to 14 victims. Continued payments in this fashion based upon compensatory damage awards by courts would amount to a significant drain on the U.S. Treasury, and while some blocked assets have been made available for attachment, in theory to make the terrorist party pay, in fact the U.S. taxpayer is most likely to end up footing the bill for these payments as well.

Virtually all of the Iranian blocked property that has been the subject of attachments involves property that is the subject already of claims against the U.S. Government before the Iran-United States claims tribunal, where we will have to account for it. And when the time comes for the United States to demand from Iran or other states reimbursement for the amounts that it has paid on their behalf, there will be offsetting claims to cover judgments against the United States rendered in foreign courts. Recently, an Iranian court entered a default judgment against the United States in a tort case for \$500 million.

Third, the current system has frequently conflicted with foreign policy and national security interests. The U.S. Government blocks assets in the interests of the Nation as a whole. This is a powerful foreign policy tool. It is not intended to expropriate those assets, but to use them to promote important foreign policy goals. Using those assets to pay court judgments undermines the President's

ability to use them in the broader interest of the Nation. For example, blocked Iraqi assets were needed this year for the people of Iraq and to support reconstruction efforts, just as blocked Afghan assets were needed for similar purposes in 2002 and just as blocked Iranian assets were held as critical leverage in 1981 to secure the release of the hostages.

Using blocked assets to pay claims and judgments will not deter terrorism. Terrorist states already know that they will never see the blocked assets unless they change their behavior. The only governments that will be hurt by the use of blocked assets for paying judgments will be the governments that replace the terrorist state governments now and end their country's support for terrorism.

Congress evidently recognized that, and therefore looked to the administration to develop an alternative program. In passing the appropriations act for the Department for fiscal year 2002, Congress made clear its interest in a comprehensive program to ensure fair, equitable, and prompt compensation for all U.S. victims of international terrorism or their families that occurred or occurs on or after November 1, 1979. That date was in the bill.

In June 2002, Deputy Secretary Armitage, in a letter to many Senators and Congressmen set out four major principles for a proposal that would do this. First, the program should provide the same benefits to those with low incomes as to those with greater means. Second, victims should receive benefits as quickly as possible without the need for litigation or a drawn-out adjudication process. Third, the amount to be paid should be on a par with that provided to families of public safety officers killed or injured in the line of duty, a catastrophe for which Congress has previously determined taxpayers would wish to provide compensation from the Federal Government. And fourth, compensation would not come from blocked assets, thereby assuring that the practice of using blocked assets as leverage in the conduct of foreign policy can continue to be available to the President.

Last month, we forwarded draft legislative language to you. We believe that the program we have proposed is the fairest and most equitable approach to providing benefits to victims or their families. It provides all victims and their families with predictability, so that they know up front what benefit the Federal Government will provide them without ever having to go to court or needing an attorney or needing ad hoc legislation from Congress for their particular situations. Importantly, for persons who have already filed lawsuits against terrorist states seeking compensation for injuries suffered in terrorist incidents, whether they have obtained judgments yet or not, the bill will not affect their ability to attach blocked assets. They are essentially grandfathered in this respect, losing no rights that they currently have.

Let me highlight some of the major provisions of the program that would be established under this bill. When an act of international terrorism occurs, the victim or victim's family would receive a quick uniform payment without having to prove who was responsible for the act of terrorism and without having to bring a lawsuit and obtain a judgment. The families of those killed would receive the same amount that is paid to the families of police officers and firefighters who are killed in the line of duty under legis-

lation enacted previously. That amount is currently \$262,000 and is subject to an automatic escalator clause. Those injured or held hostage would receive up to that amount according to a schedule which would be established by the Secretary of State in regulations.

The program would be administered by the State Department and paid for out of funds separately authorized and appropriated to the Department for this purpose. The U.S. Government would be subrogated to the extent of payments made to any recovery in litigation or settlement. Those who decided not to participate in this program could still sue to the extent permitted by current law, but they would not be able to satisfy their judgments out of blocked assets unless their suits have already been filed.

The possibility that assets of terrorist states, whether blocked or otherwise, may be available to satisfy judgments in the past has, with few exceptions, led only to either of two results, either there turn out to be no available assets and no payments are made, or Congress has paid the judgments from the Treasury. Under our bill, the route to the Treasury will be short and reliable and no one will be under the illusion that there are terrorist state assets available to compensate them in the largest number of cases where there really aren't.

We believe this program would be fair to all victims and their families. There would no longer be a need to try to find a defendant and to race to the courthouse to try to obtain a default judgment and then to see whether any blocked assets are still available for that particular country, or whether ad hoc legislation can be enacted to provide a Treasury payment, the existing system. While providing a generous benefit to victims, it would be less costly to the U.S. Treasury and fairer than paying massive default judgments to a small number of victims and leaving many more victims out.

I hope that you will consider this proposal favorable. Thank you, Mr. Chairman, for the opportunity to appear.

[The prepared statement of Mr. Taft follows:]

PREPARED STATEMENT OF WILLIAM H. TAFT, IV, THE LEGAL ADVISER, DEPARTMENT OF STATE

Mr. Chairman, I am honored to have an opportunity to appear before you today to testify in support of S. 1275.

Let me begin by expressing the Administration's and my own personal sympathy to victims of international terrorism. Over the last 25 years, we have all seen how Americans and our embassies and facilities abroad have become the targets for the most dreadful acts of international terrorism. We all remember the sight of our embassy personnel being paraded before the cameras during their captivity in Iran for 444 days and can not begin to imagine the suffering to which they were subjected. Additional Americans were taken hostage in Lebanon, and many of them were held for years by their captors under the most deplorable conditions. Others were killed by their captors, while yet others have died in attacks by suicide bombers, in acts of airline sabotage, and in attacks on our embassies abroad. All of these victims and their families have suffered unspeakable injuries and pain.

Congress has passed numerous pieces of legislation to make clear its intent that victims of international terrorism receive compensation.

First, in 1996, Congress adopted an approach by which civil suits against the terrorist parties, including state sponsors of terrorism, would hold them responsible for their acts in the form of money damages. It passed an amendment to well-established rules of sovereign immunity embodied in the Foreign Sovereign Immunities Act that removed immunity from suit for states designated as sponsors of inter-

national terrorism as well as additional legislation, making officials, employees and agents of state sponsors of terrorism liable for personal injury or death caused by their acts of international terrorism.

This legislation opened the courts to suits against the state sponsors of terrorism, and judgments were rendered against those states; it was, however, difficult for plaintiffs to collect on their judgments. In most cases, in fact, the defendant states have not appeared in the suits brought against them. Nor do these states typically have many assets in the United States against which a judgment may be executed, and what property is here is frequently blocked and often subject to competing claims of ownership.

To address this situation, in 2000, Congress passed additional legislation in the Victims of Trafficking and Violence Protection Act. This act made blocked assets of Cuba available to pay certain outstanding judgments against that country. It also provided that certain plaintiffs with judgments against Iran could be paid out of funds from the U.S. Treasury supplemented by a small portion of blocked Iranian funds. In all, approximately \$377.7 million was paid by the Treasury to 13 victims or their families. Other plaintiffs with judgments against Iran, as well as plaintiffs with judgments against other state sponsors of terrorism, however, received no payments as a result of the new legislation. An amendment to the Victims of Trafficking Act subsequently added two more plaintiffs to the list of those eligible for payments. As a result, one additional judgment holder against Iran received compensation; the other additional plaintiff is still awaiting a judgment. This brought the total of payments from the Treasury for 14 victims to \$386 million.

Following the tragic events of 9/11, Congress acted swiftly to address the immediate needs of the victims and families of those most horrific acts of terrorism by passing title IV of the Air Transportation Safety and System Stabilization Act. It established a Special Master within the Justice Department, who considers a variety of factors in determining the appropriate amount to be paid in each individual case. The payments come from the Treasury. As we all know, while many have welcomed and benefited from this program, there has also been significant criticism.

Last year, Congress addressed this subject yet again and passed the Terrorism Risk Insurance Act. This statute made additional judgment holders eligible for payments under the Victims of Trafficking Act. It also made some of the blocked assets of terrorist parties, including those of state sponsors of terrorism and their agencies and instrumentalities, available to satisfy some of the judgments awarded to victims and their families. Congress had previously passed similar provisions in 1998, amending the Foreign Sovereign Immunities Act, to permit plaintiffs to satisfy judgments from blocked assets. However, the amendment also permitted the President to waive the attachment provisions in the national security interest of the United States. President Clinton issued a waiver upon signing the amendment into law.

With passage of the Terrorism Risk Insurance Act, plaintiffs were in a position to begin attaching blocked assets of terrorist list states to satisfy their judgments. They have started to do this, but with uneven results. Certain plaintiffs who had received judgments against Iraq were able to satisfy their judgments from some \$100 million in blocked Iraqi assets. All other Iraqi assets, however, were vested by the President in the United States on March 20, 2003 and are not available to compensate judgment holders. They will be used to assist the recently liberated Iraqi people and to assist in the reconstruction of Iraq.

Plaintiffs with judgments against Iran are also attempting to attach Iranian blocked assets. But Iran has few blocked assets in the United States—about \$23 million, according to Treasury's most recent report to Congress, and the largest amount of these are diplomatic and consular properties subject to obligations pursuant to the Vienna Conventions on Diplomatic and Consular Relations, and not subject to attachment under the new statute. So there is very little money or property available to satisfy these judgments.

Thus, while it was Congress' intent to address the suffering of victims of international terrorism, the legislation it passed, piecemeal over the years, has proven unsatisfactory in several respects. The current litigation-based system of compensation is inequitable, unpredictable, occasionally costly to the U.S. taxpayer and damaging to the foreign policy and national security goals of this country.

First, let me address the inequitable and unpredictable nature of the current system. While some U.S. victims have been successful in obtaining large default judgments against a particular terrorist party, others, who may not be able to prove who was responsible for the terrorist act, are not able to obtain court judgments, though their suffering and pain are no less than those who can. And yet others are barred by international agreement from even bringing suit.

Some judgment holders have been able to satisfy judgments against the particular state sponsor of terrorism, because at the time their judgments were rendered, there

happened to be sufficient blocked assets they could attach. Others have not, because the defendant state in their cases has few blocked assets in the United States. In addition, plaintiffs have had to compete against each other for satisfaction, hoping that their writs were served before the others for attachment of the very same assets.

Yet others have been eligible to receive payments directly from the U.S. Treasury. But many have received and can expect to receive nothing under the current system. And those victims or families who have received payments have received drastically varying amounts for similar injuries.

According to the Washington Post, there are at present some 60 pending terrorism-related suits, involving more than 1,500 plaintiffs, targeting Libya, Cuba, Iran, Iraq and other terrorist states. There may be many more. The current compensation system, created through piecemeal legislation, that encourages litigation, as I have noted, has been far from equitable and predictable in providing compensation to existing judgment holders. If the system can not meet the needs of existing judgment holders, it is easy to see how inadequate it will be in addressing the needs of those who have yet to receive judgments, or the needs of future victims of international terrorism.

Second, the current system has been costly to the U.S. taxpayer and will continue to be so, whether or not the funds come directly from the U.S. Treasury. Under the Victims of Trafficking Act, payments totaling \$386 million were made from the U.S. Treasury for 14 victims. Continued payments in this fashion, based upon compensatory damages awarded by a court, for potentially more than a thousand plaintiffs would amount to a significant drain on the U.S. Treasury. And while some blocked assets have been made available for attachment, in theory to make the terrorist party pay, in fact the U.S. taxpayer is most likely to end up footing this bill.

Virtually all of the Iranian blocked property that has been the subject of attachments involves property that is the subject of claims against the U.S. government before the Iran-United States Claims Tribunal in The Hague, where we will have to account for it. Third parties who have interests in the property will file lawsuits for compensation. And when the time comes for the United States to demand from Iran or other states reimbursement for the amounts it has paid on their behalf, it will no doubt be confronted with offsetting claims to cover judgments against the United States rendered in other national courts. Recently an Iranian court entered a default judgment against the United States for \$500 million.

Third, the current system has frequently conflicted with broader foreign policy and national security interests. The U.S. government blocks assets in the interests of the nation as a whole. This is a powerful foreign policy tool. It is not intended to expropriate those assets, but to use them to promote important foreign policy goals. Using those assets to pay the court judgments of either plaintiffs suffering financial losses in business transactions or victims of terrorism, undermines the President's ability to use this tool in the broader interest of the nation. For example, blocked Iraqi assets were needed this year for the people of Iraq and to support reconstruction efforts, just as blocked Afghan assets were needed for similar purposes in 2002, and as blocked Iranian assets were held as critical leverage in 1981 in securing the release of the hostages.

Using blocked assets to pay claims and judgments will not deter terrorism, but will reduce the incentive that blocking property provides to end support for terrorism. Terrorist states already know that they will never see the blocked assets unless they change their behavior or meet other important U.S. interests. The only governments that will be hurt by the use of blocked assets for paying judgments will be the governments that end their country's support for terrorism.

Congress recognized that the current ad hoc, piecemeal approach to compensation had significant downsides and therefore looked to the Administration to help develop an alternative program. In passing the Commerce, Justice and State Appropriations Act for FY 2002, Congress made clear its interest in a comprehensive program to ensure fair, equitable, and prompt compensation for all U.S. victims of international terrorism (or their family members) that occurred or occurs on or after November 1, 1979.

In June 2002, Deputy Secretary Armitage in a letter to many Senators and Congressmen set out principles for a proposal that would do this. The letter outlined four major principles:

- (1) that the program should provide the same benefits to those with low incomes as to those with greater means;
- (2) that victims should receive benefits as quickly as possible, in a streamlined fashion, without the need for litigation or a drawn-out adjudication process;

(3) that the amount to be paid should be on par with that provided to families of public safety officers killed or injured in the line of duty—a catastrophe for which Congress has previously determined taxpayers would wish to provide compensation; and

(4) that compensation would not come from blocked assets, thereby assuring that the practice of blocking assets and using them as leverage in the conduct of foreign policy can continue.

Last month, we forwarded draft legislative language to Chairman Lugar that meets these principles and urged passage of such a program. We believe that the program we have proposed is the fairest and most equitable approach to providing benefits to victims or their families in their true time of need. It provides all victims and their families with predictability, so that they know up front what they are entitled to, without having to go to court or needing an attorney or ad hoc legislation from Congress for their particular situations. Importantly, for persons who have already filed lawsuits against terrorist states seeking compensation for injuries suffered in terrorist incidents—whether they have obtained judgments yet or not—the bill will not affect their ability to attach blocked assets; they are essentially grandfathered in this respect.

Let me highlight some of the major provisions of the program that would be established under S. 1275.

When an act of international terrorism occurs, the victim, or victim's family would receive a quick, uniform payment, without having to prove who was responsible for the act of terrorism and without having to bring a lawsuit and obtain a judgment. We would cover acts of terrorism going back to the Iran embassy hostage crisis.

The families of those killed would receive the same amount that is paid to families of police officers and fire fighters who are killed in the line of duty under legislation enacted previously. That amount is currently \$262,000, and is subject to an automatic escalator clause. Those injured or held hostage would receive up to that amount according to a schedule to be established in regulations.

The program would be administered by the State Department in a streamlined way and paid for out of funds separately authorized and appropriated to the Department for this purpose. The U.S. Government would be subrogated, to the extent of payments made, to any recovery in litigation or settlement.

Those who decided not to participate in this program could still sue to the extent permitted by current law, but would not be able to satisfy judgments out of blocked assets, except where their suits have already been filed.

We believe this program would be fair to all victims and their families. There would no longer be a need to try to find a defendant, and to race to the courthouse to try to obtain a default judgment, and then to see whether any blocked assets are still available for that particular country or *ad hoc* legislation could be enacted to provide a Treasury payment. While providing a benefit to victims of the same magnitude Congress has determined is suitable for police officers and firemen, it would be less costly to the U.S. Treasury and fairer than paying massive default judgments to a small number of victims and leaving all the others out. I hope you will consider this proposal favorably.

The CHAIRMAN. Thank you very much, Mr. Taft, for your testimony. You have pointed out in a number of the paragraphs of your testimony that the administration opposes the use of blocked assets to foreign states as a source of compensation for victims of terrorism. You have, I think, sketched out accurately the predicament currently for our government as it deals with post-war Iraq, but likewise in previous situations.

Let me say this as a practical example. When I visited with Ambassador Bremer in Baghdad about 3 weeks ago and we discussed the sources of money available for the governance of the country—quite apart from reconstruction, public safety, the repair of the oil wells, various other things that need to be done—he mentioned frequently blocked assets. He mentioned other assets that had come to the United States—sometimes simply cash out on the payment there that had been taken from banks and looters and all of this, this sort of one source of revenue.

In due course, we anticipate that there will be sales of oil. In fact, the very day that I was there, blocked assets, that is, oil reserves in Jehon, Turkey that belonged to Iraq were sold, and some revenues came therefore to this provisional government. Now the fact is that these moneys are being expended. As you're pointing out, on the other hand, there may be victims of terrorism, American victims, who are looking to the so-called blocked assets of the source of payments and judgments of lawsuits that might be successful. At some point, leaving aside the issue today, the overall one, is the American taxpayer, who takes a look at this whole situation and asks how much Iraq is costing us month by month. Secretary Rumsfeld has asked this, but likewise so have Mr. Bremer and the civil authorities.

In other words, there is one pool of money here. The question, as you pointed out, is that in the past it may be that certain lawsuits have been successful, abnormally so. Perhaps hundreds have been successful all together, with a great division among rich and poor, some were lucky, with a timely filing, or whatever happened to be the circumstance. Finally at the end of the day the blocked assets have to be replaced if we're to have a relationship with the country. Right now, we have an active one with what we hope will be a new democracy and a new day in Iraq. These are not free funds; they're being replaced even as we speak; they're being used essentially.

Now, as I gather, one of the nubs of this proposal of our government is to try to bring some order out of this chaos by saying the blocked assets are there for use of American diplomacy, American security, treaties that may be formed with future governments—preferably ones that are more favorable—but they are not available for victims' compensation. Essentially we're going to try to get some regularization of the process so that the rich and the poor all have an opportunity. Yet we want to take a look at some other more recent cases, that is, victims of terrorist violence in New York City, for example, or police officers who in the course of duty have met a terrible fate.

I don't want to oversimplify, but essentially the policy drives that. That is, this bill that I've introduced at the behest of the administration—because we have had already an active debate on the floor last Wednesday and Thursday when we took up the State Department authorization, the foreign assistance, and the Millennium Challenge Account—progressed through 56 amendments, and several of them dealt with this subject. I pointed out that we were going to have a timely hearing, and that is why I'm conducting one this morning. Although you are the only witness for the moment and I am the only Senator, the fact is this is very important business because something is going to happen here. We have a legislative vehicle in motion, and many Senators have already made proposals augmenting whatever may have been done by Senators in the past. The conference and finally a bill signed by the President has to conform, I would think, roughly to what you are suggesting this morning, or else it simply won't work given the President's budget, our foreign policy with Iraq, and a good number of other situations.

Now, let me ask, if this is the case, how did you arrive at the amount of compensation that would come to victims? What are the guidelines, the models, the profiles of what would be fair to everybody involved, given many countries now, and as I said in my opening statement, a quarter century really of American history that this encompasses.

Mr. TAFT. Now, Senator, let me say first of all that I think your holding this hearing is the right way to go about it. Although the Congress has passed, as I was surveying them, perhaps 5 or 6 different bills over the past 6 or 7 years, I really don't think that there has been actually a hearing on proposed legislation on any of those bills that was passed, and yet this is a complicated problem.

The fact that the legislation has had to be amended and changed and altered so many times suggests that holding a hearing and really looking at the problem whole is the right way to go, and so I compliment you and the committee on doing that here, and I would hope that this process would continue, and obviously Senators have many different ideas, and Congressmen as well, as to how to approach this problem, but the way to sort those out is not at 2 a.m. on some other totally unrelated bill putting in an amendment to deal with a small part of this problem. The way to do it is to look at it whole and come up with a proper program.

Now you asked specifically about, and there are obviously a lot of decisions that have to be made to go into this, which are not easy: the definition of who is eligible for the program, the definition of what events will be covered where, and the one that you asked about certainly is what amount is reasonable. In considering that, we looked at the different judgments that had been given and the different programs that already exist for some guidance. We wanted to have a generous amount and we wanted to have a uniform amount. Those were some principles that we said and we wanted to have, I think it's fair to say also, an affordable amount, an amount that a person, a taxpayer, a schoolteacher in Indianapolis who pays taxes and wants to do something for people, thinks is a reasonable amount for them to be contributing to help, but not something that would shock them and be more than they think maybe they should be pitching in to that particular tragedy.

And one of the places that we looked, and what we found that we thought was a sensible place to be in that regard, was the Public Safety Officers Program, and it provides more than a quarter of a million dollars now to people who are killed in the line of duty, people who are in a profession that we very much admire and require and respect and who suffer a catastrophe. It looked to us as if that was a reasonable amount which the Congress had previously approved in that situation and was affordable and yet generous, and that was why we came up with that figure.

The CHAIRMAN. Well, Mr. Taft, from the testimony you've given, about \$370 million, more or less, has been paid out, and did you say to 13 victims?

Mr. TAFT. There are, I believe it's 14 have been given, of whom 13 have already collected.

The CHAIRMAN. Obviously just doing the math you get to enormous awards. Now in what way were these 13 or 14 victims dif-

ferent substantially from everybody else who may be ready to file a suit now? In other words, this is quite a past history of sort of an average of over \$20 million or close to \$30 million a person.

Mr. TAFT. It is in that range. There were some judgments, although the judgments are very unequal even in that group. I think some have received over \$50 million, one payment, and some down in the single digit millions, so there is a variety even within there, but the average is in the \$20 to \$30 million range for each. I think—

The CHAIRMAN. Well, what were the circumstances—

Mr. TAFT [continuing]. If you look, though, I mean we have so many of these cases now out there. It's calculated there are perhaps over 1,500 victims suing already now and to pay each of them \$20 million is not something that I think the Congress would support or that people would say should happen, and yet if you do the real average payment, it's not in the \$20 million range because you've got hundreds of people out there who are receiving nothing at all, I mean we've got perhaps 200 people who have received payments and the rest, 1,000, 1,200 people have gotten nothing. And so the average is not quite what it appears.

The CHAIRMAN. So you're attempting to say that there ought to be a compensation figure that appears at least to the American people in fairness to be a generous amount, but one which ultimately the American people are going to have to pay. In other words, there's a supposition that somehow out there there is Iraqi money, Iranian money, other kinds of moneys that can be siphoned off without effect to deficits here, taxpayer money that comes and goes for the education, health and welfare of our country. And what you're saying is that that doesn't work out that way. Temporarily you may be able to attach something, but then you have retaliation, you finally have regularization with a country and offsetting suits there and elsewhere that finally eliminate it. This was not free money, however you might have attached it at the moment, and however compassionate the cause. Unfortunately, there never will be enough of it given the number of victims of terrorism in a dangerous world. We must bring some sense of justice so that individuals do not have to sue the Department of the Treasury or have to worry through the process of having a special act of Congress. or have to approach their Senator at 2 a.m. on the floor on some strange bill in order to get personal relief; this is the way some of this happens. Senators are constituent-oriented. They have a sense of compassion. It doesn't matter what the bill is. Given the rules of the Senate, amendments, as we saw last Wednesday and Thursday—56 of them in 24 hours—come and go pretty fast.

Yet you're saying, as opposed to things being handled that way, there ought to be certainty for victims and their families, for procedure, and likewise a quickness in terms of receiving the compensation. When the loss is acute, the needs are there. I don't want to oversimplify the proposal, but that's what I gather is the heart of what you're doing.

Mr. TAFT. And I guess only one other thing, Mr. Chairman, it ought to be for everybody. There are an awful lot of people who, many more people, I mean four, five times as many people who've received payments who have not, just nothing, and why they

haven't is in part because they don't know the right people, in part because they don't know, they can't bring their cases because they're not sure who was responsible for it, and so forth, and yet they're very—each case is, the payment that we've come up with is an across-the-board approach. Obviously this is not to say that each of these cases is the same. They're all different and they're all dreadful in their own way, but we thought in terms of what the Federal benefit should be to address this, which the Congress has made clear it wants to do something for this. Whenever the question has been raised directly, will you do something for this victim, the answer is yes, we want to, and the votes, you've seen them on the floor, they're 90 to nothing. And so we agree with that. We want to do something too, but we want to do something that's affordable and we want to do it for everybody.

The CHAIRMAN. Well I appreciate very much, first of all that you have a comprehensive statement that's a part of our record, and likewise your own summation of that, which I believe covered the salient points. You've outlined those carefully. The purpose of this colloquy, literally, is simply to illuminate once again the important points of universality, the certainty of payment, the fairness, the criteria for finally getting some judgments to all of the people who might be involved as opposed to a few who might have the benefit a specific bill offered, often—as we have both suggested—almost in the dead of night, often as an amendment to a bill that was nonrelevant, without having hearings on this subject or any general conversation with the American public about what we were doing.

That is the purpose of this hearing. You've contributed mightily to the success of that endeavor and I appreciate your testimony.

Mr. TAFT. Well thank you very much, Mr. Chairman. If you have any questions or other members of the committee of course have questions, we'll be glad to answer them for the record.

The CHAIRMAN. And we will keep the record open for another, we'll say 48 hours, because Senators who have not been able to attend the hearing this morning but are interested in this issue may very well want to raise questions through their correspondence with you. And if you would respond promptly, we would appreciate it to complete the record.

Mr. TAFT. We will certainly do that and I appreciate the opportunity. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The chair would like to now call our second panel, composed of Mr. Stuart E. Eizenstat, partner of Covington & Burling, Washington, DC, and Dr. Allan Gerson, chairman of Gerson International Law Group and honors professor, George Washington University, Washington, DC.

Gentlemen, we appreciate your coming to the hearing this morning. Both of you have appeared with our committee before and we have always profited from your counsel. Likewise we've admired your own contributions to public service, which have been very substantial throughout the years. I'd like for you to testify in the order that I introduced you. Let me say at the outset that your full statements will be a part of the record and you may proceed in any way you wish to either summarize or illuminate the points that you have made.

Mr. Eizenstat.

**STATEMENT OF STUART E. EIZENSTAT, PARTNER, COVINGTON
& BURLING, WASHINGTON, DC**

Mr. EIZENSTAT. Thank you, Mr. Chairman. I appreciate the opportunity to testify and I'm pleased that the administration has decided to tackle this issue because, in effect, in 1996, Congress passed a right to sue for money damages against terrorist parties including state sponsors of terrorism without really providing an effective remedy. And we've all been searching since then for the appropriate way to deal with this.

During my service in the Clinton administration, both as Under Secretary of State and as Deputy Secretary of the Treasury, I worked closely on issues concerning the compensation of victims of international terrorism, in particular the 2000 Victims of Terrorism and Violence Act, what we called Mack-Lautenberg, with a particular focus on the merits of using blocked assets of state sponsors of terrorism to achieve such compensation. May I also say for the record that I've also represented private parties, two families who were connected with the 2002 terrorist legislation that was passed in 2002.

Then, as now, ensuring proper compensation for terrorism victims presents a great challenge due to several factors. First, while in some instances blocked foreign state assets may be used to satisfy personal injury claims as the Clinton administration did with Congress for the use of Brothers to the Rescue pilot families killed by the Cuban Air Force, such use of blocked assets on a routine basis has the potential to weaken the ability of the U.S. Government to conduct foreign policy and to promote national security and thus should be subject to Presidential waiver authority wherever it's granted. Second, large sums from the U.S. Treasury as a source of compensation places an undue burden on U.S. taxpayers, and third, the limited pool of potentially available blocked assets for compensating terrorist victims can create an undesirable, unseemly, and unfair race to the courthouse to obtain and satisfy awards.

In light of these challenges, the creation of an administrative alternative to litigation for international terrorism claims against foreign states, by providing prompt and consistent awards to victims, could bring some relief, Mr. Chairman, from the pressures that litigation of such claims at times has placed on U.S. foreign policy, the U.S. Treasury, and on the equitable distribution of awards. At the same time, however, any administrative alternative should offer, I think, a genuine alternative to, rather than outright replacement for the litigation of international terrorist claims against foreign states. Rather than foreclosing all access to blocked assets, regardless of the circumstances of a given act of terrorism or the country or group involved, I think a more balanced approach, and one frankly more likely to pass congressional muster, would be to ensure strong Presidential waiver authority which could be exercised on a case-by-case basis when warranted by U.S. national security interests.

By creating balanced options between litigation and administrative proceedings, the victims of terrorism would be provided with

a genuine choice between two courses of action, a choice which could then be determined by the facts and circumstances of each individual claim. Moreover, given the demanding standard under the act S. 1275 for demonstrating a so-called act of international terrorism, keeping the courts open to international terrorist claims, in particular those that would be excluded from administrative proceedings, would take on greater importance. May I also say that any changes to current law that may be required should be applied only prospectively and should not impact on any pending cases, and I believe the legislation deals with that.

Let me now deal with some specifics. First, the importance of blocked assets for U.S. foreign policy. Consistent with the views expressed during my service in the Clinton administration, indeed before this very committee, blocked foreign state assets remain, Mr. Chairman, a potentially powerful tool to advance U.S. foreign policy and national security interests. Just two examples of the key role they can play, one in which I was involved when we first met—I think you may have still been the mayor of Indianapolis at that time—when I was President Carter’s chief domestic adviser, and that was to gain the release of U.S. citizens held hostage in Iran. I think, Mr. Chairman, had we not had those blocked assets available, we may never have gotten our hostages out. And later in the Clinton administration, the fact that we had Vietnamese blocked assets I think was a clear incentive to persuade the Vietnamese leadership during the normalization process to address important U.S. concerns, including accounting for POWs and MIAs.

Simply said, blocked foreign state assets, by providing important leverage for negotiations with foreign states or, as illustrated by President Bush’s appropriate blocking of Iraqi and Afghan assets, in that case providing emergency funds for the reconstruction efforts of friendly successor states, contribute importantly to U.S. foreign policy and national security interests, and therefore need to be taken great account of.

Second is to maintain a proper balance between administrative and litigation alternatives. Fully recognizing, as I’ve just done, the importance of blocked foreign state assets for U.S. foreign policy and national security interests, in my view, any proposed administrative alternative to litigation should be precisely that, a genuine alternative rather than an outright replacement of U.S. courts as a proper forum to resolve terrorist claims involving foreign states.

To achieve that balance between administrative and litigation alternatives, permit me to highlight the following considerations. First, we should make the administrative proceeding genuine. We should incentivize people to try to take the administrative route, and frankly we’re not going to do that by an award of \$262,000. It’s too small and when we compare that, for example, to the \$1.85 million average under the 9/11 compensation fund, let alone the amounts that can sometimes be awarded in courts, this is, I think, too low a standard of recovery to permit people to genuinely be channeled into this administrative process.

I think the analogy between the public officers who serve their communities by placing themselves in harm’s way—and that’s how the administration came to the \$262,000 figure—and private citizens who have not taken on such duties to the public seems to me

not an appropriate analogy. In other words, police officers, firefighters, and so forth know that they're placing themselves daily in harm's way. That's not the case with private citizens who are completely innocent, and I think the analogy breaks down at that point.

Administrative determinations, in addition, should not reverse existing court determinations. A particularly important category of claims under the act would be persons holding favorable but unsatisfied court judgments who subsequently decide to obtain an administrative award. The administrative entity, I believe, Mr. Chairman, should not be in a position to reverse a court's determination by declining to find an act of international terrorism. Court findings, in effect, should be grandfathered.

Third, the administrative determination should be subject to review. This is expressly not permitted. I think under the Administrative Procedure Act, that could be an internal review.

Fourth, a subjective requirement that terrorism victims be targeted on account of their U.S. nationality, which is what the act requires, is not workable. As drafted, only those terrorism victims specifically targeted as U.S. nationals would satisfy the definition of an act of international terrorism and give rise to the administrative award. This is dramatically narrower than the existing definition under the Foreign Sovereign Immunities Act, which requires an extrajudicial killing without the need to show a specific intent to kill on account of U.S. nationality.

As with court actions under the Foreign Sovereign Immunities Act, administrative proceedings should cover all American victims, regardless of whether the terrorist specifically targets their victims as U.S. nationals. For example, you could have a tourist who is in Israel, who is killed, as an American he might not have been targeted as a U.S. national, but he should recover.

Fifth, the importance of blocked assets for U.S. foreign policy and national security interests I think can be adequately addressed through Presidential waiver authority without the need to foreclose all access to blocked assets, which I think will run up against political opposition.

In 1998 and in 2000, President Clinton exercised his waiver authority, Mr. Chairman, on grounds of national security to prevent the attachment of foreign state assets to satisfy international terrorism awards against foreign states. That waiver authority was provided by legislation passed in 1998 and in 2000. And more recently, Section 201 of the Terrorism Risk Act of 2002, the President retains that waiver authority to prevent on grounds of national security the attachment of foreign assets covered by the Vienna Convention. What I'm suggesting is a broader waiver authority, not just limited to consular properties, but all blocked assets.

I would favor maintaining broad Presidential waiver authority exercised on a case-by-case basis to safeguard against the distribution of blocked assets undermining U.S. foreign policy and national security interests. Reliance on strong, broad Presidential waiver authority rather than blanket elimination of access to blocked assets would help keep U.S. courts as a viable alternative to the administrative system, but at the same time give the President the discretion to make sure that the foreign policy interests of the

country were not affected if blocked assets were inappropriate to use.

Serious concerns over using blocked assets of foreign states are, I think, less of a problem in dealing with blocked assets of private terrorist groups like HAMAS, but here at the same time, Presidential waiver authority is essential. Although S. 1275 would not prevent claimants from attempting to satisfy judgments by pursuing commercial purpose assets of a foreign state located in the U.S., a strategy I would support, such assets can, as Will Taft said, be difficult to locate and secure, and the limited potential for executing such commercial assets would not likely have a large impact on overall litigation prospects.

In short, I think we can advance the important goals driving the administrative process that again I applaud the administration for suggesting, without at the same time completely denying court access to all victims of terrorism against foreign states by eliminating any hope of satisfying a judgment through the execution of blocked assets. A case-by-case approach with broad Presidential waiver authority I think is the proper balance.

Let me close by commending the administration for their efforts for trying to come up with a process that is now, as Will Taft properly said, fraught with all sorts of uncertainties and conflicting legislation, just entirely too ad hoc, while at the same time providing a genuine choice between administrative proceedings and courts. A robust, viable option, one again that would pay a sufficient amount to incentivize people to take it, would have the advantage of encouraging claimants to opt for administrative relief rather than pursue litigation, with all the attendant difficulties of attempting to attach blocked assets of foreign states which at times don't even exist or have been vested for other purposes, as with Iraq and Afghanistan, or again have serious national security concerns attached to them.

It's always a pleasure to appear before you as I've done many times and I thank you for your attention.

[The prepared statement of Mr. Eizenstat follows:]

PREPARED STATEMENT OF STUART E. EIZENSTAT, PARTNER, COVINGTON & BURLING,
WASHINGTON, DC

Mr. Chairman, thank you for the opportunity to appear before you today to testify on S. 1275.

During my service in the Clinton Administration, in particular during my tenure as Deputy Secretary of the Treasury, I worked closely on issues concerning the compensation of victims of international terrorism, with a particular focus on the merits of using blocked assets of state sponsors of terrorism to achieve such compensation. Then, as now, ensuring proper compensation for terrorism victims presented a great challenge, due to several factors: first, while in some instances blocked foreign state assets may be used to satisfy personal injury claims (as the Clinton Administration agreed with Congress to use for the families of the Brothers to the Rescue pilots killed by the Cuban Air Force), such use of blocked assets on a routine basis has the potential to weaken the ability of the U.S. Government to conduct foreign policy and to promote national security, and thus should be subject to Presidential waiver authority; second, very large sums from the U.S. Treasury as a source of compensation places an undue burden on the U.S. taxpayer; third, the limited overall pool of potentially available assets for compensating terrorism victims can create an undesirable, unseemly, and unfair race to the courthouse to obtain and satisfy awards.

In light of these challenges, the creation of an administrative alternative to litigation for international terrorism claims against foreign states, by providing prompt and consistent awards to victims of international terrorism, could bring some relief

from the pressures that litigation of such claims at times has placed on U.S. foreign policy, the U.S. Treasury, and on the equitable distribution of awards.

At the same time, however, any administrative alternative should offer a genuine alternative to, rather than replace outright, the litigation of international terrorism claims against foreign states. Rather than foreclosing all access to blocked assets, regardless of the particular circumstances of a given act of international terrorism, in my view a more balanced approach would be to ensure strong Presidential waiver authority to be exercised on a case-by-case basis when warranted by U.S. national security interests. By creating balanced options between litigation and administrative proceedings, victims of international terrorism would be provided with a genuine choice between the two courses of action, a choice which could then be determined by the particular facts and circumstances of each individual claim, rather than by the absence of any real hope for enforcing a court award obtained in litigation. Moreover, given the demanding standard under S. 1275 for demonstrating an "act of international terrorism," keeping the courts open to international terrorism claims—in particular those claims that would be excluded from administrative proceedings—takes on even greater importance.

1. THE IMPORTANCE OF BLOCKED ASSETS FOR U.S. FOREIGN POLICY AND NATIONAL SECURITY INTERESTS

Consistent with the views expressed during my service in the Clinton Administration, blocked foreign state assets remain a potentially powerful tool in the advancement of U.S. foreign policy and national security interests. The Supreme Court, in the 1981 *Dames & Moore* decision, recognized that blocked assets may serve as a "bargaining chip to be used by the President when dealing with a hostile country." As two examples of the key role blocked assets can play in U.S. negotiations with foreign states, blocked assets enhanced the U.S. Government's ability, when I served in the Carter White House, to gain the release of U.S. citizens held hostage in Iran in 1981, and helped to persuade the Vietnamese leadership, during the normalization process between the United States and Vietnam, to address important U.S. concerns, including accounting for POW's and MIA's. More recently, this past March President Bush set aside blocked Iraqi assets for use in the Iraqi reconstruction effort; similarly, last year President Bush freed up blocked Afghan assets for reconstruction efforts in Afghanistan. Simply, blocked foreign state assets, by providing important leverage for negotiations with foreign states (or, as illustrated by Iraq and Afghanistan, by providing emergency funds for the reconstruction efforts of friendly successor states), contribute to U.S. foreign policy and national security interests.

2. THE IMPORTANCE OF MAINTAINING A PROPER BALANCE BETWEEN ADMINISTRATIVE AND LITIGATION ALTERNATIVES FOR INTERNATIONAL TERRORISM CLAIMS

Fully recognizing the importance of blocked foreign state assets for U.S. foreign policy and national security interests, in my view any proposed administrative alternative to litigation of international terrorism claims should be precisely that: a genuine alternative to, rather than an outright replacement of, U.S. courts as a forum for resolving international terrorism claims involving foreign states. To achieve a proper balance between administrative and litigation alternatives for international terrorism claims, I would like to highlight the following considerations.

The award available under administrative proceedings must be significant. For claimants to invest time and energy in developing a claim—whether administrative or in litigation—awards of significant value must be available. Accordingly, the proposed administrative award under S. 1275 of \$262,000 to families of victims killed by acts of international terrorism is far too small and needs to be substantially increased to contribute to the viability of the administrative proceedings as an arbiter of international terrorism claims. Recognizing that the \$262,000 figure has been proposed to match current U.S. law on compensation available to families of public safety officers killed in the line of duty—including those killed on September 11th—the amount remains sharply less than standard court awards of compensatory compensation for deaths of family members caused by international terrorism, which consistently total several million dollars. The \$262,000 amount also contrasts with the average award of approximately \$1.85 million (and ranging in excess of \$6 million) paid from the September 11th Victims Compensation Fund. Moreover, the analogy between, on the one hand, public officers who serve their communities by placing themselves in harm's way, and on the other, private citizens who have taken on no such duty to the public, is less than clear. At a minimum, additional funds should be made available to compensate claimants who have endured lengthy delays in securing awards for acts of international terrorism.

Admittedly, the certainty of the administrative award helps to balance the modest amount with far larger, but far less certain, court awards; nevertheless, larger administrative awards would provide added weight and legitimacy for the new administrative process, and thereby invite additional terrorism claims.

Administrative determinations on “international terrorism” should not reverse existing court determinations

A particularly important category of claims under S. 1275 would be persons holding favorable, but unsatisfied, court judgments who subsequently decide to obtain an administrative award. For such claims, the administrative entity should not be in a position, in effect, to reverse a court’s determination by declining to find “an act of international terrorism” giving rise to the claim: court findings on acts of state-sponsored terrorism should be grandfathered as such under the administrative process.

Administrative determinations should be subject to review

To better establish the legitimacy of a newly-created administrative entity for processing international terrorism claims, and for consistency with the Administrative Procedure Act, some form of review of administrative decisions is required.

A subjective requirement that a terrorism victim be targeted on account of their U.S. nationality would be unworkable

As drafted, only those terrorism victims targeted specifically as U.S. nationals would satisfy the definition of an “act of international terrorism” and thus give rise to an administrative award. This standard is unworkable, and dramatically narrower than the existing definition under the Foreign Sovereign Immunities Act, which requires an “extrajudicial killing” without the need to show a specific intent to kill on account of U.S. nationality. As with court actions under the Foreign Sovereign Immunities Act, administrative proceedings should cover all American victims of international terrorism, regardless of whether the terrorist actors specifically targeted their victims as U.S. nationals. The challenge of satisfying such a narrow, subjective standard would ultimately exclude significant numbers of legitimate international terrorism claims from the administrative process, such as those with dual citizenship or U.S. citizens touring abroad, not necessarily targeted as U.S. nationals, and underscores the importance of keeping U.S. courts open to international terrorism claims brought by Americans against foreign states.

The importance of blocked assets for U.S. foreign policy and national security interests may be adequately addressed through the President’s waiver authority under current law, without need to foreclose all access to blocked assets

In both 1998 and 2000, President Clinton exercised his waiver authority on grounds of national security to prevent the attachment of foreign state assets to satisfy international terrorism awards against foreign states. Such waiver authority had been provided by legislation passed in 1998 (Section 117 of the Treasury and General Government Appropriation Act of 1999) and 2000 (Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000). More recently, under Section 201 of the Terrorism Risk Insurance Act of 2002, the President retains waiver authority to prevent, on grounds of national security and on a case-by-case basis, the attachment of foreign state assets subject to the Vienna Conventions on Diplomatic Relations and Consular Relations. More generally, President Bush’s decisions to vest blocked Afghan and Iraqi assets for the reconstruction of those countries illustrate the President’s authority to determine on national security grounds the ultimate use of blocked foreign state assets.

As a balanced response to the potential U.S. interests implicated by the use of blocked assets to satisfy international terrorism awards, I would favor maintaining broad Presidential waiver authority, exercised on a case-by-case basis, to safeguard against distribution of blocked assets that undermines U.S. foreign policy and national security interests. Reliance on strong Presidential waiver authority, rather than the blanket elimination of access to blocked assets, would help to keep U.S. courts as a viable alternative to the administrative system that S. 1275 would create. If the Presidential waiver authority provided under Section 201 of the Terrorism Risk Insurance Act proved to be insufficient for safeguarding U.S. foreign policy and national security interests, the proper response, in my view, would be to strengthen the President’s waiver authority, rather than completely seal off blocked foreign state assets from American victims of international terrorism and thereby eliminate any legitimate prospects for successful terrorism litigation against a foreign state.

Serious concerns over using blocked assets of foreign states, which I have discussed, present much less of a problem in dealing with blocked assets of private ter-

rorist groups like HAMAS. Here, we are much less likely to have future diplomatic relations or to want to use the funds for diplomatic purposes. At the same time, here too Presidential waiver authority would be essential for future suits. For example, if the funds are needed to release U.S. hostages. Again, the Presidential waiver, not a blanket prohibition on use of blocked assets, would be the more reasonable approach.

Although S. 1275 would not prevent claimants from attempting to satisfy judgments by pursuing commercial-purpose assets of a foreign state located in the United States—a strategy that I would support—such assets can be quite difficult to locate and secure, and the limited potential for executing such commercial assets would not likely have a large impact on overall litigation prospects. The prospects for international terrorism litigation against a foreign state, where there is absolutely no hope of attaching blocked assets of that state, would be limited at best.

We can advance the important goals driving the administrative alternative—safeguarding U.S. foreign policy and national security interests, more equitable distribution of compensation, and reduced burden on the U.S. taxpayer—without, in effect, denying court access to all international terrorism claims against foreign states by eliminating any hope for satisfying a judgment through the execution of blocked assets. A case-by-case approach to blocked assets would leave open the courts for exceptional claims whose underlying facts and parties we may not be able to anticipate at this time and whose particular circumstances may call for a unique response. Moreover, given the demanding subjective standard for an “act of international terrorism” under S. 1275 as currently drafted (requiring an act to be committed on account of the victim’s U.S. nationality), maintaining the potential of court access for all American victims of international terrorism takes on even greater importance.

I commend the Administration’s efforts, and yours, to promote important U.S. interests and to achieve greater equity for the victims of such unspeakable events, while providing a genuine choice between administrative proceedings and the courts for American victims of state-sponsored terrorism. A robust, viable administrative option would have the advantage of encouraging claimants to opt for administrative relief rather than pursue litigation, with all of the difficulties of attempting to attach blocked assets of a foreign state, which at times no longer exist or have been vested for other purposes. Thank you Mr. Chairman for the opportunity to appear before you today.

The CHAIRMAN. Well, thank you very much, Mr. Eizenstat.
Dr. Gerson.

**STATEMENT OF DR. ALLAN GERSON, CHAIRMAN, GERSON
INTERNATIONAL LAW GROUP AND HONORS PROFESSOR,
GEORGE WASHINGTON UNIVERSITY, WASHINGTON, DC**

Dr. GERSON. Thank you, Mr. Chairman, and thank you very much for this invitation to appear before the Foreign Relations Committee on S. 1275, which, I believe, can fairly be described for what it is: a no-fault terrorism bill.

Today, Mr. Chairman, no American is immune from the scourge of an international terrorist front committed to global jihad. Despite the courageous steps undertaken by the President of the United States and our valiant men and women in uniform, the truth is that the threat remains. Eternal vigilance and a readiness to use all the tools at our disposal is more indispensable than ever. And that, Mr. Chairman, is why the introduction of S. 1275 is so perplexing, especially to the American victims of terrorism, who see themselves in the vanguard of those determined to prevent a repetition of the horrors that befell them.

Inexplicably, the sponsors of S. 1275 would undo much of what has been accomplished in the last decade. They would undo the right accorded to the victims and their families to hold the murderers and their sponsors accountable in U.S. courts of law. That empowerment of the families of the victims goes far beyond the

issue of compensation and it is one that Congress, the courts, and indeed the President have recognized since 1991.

And so I ask, why would anyone want to undo this march of progress? Why would the United States State Department take the lead in introducing such a measure? And if I may, Mr. Chairman, note from your own op-ed in today's Washington Post when you spoke, in a very different situation, about time for the United States to lead, I would like to suggest too that what the United States State Department does with respect to leading or not leading on the issue of accountability affects vital U.S. national security interests.

I appear today, Mr. Chairman, not only as an advocate. Together with my co-lead counsel who is here today, Mr. Ron Motley, we proudly represent approximately 4,000 families of 9/11 victims in their suits against the financiers of terrorism, and share the families' outrage that anyone would propose a bill which undermines the viability of such suits. But I also appear, if I may say so, as an individual who, as a scholar and former government official, has been involved in efforts to address a balance between the needs of diplomatic flexibility and the demands of justice.

But Mr. Chairman, I submit that S. 1275 has nothing whatsoever to do with balance. I submit that S. 1275 is nothing less than a setback in the war against terrorism. I also submit that S. 1275, and I use this word advisedly and regretfully, is deceptive. It purports to provide the families of victims with additional rights when it in fact deprives them of hard-won rights. Instead of addressing the moral and the legal right of the victims, and indeed of all Americans to know the details regarding the perpetrators and circumstances of the atrocity, it would cover them up as a way of achieving a political compromise.

This is not what the families of 9/11 want. This is not what the American families that are victims to terrorism believe in. As a compromise with terrorism, and it is not, I submit, what the Congress or indeed the President had in mind when he declared a war against terrorism on all fronts.

It is touted that the families of the victims will be the beneficiaries of this bill. But they themselves deny it. And, they have never been consulted on it. They do not want a no-questions-asked instrument. They want a mechanism suited to discovering the truth. They want accountability. They want punitive damages. S. 1275 gives them none of that. Indeed, and I want to emphasize this point, if the bill was intended to be truly humanitarian, to provide benefits to all, it would give them a true choice without strings attached. But this bill is full of strings.

A position paper on S. 1275 prepared by the 9/11 Families United to Bankrupt Terrorism detailing the specific flaws of S. 1275 has already been distributed to this committee and I would hope that it might be made available as part of the official record.

The CHAIRMAN. It will be made a part of the record in full.

Dr. GERSON. Thank you, Mr. Chairman.

[The position paper referred to follows:]

9/11 FAMILIES UNITED TO BANKRUPT TERRORISM—POSITION PAPER
3 JULY 2003

SENATE BILL 1215—THE SAUDI BAILOUT BILL

Let's assume that sometime in the next two years, Osama bin Laden carried out his plan to fly an aircraft into the CIA headquarters in Langley, Virginia as Abdul Hakim Murad, an Al-Qaeda operative, said bin Laden intended to do in his confession to U.S. authorities in 1995. Under proposed Senate Bill 1275, the liability for Osama bin Laden, the terrorists who carried out the attack, and the charities and wealthy individuals who financed the attack would be limited to a death benefit of \$250,000.00 per victim. This amount is far below the penalties that courts have imposed against terrorists and their financiers in anti-terrorism suits. The financial disincentive to sponsor terrorism will be removed if this bill is passed. The financiers of terrorism will realize that continuation of such dastardly operations remain relatively cost free. And, more Americans will die. S. 1275 would reward, not punish, terrorism. Such is the Orwellian inversion of purposes which this bill presents under the guise of providing an additional benefit to the American victims of terrorism.

The Congressional independent investigation of the September 11th attacks concluded several months ago and still the 9/11 Families United to Bankrupt Terrorism await the results of the investigation. The delay has been caused by a reluctance on the part of some government officials to publish, among other things, the ties that Saudi-based charities, government officials and members of the royal family have to terrorists and how the September 11th hijackers received their funding. In the same obstructive spirit the State Department offers S. 1275.

This proposed bill is offensive to the 4,000 member strong 9/11 Families United to Bankrupt Terrorism and all other families victimized by terrorist attacks. The bill seeks to retroactively eliminate the entire body of international jurisprudence enacted to protect terrorist victims including the Foreign Sovereign Immunities Act, 28 U.S.C. 1605; Torture Victim Protection Act, 28 U.S.C. 1350; Alien Tort Claim Act, 28 U.S.C. 1350 and the Anti-terrorism Claims Act, 18 U.S.C. 2333. Most importantly, the proposed bill breaches the credo of the U.S.A. Patriot Act—"Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." See USA Patriot Act, Title X, 2001. The Patriot's Act emboldens the anti-terrorism statutes and the numerous cases which have interpreted these statutes:

All Americans are united in condemning, in the strongest possible terms, the terrorists who planned and carried out the attacks against the United States on September 11, 2001, and in pursuing all those responsible for those attacks and their sponsors until they are brought to justice.

USA Patriot Act of 2001, Title X, §1002. To successfully wage a war on terrorism we must use every weapon in our arsenal including the civil justice system. "The only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts." *Boim v. Quranic Literacy Institute, et al.*, 291 F.3d 1000 (7th Cir. 2002). The State Department's proposed bill is also inconsistent with the position taken by the Department of Justice in its amicus brief filed on November 14, 2001 in *Boim*. The Department of Justice wrote: "the Government believes that this provision [Section 2333(a)] can be an effective weapon in the battle against international terrorism; it fights terrorism by discouraging those who would provide financing for this activity." In S. 1275 the State Department has crippled plaintiffs ability to use this weapon against the financiers of terrorism. Why would we now, when our nation and its citizens are threatened most disarm an effective force in combating terrorism?

Presently, victims of terrorism may bring a cause of action in the United States against a terrorist or any individual or entity that knowingly provides support to a terrorist or terrorist organization. Victims may also pursue civil litigation against a foreign state designated as a state sponsor of terrorism that engages in the terrorist activity. This bill seeks to completely supplant these rights and remedies retroactively with a no-fault black-lung type federal fund.

If this proposed bill were passed it might impair our ability to pursue our terrorist lawsuit against the financiers of the September 11th attacks. Most importantly, S. 1275 would hurt all Americans as the families of 9-11 are but the spear-holders for a national effort to deter terrorism by placing the price of terrorism not on the shoulders of the families of the victims, or on the back of US taxpayers, but on the back of those responsible.

COMPENSATION AMOUNTS ARE GROSSLY INCONSISTENT WITH TRADITIONAL TORT
VALUES

Victims of a terrorist attack, under this proposed bill, would file a claim and would receive a death benefit equaling two-hundred and fifty thousand dollars (\$250,000.00), adjusted annually for inflation. This amount bears no relationship to civil damage awards and is entirely inconsistent with awards which have previously been rendered in litigation brought by victims of terrorist activities:

In *Smith v. Islamic Emirate of Afghanistan, et. al.*, (Case: 01 Civ 10132), U.S. District Court, Southern District of New York, determined that the September 11th attacks were acts of international terrorism and that two family victims of the attacks were decreed entitled to the following damage amounts:

Family of George Eric Smith:

Economic Damages: \$1,113,280
Pain & Suffering: \$1,000,000
Al Qaeda Additional Liability: \$4,229,560

Iraq Additional Liability:

Marion Thomas (wife): \$3,000,000
Raymond Anthony Smith (Father): \$1,000,000
Deborah Sallad (sibling): \$500,000
Raymond Smith (Relation Unknown): \$250,000

Family of Timoth Soulas:

Economic Losses: \$15,139,203
Pain & Suffering: \$3,000,000
Al Qaeda Additional Liability: \$36,278,406

Iraq Additional Liability:

Katherine Soulas (wife): \$10,000,000
Father: \$3,000,000
Children: \$3,000,000 (each child)
Siblings: \$2,000,000 (each sibling)

The compensation amount authorized by S. 1275 is grossly unfair. The amount contemplated is far short of the true value of such claims in the civil justice system. The proposed compensation amount falls below even the amounts authorized by the Victims Compensation Fund. Even the VCF, which has been greatly criticized by many 9/11 families, offers greater compensation benefits than the proposed bill.

The Victims Compensation Fund has created such anxiety and angst among victims' families that it has proven to be an ineffective tool to compensate families fairly and to assist them in their time of grief. *See generally*, Kolbert, Elizabeth, "The Calculator: How Kenneth Feinberg determines the value of three thousand lives," *The New Yorker*, November 25, 2002; Chen, David, "Fund for Terror Attack Victims Offers Awards in 14 Test Cases," *New York Times*, September 30, 2002.

There is already a system in place to fairly evaluate damages suffered by a family. Juries everyday contemplate the loss and suffering that victims have endured and award damages, when appropriate, after a fair evaluation of all of the evidence. Any attempt to create a no-fault compensation system with pre-set awards creates a series of problems which we have seen repeatedly in asbestos bankruptcies, coal miners' black lung cases, and allergic reactions to vaccine cases. First, the awards will be unfair to some claimants. With this bill, the awards are so low that it would be unfair to every claimant. Second, plaintiffs and victims do not have the opportunity to tell the story of their loved one's death and hold accountable the terrorist. Third, victims are robbed of the discovery process and an opportunity to uncover who was involved, why the terrorist attack occurred, how it could have been prevented, and who was responsible for financing the attacks. What almost all victims and the families of victims seek are: 1) exposure of those responsible for their loss; 2) accountability of all responsible parties; 3) compensation for the harm they have suffered; and 4) punishment of responsible parties to deter such actions in the future. This proposed bill deprives victims of these opportunities.

PUNITIVE DAMAGES

No-fault compensation schemes deprive victims of the right to seek punitive damages. Punitive damages are a proven means by which to deter intentional and reckless conduct. There is no case in which punitive damages are more warranted and essential as a case involving terrorism. Deprivation of this right will foreclose all

meaningful opportunities for victims to hold terrorists accountable and deter future terrorist attacks.

PARENTS, SIBLINGS AND ALIENS WOULD NOT BE ENTITLED TO COMPENSATION

The proposed bill limits the number and types of persons who are eligible to file a claim for compensation for a terrorist act. S. 1275 provides compensation only for United States nationals and limits recovery to one claim per decedent. Foreign nationals, who are injured in a terrorist attack in the United States, have the right to bring a cause of action against the terrorists, their financiers and state sponsors of terrorism pursuant to the Torture Victim Protection Act and the Alien Tort Claims Act. Nevertheless, such victims are not entitled to compensation under the proposed Bill. In addition, the nuclear family, where a close familial relationship exists, whether foreign or domestic, may bring an individual action pursuant to the Foreign Sovereign Immunities Act. Thus, under current law, spouses, children, parents and siblings of a decedent may bring an individual cause of action. The proposed bill robs these individuals of their current right to seek compensation for their losses.

FROZEN ASSETS SHOULD BE USED TO COMPENSATE VICTIMS OF TERRORIST ATTACKS

Section 14 of S. 1275 eliminates provisions of the Foreign Sovereign Immunities Act and the Terrorism Risk Insurance Act of 2002 which guaranteed that victims of a terrorist act could satisfy a judgment rendered in their favor against assets of the culpable party seized by the United States government. Thus, while the proposed bill claims to permit victims a choice to either pursue litigation or file a claim for compensation through a federal fund, S. 1275 removes the means by which victims may be compensated through litigation. Depriving injured parties a meaningful remedy in litigation is depriving victims of their right to litigate.

The State Department for decades has attempted to interfere with victims' efforts to pursue litigation against individuals and foreign states that sponsor terrorism. The security of Americans is the first responsibility of government. Instead, the State Department in sponsoring this bill has made paramount its own security in exercising monopolistic power over anything involving smooth diplomatic relations. But smoothness has its price. The State Department always seeks to use seized assets as a diplomatic negotiating chip. There is no place for diplomacy with terrorists.

SUBROGATION

Even for the brave victims who may pursue litigation, the United States government reserves the right to subrogate, to the extent of payments made under the program, the victims' claims.

To the extent Section 11 implies that the United States government will prosecute terrorist financiers for theft support of a terrorist act and use the funds recovered to finance this program, it is disingenuous. It has been over one and a half years since the September 11th terrorist attacks and there has not been a single prosecution of a financier of the attacks. The United States government has recovered evidence linking, charities, banks and certain members of the Saudi royal family to funding Al-Qaeda and HAMAS. In fact, there are Internet home pages in Saudi Arabia boasting of compensation that will be awarded to families of suicide bombers. The United States government, however, has not conducted a single prosecution.

Under this proposed bill, even if the United States government began to conduct such an operation and seized some assets in satisfaction of terrorist attacks, the amount of money offered, \$250,000.00, is far too low to have any deterrent effect. Seizure of \$250,000.00 per claimant will not deter these wealthy contributors to terrorism. This pittance amount suggested in the bill will make any meaningful investigation of terrorism cost prohibitive. Collecting evidence will far exceed the cost of the subrogated amount.

LITTLE INCENTIVE FOR UNITED STATES GOVERNMENT ACTION

The United States government, to date, has failed to trace the roots of the September 11th attacks to its financial base. We believe the reason for this inaction is that the base of terrorism resides within Saudi Arabia. "For years, individuals and charities based in Saudi Arabia have been the most important source of funds for al-Qaeda; and for years, Saudi officials have turned a blind eye to this problem" See, Council on Foreign Relations, Independent Task Force on Terrorist Financing, at 9. As further evidence that officials within the U.S. government will not permit a true investigation into Saudi Arabia's role in sponsoring terrorism, the final report of Congress' investigation of the September 11th attacks has not been published. Press

reports indicate that the report will disclose “additional ties between the Saudi royal family, government officials and terrorists.” See, attached Frank Davies, “U.S. Report on 9/11 to be ‘Explosive,’” Miami Herald, (July 10, 2003). S. 1275 is a back door attempt by the State Department to increase bureaucracy and hide from the American people the true means by which terrorism is financed. Victims of a terrorist attack must be able to engage in discovery, to voice their grief and to face their tormentors, without the impediment of often illusory diplomatic obstacles. For this reason the State Department should welcome, not deprive private citizens of their duly enacted rights to pursue claims against terrorists and their financiers in US courts of law. Private citizens must not be deprived of their right to pursue litigation against terrorists and their financiers. This proposed bill should be completely shredded and sent back to the State Department forthwith.

In 1990 and 1992 Senator Charles Grassley introduced Antiterrorism legislation “to empower victims with all the weapons available in civil litigation . . . and accord the victims of terrorism the remedies American tort law.” See 137 Cong. Rec. 8143 (1991). The Senate report on the legislation stated that by imposing “liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, the flow of money.” S. Rep. 102-342, at 22. What has changed between 1990 and 2003?

- February 26, 1993—Bombing of the World Trade Center—6 murdered and 1,042 injured.
- June 25, 1996—Bombing of the Khobar Towers—19 murdered and 370 injured.
- August 7, 1998—East Africa Embassy Bombings—391 murdered and over 5,000 injured.
- October 12, 2000—Bombing of the USS *Cole*—17 murdered and 39 injured.
- September 11, 2001—Attacks in Washington, New York and Pennsylvania—2,915 murdered and thousands injured.
- October 12, 2002—Bombing in Bali, Indonesia—181 murdered and 250 injured.
- May 12, 2003—Bombings in Riyadh, Saudi Arabia—34 murdered and 194 injured.
- May 16, 2003—Bombings in Morocco—43 murdered and over 100 injured.

Do these thousands of deaths justify allowing foreign nationals, like Osama bin Laden and states to gain economic freedom for their atrocities at a cost of \$250,000 per dead American? The State Department says so. The 9/11 Families United to Bankrupt Terrorism say: No.

Dr. GERSON. On my part, I should like to focus on the national security dimension of this issue, and to show that the interests of security and the interests of justice are not only joined here at the hip, but are inextricably linked.

Of course, the President’s prerogatives in foreign affairs calls for diplomatic flexibility. We all recognize that, but it is not an unfettered right. Mr. Eizenstat has tried to draw or approach this by way of reaching a balance, but that is not what S. 1275 is about. Under S. 1275, under section 114 of that bill, it would put off limits to terrorism’s victims blocked or frozen assets. But they do not belong to the executive branch. The Constitution permits appropriation of such assets for public purposes. The congressional enacted scheme for blocking assets aimed at keeping it from our enemies; not at making it unavailable for American claimants. Its purpose was not to create a slush fund for the Executive.

Moreover, Mr. Chairman, I submit that section 114 would essentially gut the effective work of Congress which has encouraged the use of civil litigation against terrorism. It would mean that you could not recover through normal execution of a judgment, as going against blocked assets may be the only way to accomplish such recovery. In this way, S. 1275 is an effort by the State Department to overturn everything that Congress has done since 1991. And, to do that, they are willing to create and administer a new no-fault terrorism victims’ compensation system.

The State Department would argue, and indeed Mr. Taft has this morning, that the current scheme rewards those that get first to blocked assets. Mr. Eizenstat has characterized that as, "an unseemly race to the courthouse." But I would also note that Mr. Taft's testimony dwells simply on default judgments, largely against Iran, judgments that have been satisfied by the United States Treasury. And, if that is the problem, it should be labeled as such and addressed as such.

But S. 1275 represents something entirely different. Instead, the State Department approach in S. 1275 is so sweeping that it would remove all deterrents against the financing or sponsors of terrorism. As S. 1275 now stands, the American taxpayer would pay the victims of terrorism. The result is the best of all possible worlds for terrorists themselves. They can victimize at will, secure in the knowledge that it is the U.S. Treasury, not their assets, that would be called upon to pay the price. The result, Mr. Chairman, I submit, is cost-free terrorism. It is precisely the opposite of what the President and the Treasury Department and the FBI have been struggling so hard to accomplish in the aftermath of 9/11.

Toward this purpose, S. 1275 would set up a new office at the State Department to determine on a case-by-case basis whether an international terrorist act occurred. In doing so, it goes even beyond the 1996 amendments to the 1976 Foreign Sovereign Immunities Act. These amendments, which were inserted at the demand of the State Department, arrogated to it and not the courts the determination of which states are in fact state sponsors of terrorism. Rather than simply naming terrorist states, S. 1275 is open-ended, insofar as the Secretary of State will make a determination on a case-to-case basis as to whether an act of terrorism occurred.

But Mr. Chairman, the most invidious aspect of S. 1275 is its no-fault premise. In this way, it would neutralize the deterrent power, and I emphasize that, the deterrent power of civil litigation. How does that advance the national interest? How does that provide security for more Americans? And although this bill, as has been mentioned, does not directly affect the families of 9/11 as it does not apply to anti-terrorism actions filed before submission of S. 1275, the families of 9/11 are concerned above all with a sound national anti-terrorism policy. And for that reason, Mr. Chairman, I say that S. 1275 represents nothing less than the latest skirmish in a long clash of what I would call cultural wars. You will have to choose, and all the Senators will have to choose, which one is to prevail. One culture, I submit, is the culture of accountability, where the rule of law and the co-relative rights of civil actions are fundamental. And, in the countervailing culture, which supports S. 1275, expediency is supreme.

Now, Mr. Chairman, I make these remarks today not to demean the State Department but to explain its institutional shortcomings. The irony is that the projection abroad of American values of accountability and truth telling, to which the State Department is ostensibly fully committed, is in fact compromised by S. 1275. And I say this, Mr. Chairman from recent experience. Shortly before the Iraq war, I was asked by the State Department to go to Geneva as counsel to my former boss, Ambassador Jeane Kirkpatrick, whom I had served when she was Ambassador to the United Na-

tions. She had been selected by the President to lead the U.S. delegation to the U.N. Human Rights Commission, and our job there was to promote on an international scale the U.S. commitment to the rule of law as part of its commitment to human rights, and we did so by fending off attacks by such so-called U.S. allies as Saudi Arabia, who sought at the very same time to condemn the U.S. engagement in Iraq.

But how, I ask, can we present one face abroad and another at home? At a time when our government favors the establishment of truth commissions in Africa and cooperation with U.N. war crimes tribunals for the Balkans, Rwanda, and Sierra Leone, what lesson would we send to the world about our commitment to accountability and truth telling when we seek, as does S. 1275, to eviscerate the civil justice system approach and replace it with one of no fault?

Professors Steven Ratner and Jason Abrams, in their book, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, write: "Accountability helps build a culture of respect for human rights. It can signal to future violators of human rights that their actions will not simply be forgotten by some political compromise." But I submit that S. 1275 is all about political compromise. S. 1275 would allow the violators of human rights to be forgotten. And again, I ask for what purpose?

In 1999, as was pointed out, the Senate Judiciary Committee endorsed measures to enable victims of terrorism to execute on judgments against the frozen assets of terrorist-linked entities. Then in 1999, as today, I found myself shoulder to shoulder with my friend and colleague, Stuart Eizenstat, taking opposite positions on this particular issue. But those measures which enable the families of victims to go after frozen assets were indeed enacted into law. And yet today, 4 years after 9/11 we find ourselves here again, this time with the State Department trying to undo what was then wrought.

Although S. 1275 postures itself as providing a benefit to victims of terrorism through the choice of compensation from a government plan, it in fact deprives such victims and their families of their existing hard-won rights. It would award them up to \$250,000, and I will allow, if I may, Stuart Eizenstat's testimony to speak for itself on what a paltry sum that is.

But in exchange, and this is the point I want to make, in exchange for that paltry sum, they would be forfeiting their precious, hard-fought right to sue. Instead of treating family members as they deserve, which is as partners in the war against terrorism, it would relegate them to the status of victims of but another crime.

In 1996, a coalition of families—including those of victims of the Pan Am 103 bombing that I represented; of the 1995 Oklahoma Federal office building bombing; the family of Leon Klinghoffer, who was pushed off his wheelchair from the deck of the *Achille Lauro*; and the families of Americans held hostage by Iranian guerrillas in Beirut—held up during the Senate hearings on the 1996 Anti-Terrorism Act a simple sign. It read in its simplicity, "Give Us Our Day In Court." They got that day through passage of the 1996 Anti-Terrorism and Effective Death Penalty Act. They got it through the receptivity of the American courts to entertain suits for treble damages against non-state actors through the 1991 Anti-

Terrorism Act. They got it through judicial receptivity to actions under the much older Alien Tort Claims Act. And all of this activity was blessed and reinforced by Congress through passage in the aftermath of 9/11 of the 2001 USA PATRIOT Act. And now, S. 1275 would seek to take much of that away.

There can, I submit, be no effective day in court when the frozen assets of a defendant are declared off limits, and that's what this bill does. It declares them off limits, period. It does not provide for any particular schemes, as Mr. Eizenstat has discussed; it simply says they are off-limits. Moreover, the oblique language of section 14 is so broad as to erase any any logical tie to the legitimate needs of diplomatic flexibility.

I ask this: what possible legitimate foreign policy objective could possible be promoted by putting the assets of known terrorist organizations that the United States designates as terrorist organizations, like al-Qaeda and Hamas beyond the reach of collection? And yet that's what S. 1275 purports to do. For this reason, and others, S. 1275 sets back the clock instead of moving it ahead.

If I may conclude with an episode. In the summer of 1992, in a U.S. courtroom not too far from here in a case involving the then single largest attack on American civilians, I represented an individual named Bruce Smith who had lost his wife on Pan Am 103 as it exploded over Lockerbie, Scotland, on December 21, 1988. His aim was simple: to hold the Government of Libya accountable for civil damages in a U.S. court of law. It had nothing to do with American compensation. Libya had already been indicted by both the United States and the U.K. in separate criminal proceedings. Nevertheless, my former colleagues at the U.S. Department of Justice, acting on behalf of the U.S. Department of State, saw fit to intervene in that case, not for the benefit of the families of the American victims, but on behalf of the principle espoused by the Government of Libya: sovereign immunity, the outmoded 18th century concept that nations are sovereign, responsible only to themselves, and obligated to no one for the wrongs they may commit.

That absolutist view was overcome through passage of the 1996 Anti-Terrorism and Effective Death Penalty Act. But Mr. Chairman, I fear, and I say this regretfully, that ever since that day the State Department has waged a rear-guard effort to do away with the concept of civil suits against foreign entities, governmental or otherwise, implicated in the sponsorship or promotion of terrorism. That effort, which S. 1275 represents, if allowed to succeed, would set back a decade of historical advances.

In conclusion, S. 1275, in purporting to provide benefits when it in fact takes them away, and purporting to address American families' while in fact derogating from the very concept of accountability on which the rule of law is based, and then putting on the American taxpayers' shoulders the financial obligations which should rest on the shoulders of those who perpetrated the crime, robs the American people of their right to justice.

Justice for the families of 9/11, as is the case with regard to the families of Pan Am 103 and other terrorist outrages, is inextricably linked to serving a preventive or deterrent function. It is in this way that U.S. national security and the interests of justice on behalf of families of terrorism are simultaneously furthered.

For these reasons, Mr. Chairman, I say that S. 1275 simply does not deserve serious consideration. Thank you very much, Mr. Chairman.

[The prepared statement of Dr. Gerson follows:]

PREPARED STATEMENT OF DR. ALLAN GERSON, CHAIRMAN, GERSON INTERNATIONAL LAW GROUP AND HONORS PROFESSOR, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, DC

Chairman Lugar, Distinguished Senators:

I thank you for your invitation to appear before this hearing of the Senate Foreign Relations Committee on S. 1275. Today, no American is immune from the scourge of an international terrorist front committed to global jihad. Despite the courageous steps undertaken by the President of the United States and our valiant men and women in uniform, the truth is that the threat remains. Eternal vigilance and the readiness to use all the tools at our disposal is more indispensable than ever. That is why the introduction of S. 1275 is so perplexing, especially to the American victims of terrorism who see themselves in the vanguard of those determined to prevent a repetition of the horrors that befell them.

Inexplicably, the sponsors of S. 1275 would undo much of what has been accomplished in the last decade. They would undo the right accorded to the victims and their families to hold the murderous sponsors and perpetrators of terrorism accountable in US courts of law. That empowerment, that goes far beyond the issue of compensation, is one that Congress, the Courts, and the President have recognized since 1991.

Why would anyone want to undo this march of progress? Why would the US State Department take the lead in introducing such a measure?

To shed light on these questions I appear here today not only as an advocate who, together with my co-lead counsel, Ron Motley, proudly represent approximately 4,000 families of 9-11 victims in their suit against the financiers of terrorism. I appear, too, as someone who has long been involved, as a scholar and former government official, in efforts to address a balance between the needs of diplomatic flexibility and the demands of justice. But S. 1275 has nothing to do with balance.

S. 1275 is a setback in the war against terrorism.

S. 1275 is, moreover, inherently deceptive. It purports to provide the families of victims with additional rights; in fact, it deprives them of their hard-won rights. Instead of addressing the moral and legal right of the victims to know the details regarding the perpetrators and the circumstances of the atrocity, it would cover them up as a way of achieving a political compromise. This is not what Congress or indeed the President had in mind in declaring a war against terrorism on all fronts.

It is touted that the families of the victims will be the beneficiary of this bill. But they themselves deny it, and indeed have never been consulted on it. They do not want a no-questions-asked instrument. They want a mechanism suited to discovering the truth. They want accountability. They want punitive damages. S. 1275 gives them none of that. Indeed, if its scope were truly humanitarian, it would give them a true choice without strings attached. It would allow, for those needy enough to apply to the new government fund, an obligation to repay the taxpayer advance if they ever succeed in obtaining a judgment or settlement.

A Position Paper on S. 1275 ("The Saudi Bailout Bill") by the 9/11 Families United To Bankrupt Terrorism detailing the specific flaws of S. 1275 has already been distributed to this Committee, and I hope that it will be made available as a part of the official record. On my part, I should like to focus on the national security dimension of the issue, and to show that here the interests of security and the interests of justice are joined at the hip.

Of course, the President's prerogatives in foreign affairs call for diplomatic flexibility. But that is not an unfettered right. Blocked or frozen assets, which section 14 of S. 1275 would put off-limits to terrorism's victims, do not belong to the Executive Branch. The Constitution permits appropriation of such assets for public purposes. The congressionally enacted scheme for blocking assets aimed at keeping it from our enemies, and at making it available for American claimants. Its purpose was not to create a slush fund for the Executive.

Moreover, section 14 would gut the effective work of Congress in encouraging the use of civil litigation against terrorism. It would mean that you could not recover through normal execution of a judgment, as going against blocked assets may be the only way to accomplish such recovery. In this way, S. 1275 is an effort by the State Department to overturn everything Congress has done since 1991, and to do that

they are willing to create and administer a new no-fault terrorism victims' compensation system.

State would argue that the current scheme rewards those that get first to blocked assets. But the State Department approach would remove all deterrents against the financing or sponsoring of terrorism. As S. 1275 now stands, the American taxpayers would pay the victims of terrorism. The result is the best of all possible worlds for terrorists. They can victimize at will, secure in the knowledge that it is the US Treasury, not their assets, that would be called upon to pay the price. The result is cost-free terrorism. It is precisely the opposite of what the President and the Treasury Department and FBI have been struggling so hard to accomplish in the aftermath of 9-11.

S. 1275 would, moreover, set up a new office at the State Department to determine on a case-by-case basis whether an international terrorist attack occurred. It even goes beyond the 1996 amendments to the 1976 Foreign Sovereign Immunities Act, inserted at the demand of the State Department, arrogating to it, and not the courts, the determination of which states are in fact state-sponsors of terrorism. Rather than simply naming terrorist states, S. 1275 is open-ended insofar as the Secretary of State will make a determination on a case-by-case basis as to whether an act of terrorism occurred.

But the most invidious aspect of S. 1275 is its no-fault premise. In this way it would neutralize the deterrent power of civil litigation. How does that advance the national interest? How does that provide security for more Americans? Although this bill does not directly affect the families of 9-11, as it does not apply to anti-terrorism actions filed before submission of S. 1275, the families of 9-11 are concerned above all with a sound national anti-terrorism policy. And, knowing the history of this bill, they have reason to fear that even the effective date is not secure.

Distinguished Senators, S. 1275 represents no less than the latest skirmish in a clash of cultures. You will have to choose which one is to prevail. One is the culture of accountability where the rule of law and the correlative rights of civil actions are fundamental. In the countervailing culture, expediency is supreme.

These remarks are not meant to demean the State Department but to explain its institutional shortcomings. The irony is that the projection abroad of the American values of accountability and "truth-telling," to which the State Department is ostensibly committed, is compromised by S. 1275. I say this from recent experience. Shortly before the outset of the Iraq war, I was asked by the State Department to go to Geneva as counsel to my former boss, Ambassador Jeane Kirkpatrick, who had been selected by the President to lead the US delegation to the UN Human Rights Commission. Our job was to promote, on an international scale, the US commitment to the rule of law. We did so while fending off attacks US "allies" such as Saudi Arabia who sought to condemn the US engagement in Iraq. But how can we present one face abroad and another at home? At a time when our government favors the establishment of truth commissions in Africa and cooperation with UN war crimes tribunals for the Balkans, and Rwanda, and Sierra Leone, what lesson would we send to the world about our commitment to accountability and truth-telling when we seek, as does S. 1275, to eviscerate the civil justice system approach and replace it with one of no-fault?

Professors Steven Rafter and Jason Abrams have pointed out in "Accountability for Human Rights Atrocities in International Law beyond the Nuremberg Legacy" that: "Accountability helps build a culture of respect for human rights . . . It can signal to future violators of human rights that their actions will not simply be forgotten by some political compromise." But S. 1275 is all about political compromise.

S. 1275 would in this way allow the violators of human rights to be forgotten. Again, for what purpose? In 1999 the Senate Judiciary Committee endorsed measures to enable victims of terrorism to execute on judgments against the frozen assets of terrorist-linked entities. Those measures were enacted into law. Today, four years later, after 9-11, we find ourselves here again: this time, with the State Department trying to undo what was then wrought.

Although S. 1275 postures itself as providing a benefit to victims of terrorism through the choice of compensation from a government plan, it, in fact, deprives such victims and their families of their existing hard-won rights. It would accord them \$250,000. But in exchange, they would forfeit their precious right to sue. Instead of treating family members as partners in the war against terrorism, it would relegate them to the status of victims of but another crime.

In 1996, a coalition of families—including those of the victims of Pan Am 103, the 1995 Oklahoma Federal Office Building bombing, the family of Leon Klinghoffer who was pushed in his wheelchair off the deck of the *Achille Lauro*, and the families of Americans held hostage by Iranian guerrillas in Beirut—held up during the Sen-

ate hearings on the 1996 Anti-Terrorism Act a simple sign. It read: "Give Us Our Day In Court."

They got that day in court through passage of the 1996 Anti-Terrorism and Effective Death Penalty Act. They got it through the receptivity of American courts to entertain suits for treble damages against non-state actors through the 1991 Anti-Terrorism Act. They got it through judicial receptivity to actions under the much older Alien Tort Claims Act. All of this activity was blessed and reinforced by Congress through passage, in the aftermath of 9-11, of the 2001 U.S.A Patriot Act. Now, S. 1275 would take much of that away.

There can be no effective day in court when the frozen assets of a defendant are declared off limits. Moreover, the oblique language of Section 14 is so broad as to erase any logical tie to the legitimate needs of diplomatic flexibility. What possible legitimate foreign policy objective would be promoted by putting the assets of known terrorist organizations like al Qaeda and Hamas beyond the reach of collection?

For this reason and others, S. 1275 sets back the clock instead of moving it ahead. In the summer of 1992 in a US courtroom not too far from here in a case involving the then single largest attack on American civilians, I represented an individual, Bruce Smith, who had lost his wife on Pan Am 103 as it exploded over Lockerbie, Scotland on December 21, 1988. His aim was to hold the government of Libya accountable for civil damages in a US court of law. Libya had already been indicted by both the United States and the UK in separate criminal proceedings. Nevertheless, my former colleagues at the US Department of Justice, acting on behalf of the US Department of State, saw fit to intervene in that case, not for the benefit of the families of the American victims, but on behalf of the principle espoused by the government of Libya: sovereign immunity, the outmoded eighteenth century concept that nations are sovereign, responsible only to themselves and obligated to no one for the wrongs they may commit. That absolutist view was overcome through passage of the 1996 Anti-Terrorism and Effective Death Penalty Act. Ever since, I fear, however, the State Department has waged a rear-guard effort to do away with the concept of civil suits against foreign entities, governmental or otherwise, implicated in the sponsorship or promotion of terrorism. That effort, if allowed to succeed, would set back a decade of historical advances.

S. 1275, in purporting to provide benefits when it in fact takes them away, in purporting to express American values while in fact derogating from the very concept of accountability on which the rule of law is based, and in putting on the American taxpayers' shoulder the financial obligation which should rest on the shoulders of those who perpetrated the crime, robs the American people of their right to justice. Justice for the families of 9-11, as is the case with regard to the families of Pan Am 103 and other terrorist outrages, is inextricably linked to serving a preventive or deterrent function. In this way, US national security and the interests of justice on behalf of the families are simultaneously furthered.

S. 1275 does not deserve serious consideration.

Thank you.

The CHAIRMAN. Well thank you very much, Dr. Gerson. As you've noted, you and Mr. Eizenstat have argued before our committee before, and we have benefited from those diverse views.

Let me ask, just as a layperson in all of this, certainly as you pointed out those who came to hearings before had signs that this is fundamental for American justice, and that this is something that has a strong appeal to each one of us as legislators. As you pointed out, in the 1996 act, to some extent that opportunity was there. At least as we've established in the case of Iran, there were some substantial blocked assets. Over \$370 million of them have been paid to certain victims.

One of the problems that strikes me as a layperson is, taking a look at the profile of the terrorists who flew into the World Trade Center, one can say, I suppose, even if those individual men had no particular net worth that was identifiable, no assets could be attached because they in fact perpetrated the devastation not only on the building but then the victims that were a consequence of that. As you've pointed out, Dr. Gerson, backing them, at least as we've alleged, were al-Qaeda operatives. There might be some assets

there, despite allegations that S. 1275 sort of puts those off limits. I would just say as a practical matter—and I've sat through many hearings trying to establish how in the world the United States is going to get cooperation from other countries in blocking the transfer of assets, even finding assets—maybe the assumption is correct, out there somewhere, in markets or in however these assets might occur, that al-Qaeda has something that could be attached, that could somehow be of availability for a day in court for the victims of 9/11.

Now, as we've all pointed out, the 9/11 victims are not a part as we understand it of the S. 1275 legislation. As you say, their interest is justice for everybody and deterrence against terrorism. Yet at the same time, just as a practical matter, as we think about deterrence against terrorism, and war against terrorism, it appears to me that if the hijackers are an indicator, we may be facing persons who are certainly not attached to a nation-state, that may be loosely attached to a cell of al-Qaeda if we can establish that. Therefore you can have a day in court, but the prospects of there being any relief are pretty dim. Nor, at least as I understand the profiles of the hijackers, would they have been deterred by any of the legislation that we're talking about today. That is not really a part of their ethos, so they go ahead and go in the World Trade Center anyway and kill Americans and people from other nations.

Thus I understand the general principle, but in terms of the application of terrorism as we are fighting it now, it may miss the mark. As I understand, this may be expedient, S. 1275. It just says, regardless of who these hijackers were, whether they knew about the law or they were deterred, whether they belong to anybody, there ought to be some relief for victims that is fairly certain. Furthermore, in one form or another, this is going to be paid for by the American taxpayer, as you've said.

As I read Mr. Eizenstat's testimony, plus other available testimony before the committee on this issue in the past, the American taxpayer picks up the tab in any event, one way or another. You can attach the assets, but in due course the offsets, as treaties come about, as new governments are rehabilitated or what have you, mean that essentially this wasn't free money. Maybe the State of Iran is deterred, or Libya, or Iraq. These are nation-states in the classic sense that we've thought about this. Now, given the sub-nationals, the cells, the rest of it, even that becomes murkier in terms of the deterrent aspect against terrorism.

Thus what the State Department has done, as I understand their rationale, is taken into account the thousands of victims and the probable desire for fairness among the victims, the lack of certainty certainly, the years that may go by even if you get your day in court and you get a judgment of getting anything, and maybe not even deterrence, because the whole scheme of terrorism changes. At least the State Department is saying that we will guarantee that American citizens will get something.

Mr. Eizenstat has testified, and you have sort of agreed with part of that testimony, well if the compensation is \$252,000 or \$262,000, that's too little. Essentially \$1.8 million is being mentioned with regard to certain victims of 9/11. Mr. Eizenstat is saying that if you're going that route, the sum ought to be higher, and likewise

there ought to be so-called flexibility, so that you are not bound to that particular situation, but you have the ability to try out some other remedy. However, if the incentive that comes from the higher figure is such, more victims would settle at that point. People would find their cases closed earlier. Still you have either option beyond those options that the State Department's bill has.

If you will discuss with me for a moment, Dr. Gerson, the whole idea of prevention and deterrence as well as, without arguing for or against expediency or certainty, or however one wants to characterize the State Department, why it is a bad thing if this brings about some justice in a fairly certain timely way for thousands of people who otherwise, despite all protestations of the legal system, are not getting any justice, any compensation of anything in the current situation.

Dr. GERSON. Thank you, Mr. Chairman. I'd be very pleased to respond. As I understood it, you raised two questions. One, what is the linkage to deterrence by the kinds of civil suits that families of the victims of terrorism have brought and continue to bring? Second, why is it such a bad thing to provide some measure of relief to the families of victims? If I might, I'll respond to both questions in turn.

With regard to deterrence, it is true, Mr. Chairman, that the world has changed and that we have many more non-state actors. But it has not changed in one fundamental aspect: The non-state actors continue to be funded by governments. As Tom Friedman pointed out in a piece in the New York Times not too long ago, 95 percent of all terrorism continues to be governmental-sponsored terrorism or somehow government-related terrorism. In our particular suit on behalf of 9/11 families entitled *Burnett vs. Baraka Investment and others*, we have named nearly 200 different defendants, and these defendants are the ones that financed terrorism. We can not deal with terrorism without dealing with how it is financed. That's the essence of this suit.

We have in the audience today, Mr. Chairman a family member, Matt Sellito, who lost his son tragically at the World Trade Center. I heard him speak not too long ago, and if I can paraphrase him, he said the following. He said the perpetrators of that dastardly deed did a terrible, terrible thing, but their sin is even compounded by the sins of those who financed them, the cold-blooded handlers. These are the people that we are going after. It's not the funds that al-Qaeda may have here that we are after. It's the funds that the financiers have that are of interest in order to shut down the financing of terrorism. Unless you shut that down we are not effective. And this has been recognized. Mr. David Aufhauser, the General Counsel of the Treasury Department spoke here in Congress not too long ago and he said exactly the same thing: We can not address the issue of terrorism without closing down the financing of terrorism. That's what this lawsuit seeks to do. And it will have a deterrent impact, we believe, in that regard.

The CHAIRMAN. On that point now, the 200 defendants mentioned might have some funds, but as a practical matter, how do you get your hands on any of the assets of these people? I'm just inquiring after looking at this from the standpoint of our Intelligence Committee or Foreign Relations Committee, with one hear-

ing after another of how you block transfers, how you even identify where the money is. I mean, you can name 200 out there, but physically how do you get any assets from any of these people?

Dr. GERSON. Well, our job has been to identify the enormous quantity of assets that they have in the United States and to make sure that the price for the terror that they helped commit is going to be a price that they're going to pay through civil damages. Those assets are substantial. They have been identified in the United States and elsewhere. And, insofar as we are dealing with corporate interests as well, banks, institutions, and so-called charities that have any business in the United States, if they refuse to honor a judgment duly entered by a court of the United States they will never be allowed to do business in the United States again. And, if I may say so, they really have no place to take their money. We do have treaties with other countries. Those assets will be chased down wherever they are.

For this reason, Mr. Chairman, I believe that civil actions constitute a very, very effective tool and a deterrent. Having been involved in the Pan Am 103 case, that's hopefully reaching a conclusion, I think everyone will say that it was the fact that Libya's assets and their ability to do business with the United States was jeopardized constituted the economic considerations that forced them to have a change of policy.

Now, Mr. Chairman, I would like to address the other point that you made, which is why S. 1275 is a bad thing. It's a bad thing for a simple reason: It's deceptive. It's not a gift. It's a gift with terrible strings attached. The families that waved the sign that day that said "Give Us Our Day In Court" will now have taken away their day in court because S. 1275 is not without strings. And the string that are attached to it make you forfeit your right to sue. You know, there is the government compensation fund that applies to the families of the victims of 9/11. That doesn't have a string attached. This would have that string attached. And it would lure families in their desperate hour of need, when they are emotionally distraught, into believing that they are getting some relief when in fact they are forfeiting their most precious asset.

I need to say this too, Mr. Chairman, having worked with families of victims now for some time. Many of these families would say, we want their money and then as soon as we get it we'd like to burn it. Money is not what their objective is. This is not about money. This is about accountability. They want to know the truth, and the American people want to know the truth. This bill, if we shed all the rhetoric, is about eliminating the truth because it will serve as a deterrent to civil actions and that's a terrible thing for America.

Mr. EIZENSTAT. May I make a comment? First of all, just a clarification, and I think it shows the difficulty and the complication. In our 2000 legislation, which I helped to negotiate with Senators Mack and Lautenberg, the \$377 million which has been paid was not paid out of Iranian assets, it was not paid out of Iranian assets, it was paid out of U.S. Government assets in an amount equivalent to the amount that Iran had deposited in the foreign military sales account and which was a matter of litigation in The Hague.

What we did in that case, and this is why it's not completely, I think Allan is overstating it a bit, it's not completely a sort of a free hand for the terrorist state, is that in that legislation, and it would be provided in S. 1275 as well, the U.S. Government is subrogated to the right of the plaintiffs to sue the ultimate terrorist state. So I would hope under the 2000 legislation that if at some point in time we in fact normalize relations with Iran that this would be one of the claims that would be lodged, so that Iran would have to know that we were not going to forget this.

But again I think that the complication is evident here. According to the Treasury in their latest report to the Congress, Iran has only about \$23 million in blocked assets so I don't believe, as Allan says, that one should be foreclosed from going to court. I think that there should be a right under certain circumstances to get blocked assets, subject again very importantly to this Presidential waiver. But I think that it's oftentimes, as you're suggesting, a chimera. These blocked assets are very limited, sometimes they don't exist at all, and at the very least having a clear administrative process with an adequate payment level would provide some measure of certainty, and I would hope that a lot of claimants would take that rather than the uncertainty and the litigation fees and the attorneys' costs and so forth.

I at the same time don't think they should be foreclosed from taking that route so long as the President has the authority to say, in a particular case, we believe that these blocked assets serve a national security purpose and that they therefore shouldn't be subject to attachment for a judgment, and claimants would have to make that decision as to whether they want to take that risk. There will be some instances, and we've done it in the Cuban case where we actually used blocked assets and we didn't exercise the waiver, President Bush, I think again showing the fine balance.

My understanding is that for some of the outstanding claimants in 2003, he permitted the use of the blocked assets in a limited amount, I think it was up to \$100 million, but then foreclosed it for other matters because he wanted to use the Iraqi assets for the reconstruction of the country, and that, I think, is a very important national purpose.

The CHAIRMAN. Well, you both have illustrated the dilemma that the Congress has in legislating this issue. If we leave things as they are, then presumably victims of terrorism—whether it's non-state or state and so forth—have their day in court, their ability to sue. The United States, if it's fortunate, can chase down assets and may or may not find any, or find foreign policy objectives as in the case of Iraq, as it tries now to compromise. The President apparently puts \$100 million over if it might be used for victims, but the rest is to reconstruct the country because that's pretty important in terms of world peace and national objectives. Those foreign policy objectives are always going to be fairly important. With Iran, for example, if we were to come hypothetically into some diplomatic relationships beyond those which we have, it's probably going to center for a moment around whether Iran forgoes its nuclear experiment and movement toward what many alleged before this committee is an attempt to move toward producing nuclear weapons. It's a very serious issue.

The compensation of victims of terrorism is a very serious issue. Perhaps you give the President the opportunity to make the choice and he says, well, as much as I think there ought to be some assets available for the victims, at the same time, nuclear weapons might annihilate all of us. This is a tough choice but it is nevertheless what I'm trying to sort out. Both of you—in your experience in various administrations, and in responsibilities you've had—have had to deal with this. I'm dealing with this as a citizen amateur this morning, just trying to ferret out how in the world an ordinary citizen who's a victim of terrorism is ever likely to be compensated.

It may be, as you've pointed out, Dr. Gerson, that this is not the interest of any of the victims, but rather their interest in getting the satisfaction of a judgment that somebody's responsible, even if there's not a dime available. Maybe this is what this is about. Perhaps that can be achieved in the current legislation, that is, there'll be some satisfaction, a course of rule in favor of the victims. Yet they should not anticipate—in this world at least—any compensation unless American taxpayers decide to appropriate substantial sums of money. That's essentially what the State Department bill does. I think both of you pointed out in various ways that, either rightly or wrongly, for good or for bad, we're talking about a transfer of funds from some American citizens to others. Those who are going to get the money have suffered because of some totally extraneous act of their lives. They or their loved ones just were in the wrong place at the wrong time.

Now, beyond that, you've said, Dr. Gerson, that this could apply even to an American tourist who's caught in the crossfire of a terrorist act in Israel, or elsewhere, as I understand it and maybe it should. Yet that's an even broader application than the 9/11 situation or the Pan Am aircraft. In other words, we would once again need to come to some definition. The State Department has defined it, as you've indicated, far too narrowly in terms of circumstances. That may be so; it may not be. The purpose of the hearing is to try to refine where one ought to be on this issue.

As a practical matter, it's still sort of centered on the thought of whether justice is served if there is very little possibility of compensation for anybody despite the prospect that you have the right to sue and wait and wait and hope that somehow the world will provide. I don't think the world will. I'm sort of pragmatically thinking probably the American Government would do so in a systematic way if people are in fact to get some compensation. So have another go at that if you will.

Mr. EIZENSTAT. May I take a stab at that? I mentioned that you and I came in contact first during the Carter years. Let's take a hypothetical based on an actual situation. We had the hostages taken, 444 days.

The CHAIRMAN. Yes.

Mr. EIZENSTAT. We froze Iranian assets. Let's assume, Mr. Chairman, at that point, that Congress had passed what it did in 1996 20 years later and had already allowed suits in an amendment to the Foreign Sovereign Immunities Act against Iran. And let's assume that those hostages had filed the suits and gotten the default judgment and the President's sitting there in the White House trying to negotiate the release of the hostages, and the vic-

tims have gotten large judgments against Iran pursuant to what Congress later passed.

It's this kind of dilemma that to me means that the President should have the authority to make that kind of balanced judgment. Perhaps in that situation he would have decided that the hostages should get some amount, as President Bush did with the Iraqi situation. But certainly, had all of those assets been consumed by lawsuits, we would have been devoid of what was an absolutely critical tool to get those hostages released.

So I think really when Congress legislates here, and I think it should, because there's just no certainty, I think that creating an administrative forum with an adequate compensation system is important. Preserving the right to sue is also important, but then if that right to sue is going to be satisfied out of blocked assets, the President for sure ought to be able to make that judgment. That's what he's paid for. That kind of balance that I'm suggesting would have been a difficult balance in 1980, 1981, but one in the end that he would have been called upon to make, and I think only he could make that.

The CHAIRMAN. Dr. Gerson.

Dr. GERSON. Mr. Chairman, let me first comment on your use of the phrase "amateur" to describe your involvement in this field. You are anything but an amateur and you of course understand the complexities of the legislative process. Having said that, may I suggest that the best way to deal with this issue is simply to get S. 1275 off the table. It simply is the wrong vehicle for addressing any of the issues that we have discussed today. The purpose of S. 1275, as I tried to point out, is simply to continue a very long war that the State Department has waged against having any U.S. claimants become involved in what they consider the exclusive monopolistic prerogative of the State Department in dealing with foreign affairs. We are way beyond that, yet that is what this bill represents.

In terms of the specifics, I personally am opposed to having the U.S. taxpayers pay anything to the families of victims. The vast majority of the families of terrorism do not want anything like this. They want the price to be paid by the perpetrators. They don't want money from the U.S. Treasury. If they are to get money from the U.S. Treasury because it is necessary to provide some emergency relief, it should be labeled properly as such without deceptive advertising, and there should be no strings attached.

Mr. Eizenstat has, my friend Stu has spoken a lot about the Presidential waiver authority, and that's fine, but it doesn't have anything to do with S. 1275. I used to serve in the Reagan administration at one point as the Deputy Assistant Attorney General for Legal Counsel, and my job was to expand the President's prerogatives, and very often I would use the word IEEPA, which was not a cry of horror, it simply stood for the International Economic Emergency Powers Act. And the President has ample authority in specific circumstances, in specific circumstances, to make his case that his foreign policy prerogatives require a special treatment in a particular case.

But that's not what S. 1275 does. S. 1275 is a blanket omnibus bill that would put all frozen assets off limits, including, which is

the most invidious aspect of it, not only the assets of foreign countries, but also the assets of terrorist organizations, and there's no, absolutely no sound foreign policy objective that can be served by having the President wield increased flexibility with regard to negotiating with terrorist groups.

So, again, for these reasons I submit that we're dealing with the wrong vehicle to accomplish these ends. S. 1275 has nothing to do with balancing legitimate foreign policy considerations, the interests of flexibility and diplomacy that we all acknowledge the President is entitled to. This is the wrong vehicle. It should be gutted. It should not be discussed as the basis for any further discussions in the Congress.

Mr. EIZENSTAT. Mr. Chairman, I've suggested some significant changes that could be made, but I think it's a basis to at least begin the discussion. I think it's incorrect to suggest that there should be no administrative remedy, because I think without that administrative remedy, as you've very cogently suggested, victims in the end may think that there's a pot of gold at the end of the rainbow when there isn't.

I also think that to suggest, as I assume that Allan is doing, that in all cases willy nilly that those who have a default judgment against either a terrorist organization or a state sponsoring them should be able to attach frozen assets or blocked assets without any consideration of the foreign policy implications also goes too far. And that's why what I'm suggesting is building on this administrative remedy that the administration has suggested, making it a more viable alternative by increasing the amounts and incentivizing people to take it, allowing suits, not cutting off suits, but giving the President the authority in terms of satisfying any judgment out of blocked assets the right to balance in a particular case, and he might decide with Hamas or a terrorist group, we don't have any interests, we're not going to normalize relations with them. In other instances he may decide an extraordinary case like the Cuba case, OK, we'll let frozen assets be used, but he should have the authority, as President Clinton did to waive in 1998 and 2000, and in effect as President Bush did in 2003 to say no, there are supervening uses for these: leverage for normalization, leverage for hostages, rebuilding a country, as in Afghanistan and Iraq.

Without that kind of balance, then I think, you know, we're not going down the right path, but I do think that this is a good faith effort by the administration to try to begin putting these issues into context, and although, again, I have suggested modifications to it, I would hate to see Congress just abandon it and say, OK, we're just going to continue this ad hoc process and what will happen is when a lawsuit's filed and Allan gets a judgment, they'll be back here looking for some additional legislation in terms of finding an asset to attach or whatever, we'll be right back into the same issue. So we might as well get on it, try to deal with it, and try to incentivize people to go, without foreclosing a court action, into an administrative route.

Dr. GERSON. If I could just respond briefly, Senator. With all due respect to my colleague, Stu Eizenstat, the President already has the authority. He doesn't need S. 1275. S. 1275 is not about that.

Second, he suggests that S. 1275 represents a good faith effort. I've tried to make it clear in context, in the historical context, that this is not a good faith effort, that it is really not about compensating the families of victims. It is about freezing the families totally out of the foreign policy process at a time when it has been demonstrated and in which the Congress has repeatedly affirmed, most recently through the 2001 USA PATRIOT Act, that the families have a rightful role to play in the war against terrorism, and that civil litigation is one component.

Stuart, you don't have to be afraid that I'm going to be back here before Congress if I win a judgment. The amount of money that can possibly be frozen with regard to the defendants that we have sued is minuscule and if you want to drop S. 1275 on that basis, I'm willing to talk to you about that.

Thank you.

The CHAIRMAN. Well, I thank both of you gentlemen for your testimony, as well as Mr. Taft on behalf of the State Department. You have helped us make an important record for this legislation including advice for any other modifications to it or for none at all, as you've suggested, Dr. Gerson, which may be the best alternative. You certainly have given us a great deal to think about. I will share your testimony and the findings of the hearing with the other members of our committee as they help me determine whether we should progress.

For the moment, our hearing is adjourned.

[Whereupon, at 11:17 a.m., the committee adjourned, to reconvene subject to the call of the Chair.]

ADDITIONAL STATEMENT SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF SENATOR GEORGE ALLEN

Mr. Chairman, I appreciate the opportunity to comment on the Benefits for Victims of International Terrorism Act (S. 1275). To begin, I would like to commend the chairman for focusing on this issue and holding this hearing. Many victims of international terrorism reside in the Commonwealth of Virginia and have been seeking restitution for many years. Virginians were victims of the 9/11 attacks, the attack on the U.S.S. *Cole*, the hijacking of TWA flight 847, and the Iran Hostage Crisis, just to name a few.

I have personally been involved in this issue since I first took office as a United States Senator. I have met with victims, victims' families, victims' groups and their various representatives. I have also maintained an ongoing dialog with the administration regarding this issue. I am particularly pleased that the State Department Legal Advisor is here to defend his Department's proposal. His presence, and the positive and proactive step of finally sending a proposal to the Congress allows me some hope that there will be a sincere dialog on this most important issue.

Last year, along with Senator Harkin and a bipartisan group of our colleagues in the Senate, I introduced a bill to clear the way for the use of terrorist assets to be used to satisfy judgments against State sponsors of terrorism who have been held liable for damages against Americans in United States federal courts. The language of our bill was introduced as an amendment to the Terrorism Risk Insurance Act, and it was approved by the Senate by a vote of 81 to 3. The House of Representatives voted to instruct conferees to retain the Senate amendment by a vote of 373 to 0.

The State Department's arguments were thoroughly debated last year, and the Congress acted firmly to support a victims' rights to pursue justice over State's objections. Having said this, however, I understand some support for a minimum guaranteed disbursement to all American victims of terrorism. I believe with appropriate changes, S. 1275 can be an act that provides the necessary assistance to victims of international terrorism, provided, however, that it in no way jeopardizes the right

of victims to pursue legal recourse through our court system under the 1996 Antiterrorism amendment to the Foreign Sovereign Immunities Act, as amended in 1998, 2000, and 2002.

I do, however, have serious concerns about the bill as introduced in the Senate. The policy reflected in the laws in place today is sound. But since this policy is a composition of amendments over many years, I welcome this initiative to clarify the process. In short, the policy must not deny American victims the rights that they currently have, but can include a form of disbursement program as proposed by the State Department. My specific comments and concerns are include:

- Participation in the disbursement program must be an option and not a substitute for the current system. For example, it must be clear that a victim who participates in the administrative proposal will not be prohibited from bringing a civil action in federal courts.
- The 1996 Antiterrorism Act created a federal cause of action against State sponsors of terrorism. Under the act, and the subsequent amendments to it, American victims of State sponsored terrorism may bring suit against the foreign sovereign and attach its assets, including those regulated by the U.S. Government, held here in the United States.
- The determination or a terrorist event must be appealable.

A payment under the current proposal should be viewed as assistance and, as such, should not bar an American's ability to prosecute foreign State sponsors of terrorism and the individuals responsible for their suffering. If in fact a victim successfully prosecute his or her claim and receives compensation, moneys provided under this proposal should be returned to the Treasury.

Congress has made its intentions clear that the U.S. Government should not bar the use of terrorist assets to compensate victims. We should not burden U.S. taxpayers for the terrorist acts of foreign nations in the event adequate assets of these nations are under the control of the U.S. Government.

The State Department has opposed every effort to attach the regulated, blocked and frozen assets of State sponsors of terrorism. They have made their views known, yet the Congress has overwhelmingly acted to allow attachment in satisfaction of judgments against State sponsors of terrorism. This bill should not be yet another chance to undo past legislation, but must only be an opportunity to add to and improve upon current law and policy.

Lastly, the current proposal gives the Department of State the responsibility to receive, examine, adjudicated and render final decisions with respect to claims filed. Such a program cannot be handled by the State Department. Instead, this function should be performed by the Justice Department which has much more expertise in these matters. In fact, the Foreign Claims Settlement Commission is one option for administration of this program. The State Department's administration of the proposal has the potential to create the appearance of a conflict of interest because of the Department's dealings with those foreign sovereigns that had been designated State sponsors of terrorism.

Mr. Chairman, I look forward to working with you and members of the committee to develop a comprehensive program that addresses the rights and needs of American victims of terrorism to pursue justice, while minimizing the exposure to the U.S. taxpayer, and emphasizes accountability for State sponsors of terrorism and those who victimize innocent Americans.

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

RESPONSES OF WILLIAM H. TAFT, IV, LEGAL ADVISER, DEPARTMENT OF STATE, TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR GEORGE ALLEN

Question 1. Mr. Taft, I understand the position of your Department and the Treasury Department is that under all circumstances the use of terrorist assets regulated, to include "blocked" and "frozen" assets, to satisfy claims of U.S. nationals undermines U.S. foreign policy and national security interests. But this has not always been the position of the Treasury and State Departments, as I understand the situation.

- Are you aware that, in 1994, Mr. Newcomb of Treasury's Office of Foreign Assets Control testified that there was a "longstanding U.S. Government policy of preserving blocked assets as a pool against which all claimants are given an opportunity to seek recovery"?

- Could you please explain how your current position to defeat use of blocked assets is consistent with this “longstanding” U.S. government policy?
- To the extent it is not consistent, what has changed since 1994?

Answer. I am not aware of Mr. Newcomb’s testimony. I would refer any questions you may have regarding his testimony to the Treasury’s Office of Foreign Assets Control. Perhaps the comment refers to the historical fact that the United States has often retained blocked assets as frozen pending negotiation of a lump-sum claims settlement agreement with the foreign government when relations are normalized, at which time we have obtained the agreement of that government to use some or all of the assets to pay claims. This approach often furthers the foreign policy interests of the United States as well as the interests of claimants. The Executive Branch’s policy that blocked assets are to be preserved to further U.S. foreign policy and national security interests is longstanding; naturally, where possible, we seek to protect the interests of all categories of U.S. claimants as well.

As I stated in my testimony, the ability to block, and keep blocked, a foreign state’s assets is one of the primary and most powerful foreign policy tools available to the President to deter aggression and discourage or end hostile actions by such states against U.S. citizens.

The leverage provided by blocked assets has proved central to our ability to protect important U.S. national security and foreign policy interests.

I note, in particular, the critical role that blocked assets played in normalization with Vietnam after its assets had been blocked for some 20 years. Not only did the blocked assets persuade Vietnamese leadership to address important U.S. concerns, including accounting for POWs and MIAs and moderating Vietnamese actions in Cambodia, they also aided in the conclusion of a favorable claims settlement agreement, worth over \$200 million in U.S. claims, as had been adjudicated by the Foreign Claims Settlement Commission.

As the Vietnam claims settlement illustrates, the leverage gained by blocked assets can promote a settlement of claims. The Department believes that if blocked assets are to be factored in to the payment of claims, they should not be used on an ad hoc basis. Rather, they should be preserved, and when circumstances warrant, be factored in to an overall settlement of outstanding claims of our nationals upon normalization.

Question 2. Mr. Taft, in proposing the Iraq Claims Act in 1994, State proposed that the adjudication of claims be submitted to the Foreign Claims Settlement Commission. Now you propose to establish some sort of adjudication authority in the State Department.

- Aren’t we just creating new bureaucracy in placing this authority in the State Department when the Foreign Claims Settlement Commission is already in place and has the resources and expertise needed to evaluate and adjudicate these claims?
- What expertise does State have in adjudicating individual claims by terrorism victims? Isn’t it better to place this function within the expertise of the Foreign Claims Settlement Commission?
- Given the clear antipathy of the State Department to these claims of terrorism victims, why should victims believe that their claims will be fairly adjudicated by the State Department was Congress to agree to this portion of your proposal?

Answer. In 1993 and 1995, the Department had proposed legislation that would have directed the Foreign Claims Settlement Commission (“FCSC”) to adjudicate all pre-Gulf War claims against the Government of Iraq. This would have covered primarily commercial and expropriation claims, along the lines of claims covered by other titles in the International Claims Settlement Act of 1949, as amended. FCSC decisions would have been based on evidence presented in each case, and would have served as the basis for pro-rata compensation of claims; this would have been the sole recourse allowed to those claimants. While the bill passed the House in 1994, it was never passed by the Senate and was never enacted.

The current legislative proposal (S. 1275) is different. It would provide a benefit available to all victims of international terrorism since 1979. Rather than require adjudication on a case-by-case basis, the legislation would treat all victims the same, and would thus provide simplified and expedited relief. While substantial staffing might be needed in the initial years of the program to set up the program and deal with cases from 1979 to present, once that is dealt with we envisage that staffing requirements would be small.

While the State Department works closely with the FCSC and fully supports it as a suitable mechanism for the adjudication of international claims, the State Department also has long and deep experience in handling international claims on be-

half of U.S. citizens. For example, the Office of International Claims and Investment Disputes has administered claims programs with respect to Iraq, Iran, Germany and Egypt, among many others. The Department considers supporting U.S. citizens' claims under international law one of its important functions.

It is incorrect to say that the State Department has any antipathy to victims of terrorism. The program the Department proposes in S. 1275 would provide payment to hundreds of victims who presently have no prospect of receiving any compensation from any source.

Question 3. In the Iraq Claims Act, the State Department never proposed to be given authority to set fees of attorneys and agents representing claimants.

- Why is this provision necessary?
- Assuming that this type of provision is necessary, isn't there a distinction between future assets and existing cases—in other words, is it constitutional to authorize an agency to interfere with fee arrangements that have already been established before the date of enactment and already performed in whole or part by attorneys representing the claimants in court, as opposed to setting the terms for future retention agreements?

Answer. In contrast to the "Iraq Claims Act," S. 1275 would establish a new, publicly-funded benefits program in which victims of terrorism would have the option of participating. The program is intended to provide a streamlined process for awarding benefits that is not dependent on the expenditure of attorneys fees in order to obtain payment. In this regard, it is certainly appropriate for Congress to want to ensure that claimants receive as much of the benefits to which they are entitled under the program as possible. Section 12 of S. 1275, which authorizes the Secretary to issue rules with respect to the nature and maximum amount of fees that an agent may charge for representing a claimant, is modeled after a similar provision in the Public Safety Officers' Benefits Program (42 U.S.C. 3796c(a)).

In addition to the Public Safety Officers' Benefits Program, Congress has lawfully authorized or provided for the regulation of agents' fees in a number of other contexts, including under 22 U.S.C. 1623(f), which imposes a 10% fee cap on claims brought before the Foreign Claims Settlement Commission. *See, e.g.*, 38 U.S.C. 5904(d) (veteran's benefits); 42 U.S.C. 300aa-15 42 U.S.C. 406(a) (social security claims); *see also* 20 C.F.R. 725.366 (coal mining disability).

Any fees that would be capped under rules issued pursuant to Section 12, would be for work performed in connection with obtaining benefits under a program that has yet to be established. If the program is established and a person chooses not to participate in it, such rules would obviously have no legal effect on contractual arrangements that he or she may have entered into in connection with other efforts to seek compensation. Similarly, even if a person accepts benefits under the program, such rules would not affect contractual arrangements for representation in connection with litigation that he or she would still be entitled to pursue, *i.e.*, suits against entities other than those set forth in section 12(c)(2)

Question 4. As I read the current language of the bill, as introduced, the Treasury will pay compensation to American victims—thereby increasing the deficit—and once the payment is made, a responsible state sponsor of terrorism is immune from suit. Isn't this creating an incentive rather than a deterrent for state sponsors of terrorism?

- You state that the blocked assets of terrorist states should not be used for compensation. Has the U.S. government used any of the regulated, frozen or blocked assets for any purpose such as compensation to U.S. corporations? (If yes, what?)
- What accounting is done for frozen and blocked assets accounts? And for whom? I notice that the annual Treasury Department report details only aggregate values. What congressional committee exercises oversight over these accounts? How are they audited and how frequently? Please include Iran's sub account in the Foreign Military Sales Account program in your response.
- Why are active duty military excluded under the current proposal when they're not excluded from the 1996 Antiterrorism Act? Shouldn't there be a distinction to military in uniform engaged in combat and Americans who may be employed by the U.S. military, but engaged in noncombat operations? Think about the inequity of excluding an American service member on vacation, for example, as you provide your answer.

Answer. Making blocked assets available to pay terrorism claims will not have the desired effect of deterring terrorism. Blocking by itself achieves the goal of denying state sponsors of terrorism the benefits of the assets blocked for as long as they act in ways antagonistic to U.S. interests. A permanent taking of those assets would

not constitute any greater denial of benefits and thus would not increase the deterrent effect on the state involved. Indeed, as noted above, Israel's compensation program for victims of terrorism appears to be based upon payments made by the state. In developing such a program, I doubt that Israel believes that it is creating an incentive for state sponsors of terrorism. Tough sanctions and strong preventive measures affecting security and terrorists' ability to raise funds and operate are the best available means to deter terrorism.

Blocked assets have not been used to pay compensation to U.S. corporations, outside of the general claims settlements, referred to above.

Since blocked assets are not U.S. funds, and are not expended by the United States, naturally they are not accounted for in federal authorizations and appropriations. The Department of the Treasury's Office of Foreign Assets Control regulates such assets and imposes reporting requirements on holders. That Office provides an Annual Report to Congress concerning blocked assets of terrorist parties and state sponsors of terrorism.

As Judge Lamberth held in *Flatow v. Islamic Republic of Iran*, 74 F.Supp.2d 18 (D.D.C. 1999), Iran's sub account in the Foreign Military Sales program is U.S. Government property and, therefore, does not constitute blocked funds.

The Defense Department takes the position that active duty military should not be included in S. 1275. The Defense Department provides benefits for the injury or death of its military personnel, whether or not they are killed in combat.

RESPONSES OF WILLIAM H. TAFT, IV, LEGAL ADVISER, DEPARTMENT OF STATE, TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

Question 1. Under Section 7(a) of S. 1275, benefits are to be awarded "in the same manner and the same amount" as death benefits are paid under the Public Safety Officers' Benefit Program (42 U.S.C. 3796 et seq.). Under 42 U.S.C. 3796(f), benefit payments are "in addition to any other benefit that may be due from any other source" (with certain exceptions set forth in the statute). Other provisions of federal law, however, appear to limit recovery by federal employees for other death or injury benefits (e.g., 5 U.S.C. 8116(b)), which requires beneficiaries eligible for benefits under more than one statutory provision to elect which benefits they shall receive). What is the intention of the administration with regard to benefits received by eligible federal employees under S. 1275? Is it intended that they could receive benefits under both S. 1275 and other applicable provisions of federal law?

Answer. Except as otherwise provided for in S. 1275, benefits received by persons, including federal employees, are intended to be in addition to other amounts received from other sources, including under the Federal Employees' Compensation Act (FECA), private employer insurance programs, etc. If benefits received under S. 1275 were to reduce or preclude receipt of other benefits, then the meaningful relief S. 1275 is intended to provide could be substantially reduced. Further, while 5 U.S.C. 8116 provides that the right to compensation benefits under FECA is exclusive and in place of other legal liability of the United States, it does not affect rights of recovery against unrelated third parties. In contrast, section 12(c)(2) of S. 1275 would require persons accepting benefits to forego suit against a foreign state or government or its agencies or instrumentalities. If other benefits were to be reduced by S. 1275 payments, persons might very well be dissuaded from participating in the Benefits for Victims of International Terrorism Program and choose instead to pursue litigation against foreign state or government actors. This in turn would undercut S. 1275's goal of moving away from a litigation-based system that has proved inequitable, unpredictable, costly to the U.S. taxpayer, and damaging to U.S. foreign policy and national security goals.

Question 2. a. The number of pending cases against state sponsors of terrorism of which the Department of State is aware; and

b. Cases in which plaintiffs have received judgments against states sponsors of terrorism but in which they have not recovered damages or received payments under the authority of recent congressional enactments cited in your testimony (and the amount of damages awarded in each cases).

Answer. *a.* The Department of State is aware of 61 pending cases against state sponsors of terrorism. Because the U.S. Government is not a party to these suits, we are not served in the cases. It is, therefore, possible that there are others of which we are not aware.

b. We are aware of 14 outstanding judgments against state sponsors of terrorism for which plaintiffs have not recovered damages or received payment through congressional enactment. The total amount of damages awarded in those cases is \$71 billion (including \$9.4 billion in compensatory damages and \$61.7 billion in punitive damages).

Question 3. Under Section 4(a) of S. 1275, in every instance in which there is a “terrorist incident,” the Secretary of State must, in consultation with various other cabinet secretaries, determine whether the incident constitutes an act of international terrorism under the definition of the bill. Who will make the threshold determination that a “terrorist incident” has occurred? Is that power solely vested in the Secretary?

Answer. Yes, the decision is vested solely with the Secretary of State, who will make his decision in consultation with the Attorney General and the Secretaries of Defense, Homeland Security and the Treasury.

Question 4. Under Section 4(a) of S. 1275, there is no procedure set forth for a reconsideration of a negative determination in the event that new evidence emerges that suggests the incident was, in fact, an act of international terrorism. How does the Department envision handling such cases?

Answer. If new information were made available, the Secretary could make a new determination as to whether an act of international terrorism occurred. While not addressed by the statutory language of the bill, this situation could be addressed in the rules and procedures that the Secretary may issue as necessary to carry out the act pursuant to Section 12 of the bill (“the Administration Procedures”).

Question 5. Under Section 3(a) of S. 1275, an act of international terrorism requires that the act be directed “in whole or in part at the United States” or at an individual “because of that person’s status as a U.S. national.”

a. How will such intent be determined?

b. Could this definition exclude cases—such as bombings of buses in Israel in which U.S. nationals are passengers—in which U.S. plaintiffs have previously sought recovery against state sponsors of terrorism?

Answer. The determination of intent would be made based upon the facts involved in the incident, similarly to the manner in which the determination of whether an “act of terrorism” had occurred would be made.

The intent component of the definition of an act of international terrorism is designed to include the maximum number of U.S. victims who become victims because the terrorists target U.S. nationals or the U.S. Government. Victims who are not so targeted are not subject to these same considerations. A U.S. national who is randomly injured or killed by an act of terrorism not targeted at Americans or the U.S. Government is in the same situation as an American who is injured or killed by some other event abroad, such as during a robbery or a civil disturbance. The losses resulting from both events are tragic for the victims and their families.

If, for example, a bus that was generally known to carry American tourist or student passengers was the subject of a terrorist bombing, the act would qualify. If, on the other hand, the bus was known to regularly carry only foreign nationals, and an American happened to be riding the bus at the time of the incident, it would not be covered. I would note, however, the potential for compensation through programs in countries where the attack took place, such as the Israeli program described in Answer #6.

Question 6. Do you know how other states which have long dealt with terrorism—such as the United Kingdom and Israel—address the issue of compensation for victims of terrorism, if at all? If so, please provide a summary of such programs.

Answer. We do not have much information concerning how other countries deal with issues related to compensation for acts of terrorism. I would refer you to one useful law review article we have been able to locate, entitled “Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience” by Hillel Sommer, 36 *Indiana Law Review* 335 (2003). The article describes the main difference between Israel’s program and the September 11 Fund. It says that “the Israeli program is a permanent system, continually in place, the result of extensive and lengthy consultation, rather than an ad hoc quick fix arrived at under severe time constraints in the emotional aftermath of major terrorist attacks and causing multiple issues of inequity.”

The article also states that in addition to Israeli citizens and residents, all foreign nationals harmed by a hostile act while in Israel or in the Territories administered by Israel are also eligible for compensation, provided that they entered Israel legally. Thus, U.S. nationals who become victims in Israel, but who may not be cov-

ered by S. 1275 because they were not targeted as U.S. nationals, may be eligible for compensation under the Israeli program.

We are not aware of any states that rely on victims bringing suits against foreign states in their courts to provide compensation for their injuries.

Question 7. To what degree were the U.S. nationals who were hostages in the U.S. Embassy in Iran compensated by the U.S. government and under what authority?

Answer. In 1980, while the hostages were still in captivity, Congress passed the Hostage Relief Act, which provided some compensation regarding tax liabilities and other benefits. In 1981, following their release, the President established a special commission to make recommendations as to how the hostages should be compensated for their ordeal. The commission issued its report that same year and recommended that additional compensation be paid. It was also noted during hearings on the Algiers Accords before the Senate Foreign Relations Committee that “[t]raditionally American hostages and prisoners of war have not looked to the country of their detention, but have looked to the United States for compensation.” (Hearings before the SFRC, p. 49 (Feb. 17, 19 & 25, Mar. 11, 1981).)

In 1986, the Victims of Terrorism Compensation Act was enacted. Section 802 provided for payments to the hostages of “\$50 for each day any such individual was held captive,” section 803 provided for additional compensation to include medical, educational and other benefits. Pub.L. 100-399, §§802,803, Stat. 853 (1986). The hostages received compensation according to these laws, which amounted to an average total amount of \$50,000 per individual.

Question 8. Would assets of terrorist organizations (which are not sovereign states) that are frozen or blocked in this country by statute or Executive Order be available to compensate victims of terrorism? Under what authority? Did the Administration consider including such a provision in its legislative proposal?

Answer. Based on the language of section 14 of the bill, assets of any terrorist party, including non-state parties, would not be available for attachment under Terrorism Risk Insurance Act (TRIA) or the Foreign Sovereign Immunities Act (FSIA). Our real focus, however, was in providing victims or their families with an immediate benefit and steering them away from the often unsatisfactory experience of pursuing litigation against state sponsors of terrorism and particularly, attachment against blocked assets. It would also allow compensation for terrorist acts committed by groups with no state sponsor. I would note that section 12(b)(2) provides that anyone who accepts benefits may not begin or maintain a civil action for the act of terrorism against a foreign state or the United States. It does not prevent individuals from suing non-state terrorist parties.

Making non-state terrorist party assets available for the fund from which payments would be made merits consideration. We have actually begun looking at this question and have some initial observations. First, though terrorist party interests in property are blocked, as with blocked assets of states, there may be ownership and other claims by third parties to those assets. Second, there may be other statutes or regulations that already provide for the disposition of those assets that would conflict with this idea. The Patriot Act, for example, provides that such assets may be forfeited, but it is not clear whether once forfeited, they are to be used for some other designated purpose. But as I indicated, this idea merits further consideration and consultation with other elements of the Executive Branch.

Question 9. Why will the program be funded out of the State Department budget? Will additional resources be sought for this purpose in the Department budget if S. 1275 is enacted?

Answer. Because the program addresses international terrorism and implicates U.S. foreign policy and national security considerations, the Administration decided that the Victims of International Terrorism Benefit Fund (“Fund”) should be located in the International Affairs 150 Account. Under the proposed legislation, the Fund would receive an appropriation separate and additional to other Department appropriations; awards and the administration of the program would be funded exclusively out of the Fund. Thus, additional resources will need to be appropriated for the Fund for the program to function if S. 1275 is enacted.

Question 10. What are the anticipated costs of administering the program contemplated by S. 1275?

Answer. We anticipate that more administrative resources would need to be devoted to the program particularly during the first two-three years in order to start up the program, including developing rules and regulations. Also, because the program would cover acts of international terrorism dating back to November 1, 1979, we expect that there would be a large number of requests for Secretarial determina-

tions of terrorist acts and an even larger number of retroactive claims to process during this initial three-year period. In order to handle this up-front workload, we anticipate that the average annual cost of administering the program for the first 3 years would be approximately \$1,333,000, which would include the hiring of 5 new attorneys, 4 analysts or paralegals, and 2 support staff. Of course, the level of future terrorist attacks could have an impact on the program's administrative costs.

Question 11. Section 10(a)(3) of S. 1275 would authorize the use of "unexpended balances of expired appropriations available to the Department" for payment of awards under this program. If the legislation were enacted today, what would be the anticipated amount of such balances that would be available?

Answer. Unexpended balances of expired appropriations include the amount of unobligated appropriations and undelivered orders outstanding for Congressional appropriations provided to the Department. These accounts incur adjustments for obligations and expenditures relating to undelivered orders for goods or services ordered but not yet received for five years after the availability of a fixed appropriation account ends, at which time the accounts are cancelled. At the end of FY 2002, the Department cancelled \$45 million in FY 1997 expired appropriations. Based on experience, we project that a similar amount will be cancelled in FY 2003.

