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106TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 106–733

JUSTICE FOR VICTIMS OF TERRORISM ACT

JULY 13, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 3485]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3485) modifying the enforcement of certain anti-terrorism judgments, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

79–006

SECTION 1. ENFORCEMENT OF CERTAIN ANTI-TERRORISM JUDGMENTS.

(a) SHORT TITLE.—This Act may be cited as the "Justice for Victims of Terrorism Act".

(b) DEFINITION.—

(1) IN GENERAL.—Section 1603(b) of title 28, United States Code, is amended—

(A) in paragraph (3) by striking the period and inserting a semicolon and "and";

(B) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively;

(C) by striking "(b)" through "entity—" and inserting the following:

"(b) An 'agency or instrumentality of a foreign state' means—

"(1) any entity—"; and

(D) by adding at the end the following:

"(2) for purposes of sections 1605(a)(7) and 1610 (a)(7) and (f), any entity as defined under subparagraphs (A) and (B) of paragraph (1), and subparagraph (C) of paragraph (1) shall not apply.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—Section 1391(f)(3) of title 28, United States Code, is amended by striking "1603(b)" and inserting "1603(b)(1)".

(c) ENFORCEMENT OF JUDGMENTS.—Section 1610(f) of title 28, United States Code, is amended—

(1) in paragraph (1)—

(A) in subparagraph (A) by striking "(including any agency or instrumentality or such state)" and inserting "(including any agency or instrumentality of such state)"; and

(B) by adding at the end the following:

"(C) Notwithstanding any other provision of law, moneys due from or payable by the United States (including any agency, subdivision or instrumentality thereof) to any state against which a judgment is pending under section 1605(a)(7) shall be subject to attachment and execution, in like manner and to the same extent as if the United States were a private person."; and

(2) by adding at the end the following:

"(3)(A) Subject to subparagraph (B), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive this subsection in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

"(B) A waiver under this paragraph shall not apply to—

"(i) if property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations has been used for any nondiplomatic purpose (including use as rental property), the proceeds of such use; or

"(ii) if any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations is sold or otherwise transferred for value to a third party, the proceeds of such sale or transfer.

"(C) In this paragraph, the term 'property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' and the term 'asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

"(4) For purposes of this subsection, all assets of any agency or instrumentality of a foreign state shall be treated as assets of that foreign state.".

(d) TECHNICAL AND CONFORMING AMENDMENT.—Section 117(d) of the Treasury Department Appropriations Act, 1999 (Public Law 105–277; 112 Stat. 2681–492) is repealed.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to any claim for which a foreign state is not immune under section 1605(a)(7) of title 28, United States Code, arising before, on, or after the date of enactment of this Act.

SEC. 2. PAYGO ADJUSTMENT.

The Director of the Office of Management and Budget shall not make any estimates of changes in direct spending outlays and receipts under section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 902(d)) for any fiscal year resulting from enactment of this Act.

SEC. 3. TECHNICAL AMENDMENTS TO IMPROVE LITIGATION PROCEDURES AND REMOVE LIMITATIONS ON LIABILITY.

(a) GENERAL EXCEPTIONS TO JURISDICTIONAL IMMUNITY OF FOREIGN STATE.—Section 1605 of title 28, United States Code, is amended by adding at the end the following:

"(h) If a foreign state, or its agency or instrumentality, is a party to an action pursuant to subsection (a)(7) and fails to furnish any testimony, document, or other thing upon a duly issued discovery order by the court in the action, such failure shall be deemed an admission of any fact with respect to which the discovery order relates. Nothing in this subsection shall supersede the limitations set forth in subsection (g).".

(b) EXTENT OF LIABILITY.—Section 1606 of title 28, United States Code, is amended by adding at the end the following: "No Federal or State statutory limits shall apply to the amount of compensatory, actual, or punitive damages permitted to be awarded to persons under section 1605(a)(7) and this section.".

PURPOSE AND SUMMARY

H.R. 3485 would allow victims of terrorism to satisfy judgments against foreign states by allowing assets frozen by the U.S. to be subject to attachment and execution. While providing for the protection of embassies and assets necessary for their actual operating expenses from attachment and execution if the President deems it necessary in the interest of national security, H.R. 3485 provides that protection is specifically denied under the bill for proceeds from any property which has been used for any non-diplomatic purpose (including rental property) or for proceeds from any asset which is sold or transferred for value to a third party.

BACKGROUND AND NEED FOR THE LEGISLATION

In March 1985, Terry Anderson, an American journalist working in Beirut, was kidnapped by agents of the Islamic Republic of Iran. He was held captive by his kidnappers in deplorable conditions until early December 1991.

During the 1980's, three other individuals working in Lebanon, David Jacobsen, an administrator of the American University hospital in Beirut, Joseph Ciccippio, a comptroller of the America University school and hospital and Frank Reed, a principal of a private secondary school in Beirut, were also held captive by agents of the Islamic Republic of Iran.

In April 1995, Alisa Flatow, a 20-year-old college student from New Jersey, was on a bus on the Gaza strip going to a Passover holiday celebration. A terrorist from the Iranian backed Islamic Jihad rammed his car loaded with explosives into the bus, killing Ms. Flatow and seven others.

Two Americans studying in Israel, Matthew Eisenfeld and Sara Duker were killed in a suicide bombing of a bus in Jerusalem in February 1996. Those responsible were provided training, money, and resources by Iran.

Also in February 1996, Cuban MiG aircraft shot down two aircraft flown by the "Brothers to the Rescue" organization in international airspace over the Florida Straits. Three American citizens were killed in the attack.

After the Brothers to the Rescue incident, at a February 26, 1996, White House press briefing President Clinton stated "I am asking that Congress pass legislation that will provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the

United States. If Congress passes this legislation, we can provide the compensation immediately."

The Brothers to the Rescue families did receive $300,000 each ($1.2 million total) out of Cuban blocked assets as, in the President's words, a "humanitarian gesture" with assurances from the Department of State that those payments would not affect receiving their full judgment.

In 1996, the Antiterrorism and Effective Death Penalty Act became law. That law allowed American citizens injured in an act of terrorism or their survivors to bring a private lawsuit against the terrorist state responsible for that act.

Upon enactment of the Antiterrorism and Effective Death Penalty Act, several victims of terrorism or their families filed suit against terrorist states. There are several cases pending in U.S. courts by the families of victims of terrorism. To date, judgments have been awarded to families of victims in ten cases.

The three Brothers to the Rescue victims' families went to court and on December 17, 1997, in separate but related judgments were awarded $48 million in compensatory damages and $132 million in punitive damages, plus nearly $20 million in post-judgment interest and costs. The administration fought to block the attempted attachment of any Cuban assets to satisfy that award.

In March 1998, Alisa Flatow's family went to court and was awarded $22.5 million in compensatory damages and $225 million in punitive damages. The administration fought to block the attachment of any Iranian assets to satisfy the award.

In August 1998, David Jacobsen, Joseph Ciccippio and his wife, and Frank Reed and his wife, were awarded a total of $65 million in compensatory damages. They were not awarded any punitive damages. The administration fought to block the attachment of any Iranian assets to satisfy the award.

In 1999, the Congress passed Section 117 of the Fiscal Year 1999 Treasury Department Appropriations Act, mandating that the Executive Branch must allow Americans to attach the assets of terrorist states in the U.S. in order to collect judgments won in Federal court. That legislation included a provision for a Presidential waiver to block the attachment of assets if it was in the interest of national security.

In Presidential Determination No. 99–1, the President determined that the authority granted by Section 117 for the attachment of assets of terrorist states in general would impede foreign policy and therefore would not be in the interest of national security. This determination effectively applied the Presidential waiver in Section 117 to all judgments attempting to attach to terrorist state assets.

On August 11, 1999, in *Alejandre* v. *Republic of Cuba*, 183 F.3d. 1277 (11th Cir. Aug. 11, 1999), the U.S. Court of Appeals ruled that congressional intent in passing Section 117 was unclear as to whether all blocked assets of an agency or instrumentality of a terrorist state could be executed upon to satisfy an Anti-Terrorism Act judgment. The Court cited the 1983 Supreme Court ruling in *First National City Bank* v. *Banco Para El Comercio de Cuba*, 462 U.S. 611 (1983), when coming to the conclusion that without an indication of more explicit intent by the Congress, the court was compelled to determine that the Foreign Sovereign Immunities Act

does not intend that there is cross-liability between parent and subsidiary entities without the presence of fraud or a determination that the subsidiary is an alter ego of the parent entity.

On November 15, 1999, in *Stephen M. Flatow* v. *The Islamic Republic of Iran*, C.A. No. 97–396 (RCL), the U.S. District Court of the District of Columbia ruled in favor of the United States' motion to quash Mr. Flatow's attempt to attach certain assets and monies held by the U.S. to satisfy his judgment. In that ruling the court stated "Because this Court finds that Congress has not clearly and unequivocally waived the United States' sovereign immunity, the Court grants the United States Motion to Quash the Writ of Attachment."

In March 2000, Terry Anderson and his family were awarded $41.2 million in compensatory damages and $300 million in punitive damages by the U.S. District Court for the District of Columbia. It is expected that the Presidential waiver will be used to the block the attachment of any Iranian assets to satisfy their judgement as well.

On July 11, 2000, the families of Matthew Eisenfeld and Sara Duker were awarded $327 million in compensatory and punitive damages by the U.S. District Court for the District of Columbia. The administration will certainly assert the Presidential waiver to block the attachment of any Iranian assets to satisfy their judgement as well.

The President's continued use of his waiver power has frustrated the legitimate rights of victims of terrorism, and thus this legislation is required. While still allowing the President to block the attachment of embassies and necessary operating assets, H.R. 3485 would amend the law to specifically deny blockage of attachment of proceeds from any property which has been used for any non-diplomatic purpose or of proceeds from any asset which is sold or transferred for value to a third party.

Two amendments were adopted during committee consideration. One amendment was offerred by Congressman Bill McCollum and the other by Congressman John Conyers.

The amendment offered by Mr. McCollum and accepted by the committee clarifies that property properly characterized as diplomatic under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations is not subject to attachment in aid of execution or execution. The administration had concerns that the bill could be construed to allow execution against diplomatic property under the Vienna Convention in a way that would create a liability on behalf of the United States. The McCollum amendment is intended to prevent such liability.

It is important to note that for assets which could be deemed diplomatic property and which the administration fears execution against would violate international agreements, the administration has not provided any evidence that the execution of such blocked assets is inconsistent with any international agreement. Yet, in light of concerns expressed by the administration that execution, unlike blocking, would cause liability, the McCollum amendment assures that the definition of diplomatic property which is protected from execution in H.R. 3485 is the same definition of diplomatic property in the Vienna Convention.

The amendment offered by Mr. Conyers and accepted by the committee would (1) provide that when a country which sponsors terrorism and is a party in a trial brought under the Anti-Terrorism Act does not provide the necessary evidence required under any discovery order, the Court can impose any type of sanction available by law on that country; and (2) provide that no Federal or State statutory limits will apply to the amount of compensatory, actual, or punitive damages that can be awarded to individuals by the courts in these victim of terrorism cases.

The committee would note that although the Congressional Budget Office estimates the cost of H.R. 3485 at $405 million, they admit that:

> Enactment of H.R. 3485 could result in savings in later years if future disbursements that would otherwise have to be made under current law were reduced because of the payments made in 2001. CBO has no basis for estimating these effects—if any—because they would depend on future decisions of the international Iran-U.S. Claims Tribunal and the responses of the United States and Iran to these decisions.

The CBO scoring of this bill is based on all sources of money held by the U.S. that will potentially be available to pay out to claimants rather than actual known outlays. The committee believes that any attempt at a definitive cost analysis at this time on H.R. 3485 is futile due to the uncertainty of the many factors, some of which are mentioned in the above portion of the CBO estimate.

HEARINGS

The committee's Subcommittee on Immigration and Claims held a hearing on H.R. 3485 on April 13, 2000. Testimony was received from Terry A. Anderson; Stephen M. Flatow; Maggie A. Khuly; and Ronald W. Kleinman, Esquire, with additional material submitted by Robin L. Higgins; Joseph & Elham Cicippio; Frank & Fifi Reed; David P. Jacobsen; Stewart Eizenstat, Deputy Secretary of the Treasury; and the Honorable Lincoln Diaz-Balart.

COMMITTEE CONSIDERATION

On June 21, 2000, the committee met in open session and ordered favorably reported the bill H.R. 3485 with amendment by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 3485, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 7, 2000.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3485, the Justice for Victims of Terrorism Act.

If you wish further details on this estimate, we will be pleased to provide them. The principal CBO staff contact is Lanette J. Keith.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure.

H.R. 3485—Justice for Victims of Terrorism Act.

H.R. 3485 would enable victims of Iranian terrorism who have won judgments against Iran in U.S. courts to collect monetary damages from that country—primarily by obtaining certain funds currently held by the U.S. government. As shown in the following table, CBO estimates that enacting this bill would increase direct spending by about $405 million in 2001; therefore, pay-as-you-go procedures would apply.

Although the bill would pertain to victims of other nations that sponsor terrorism, CBO does not expect that any budgetary effects would result from judgments against other nations. As shown in the following table, CBO estimates that enacting this bill would increase direct spending by about $420 million in 2001; therefore, pay-as-you-go procedures would apply. Enactment of H.R. 3485 could result in savings in later years if future disbursements that would otherwise have to be made under current law were reduced because of the payments made in 2001. CBO has no basis for estimating these effects—if any—because they would depend on future decisions of the international Iran-U.S. Claims Tribunal and the responses of the United States and Iran to these decisions.

[By fiscal year, in millions of dollars]

	2001	2002	2003	2004	2005
CHANGES IN DIRECT SPENDING					
Estimated Budget Authority	405	a	a	a	a
Estimated Outlays	405	a	a	a	a

a. H.R. 3485 could result in savings after 2001, but CBO has no basis for estimating such savings—if any—because they would depend on future decisions made by the Iran-U.S. Claims Tribunal, the United States, and Iran.

The legislation contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Iran is one of seven countries that is designated by the federal government as a sponsor of terrorism. (The provisions of H.R. 3485 would apply to the other six nations as well; however, according to information from the Department of State, the only budgetary effect of S. 1796 the bill would involve primarily affect assets of Iran.) Under current law, victims of state-sponsored terrorism may pursue claims against that state's government in U.S. courts. Information from the Department of State indicates that victims of Iranian terrorism have won punitive and compensatory damages in U.S. courts that exceed $650 million.

The U.S. government currently holds, in the Foreign Military Sales (FMS) Trust Fund, about $400 million on behalf of Iran previously paid by Iran for the purchase of military equipment that was not delivered. The disposition of those funds is currently before the Iran-U.S. Claims Tribunal, an international body established to settle disputes between the two nations. Under current law, victims of terrorist acts may attach, by judicial order, property of the Iranian government held by the United States. Victims, however, have been unable to obtain payment in satisfaction of those judgments because the funds they have attached are protected by the federal government's sovereign immunity. As a result, those judgments remain unpaid.

By explicitly waiving the federal government's sovereign immunity, H.R. 3485 would remove a barrier to the execution of the victims' judgments., resulting That action would likely result in the payment of these the judgment claims from the FMS Trust Fund. As a result, CBO estimates that enacting this provision would increase direct spending by $400 million in fiscal year 2001. CBO cannot determine whether the payment of these claims to terrorist victims would reduce, eliminate, or leave unaltered the any liability of the United States to Iran, which is yet to be determined by before the Iran-U.S. Claims Tribunal. Thus, it is possible that some or all of the funds we estimate will be paid to victims of terrorism under this bill could be offset by a reduction in payments that would be made from the FMS Trust Fund to Iran under current law. CBO, however, has no basis for predicting the future decisions of the Iran-U.S. Claims Tribunal, nor the response of the federal governments to such decisions.

The bill would also make possible the attachment of rental proceeds from leasing Iranian diplomatic property in the United States. Under current law, the President has authority to preclude such assets from attachment and execution to satisfy judgments against states that sponsor terrorism. H.R. 3485 would limit that authority for rental proceeds. Based on information from the Treas-

ury Department, CBO estimates the value of such rental proceeds in this country that could be seized under this provision to be about $5 million.

The United States has a custodial responsibility under international agreements to maintain diplomatic assets belonging to Iran; therefore, the federal government would likely be liable to Iran for the loss of this $5 million from rental proceeds. If those amounts are seized, CBO anticipates that the United States would have to promptly reimburse Iran for their value.

On May 3, 2000, CBO transmitted a cost estimate for S. 1796, the Justice for Victims of Terrorism Act, as reported by the Senate Committee on the Judiciary on March 9, 2000. S. 1796 would have limited the President's authority to preclude most Iranian diplomatic property in the United States from attachment and execution to satisfy judgements against Iran. H.R. 3485 would limit the President's ability to preclude only the rental proceeds of such property. Because of that limitation, CBO estimates that H.R. 3485 would result in about $15 million less in direct spending than S. 1796.

The CBO staff contacts for this estimate are Lanette J. Keith and John R. Righter, and Joseph C. Whitehill. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article 1, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1(a). Short Title

This subsection provides that the short title of the legislation is the "Justice for Victims of Terrorism Act".

Section 1(b). Definition

This subsection indicates that only part of the statutory definition of "agency or instrumentality of a foreign state" shall apply to any case concerning the attachment and execution of property in the United States of a foreign state based on a judgement against that foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts by an official, employee, or agent of a foreign state.

The new definition provides that an entity can be deemed an agency or instrumentality of the foreign state which sponsored the terrorist act regardless of where that entity is incorporated.

This subsection also includes a technical and conforming amendment to 28 U.S.C. 1391(f)(3) to change "1603(b)" to "1603(b)(1)".

Section 1(c). Enforcement of Judgments

This subsection states that moneys due from or payable by the U.S. to any foreign state which sponsors terrorism and has a judgment pending against it for a terrorist act shall be subject to attachment and execution as if the U.S. were a private entity.

The subsection also provides that, when it is determined that a waiver is necessary in the interest of national security, the President may waive this subsection and protect any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations from attachment and execution to satisfy a judgment as well as any funds necessary for actual operating expenses of those properties. If these properties have been used for any nondiplomatic purpose (including use as rental property), the proceeds of that use are not subject to such a waiver of this subsection. Additionally, this waiver does not apply to any proceeds from the sale or transfer to a third party of these properties.

Finally, this subsection provides that there is cross liability between any agency or instrumentality of a foreign state and the foreign state itself. This provision specifically provides that a judgment against a foreign state that sponsors terrorism can be executed against assets of an agency or instrumentality of that foreign state even if there is no proof of fraud or any proof that the agency or instrumentality is an alter ego of the foreign state. This is intended to allow collection on judgments even in light of *First National City Bank* v. *Banco Para El Comercio de Cuba*, 462 U.S. 611 (1983).

Section 1(d). Technical and Conforming Amendment

This subsection repeals Section 117(d) of the Treasury Department Appropriations Act of 1999.

Section 1(e). Effective Date

This subsection provides that all amendments made in Section 1 of the bill will apply to any claim involving a foreign state that sponsors terrorism which arose before, on, or after the date of enactment of this legislation.

Section 2. Technical Amendments to Improve Litigation Procedures and Remove Limitations on Liability

Subsection (a) would amend 28 U.S.C. 1605 to provide that when a country which sponsors terrorism is a party in a trial brought under the Anti-Terrorism Act and does not provide the necessary evidence required under any discovery order, the Court can impose any type of sanction available by law on that country. Subsection (b) would amend 28 U.S.C. 1606 to provide that no Federal or State statutory limits will apply to the amount of compensatory, actual, or punitive damages that can be awarded to individuals by the courts in these victims of terrorism cases.

AGENCY VIEWS

TREASURY DEPUTY SECRETARY STUART E. EIZENSTAT, DEFENSE DEPARTMENT; UNDER SECRETARY FOR POLICY WALTER SLOCOMBE; AND STATE DEPARTMENT UNDER SECRETARY FOR POLICY THOMAS PICKERING TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON IMMIGRATION AND CLAIMS

Mr. Chairman and Members of the Committee:

We are submitting this joint testimony as envisaged by the letters of Deputy Secretary Eizenstat of April 12 to Committee Chairman Hyde and Subcommittee Chairman Smith in response to let-

ters to Secretary Summers and Secretary Albright from Chairman Hyde, inviting them or their designees to testify before this subcommittee on April 13 concerning H.R. 3485, the "Justice for Victims of Terrorism Act." Deputy Secretary Eizenstat has worked extensively on this issue for the Administration over the past 18 months, and we, on behalf of our Departments, join him in presenting our views on this proposed legislation. We share your goal that U.S. victims of terrorism and their families receive justice and compensation for their suffering. We are actively engaged with the Congress in ongoing discussions to resolve the complex issues identified and to address the needs of victims of terrorism. We also appreciate the opportunity to submit this statement into the record.

Let us begin by expressing the Administration's and our own genuine and personal sympathy to victims of international terrorism—an evil that this administration has led the world in combating. It is the responsibility of the United States Government to do everything possible to protect American lives from international terrorism and other heinous acts. People like Mr. Flatow, Mr. Anderson, Mr. Cicippio, Mr. Jacobsen, and Mr. Reed and their families, and the families of the Brothers to the Rescue pilots, deserve support in their goal of finding fair and just compensation for their grievous losses and unimaginable experiences. Those of us who have met with them have been touched by their suffering and impressed with their strength and determination to seek justice. We understand their frustrations and the frustrations that have led the sponsors of this legislation to introduce it. We are dedicated to working with the Congress to achieve the goal of obtaining compensation for the victims and their families. But we feel strongly that this must be done in a way that is consistent with the broad national interests and international obligations of the United States.

It is obvious that the states involved here—states that we have publicly branded as sponsors of terrorism—do not view the United States as a friendly environment in which to conduct financial transactions. As part of our efforts to combat terrorism, we impose a wide range of economic sanctions against state sponsors of terrorism in order to deprive them of the resources to fund acts of terrorism and to affect their conduct. Because of these measures, terrorism-list states engage in minimal economic activity in the United States. In many cases, the only assets that states which sponsor terrorism have in the United States are either blocked or diplomatic property. Such property should not be available for attachment and execution of judgments, for very good reasons involving the interests of the entire nation, which are described in detail below. As much as we join the sponsors of this bill in desiring to have victims of international terrorism and the heinous acts of the Cuban Air Force compensated, it would be unwise to ignore these reasons and prejudice the interests of all our citizens for this purpose.

This question is complex and fraught with difficulties. For this reason, last year, we proposed, among other things, that a commission be established to review all aspects of the problems presented by acts of international terrorism. Such a commission would have specifically studied the issue of compensation with the goal of recommending proposals to the President and to the Congress to help

the victims and their families receive compensation in a manner that would not impinge upon important U.S. national interests. While this proposal was not taken up, we believe this approach still has merit.

H.R. 3485, though born of good intentions, is fundamentally flawed. The legislation would have five principal negative effects, all of which would be seriously damaging to important U.S. interests, and would, at the end of the day, result in substantial U.S. taxpayer liability.

First, blocking of assets of terrorist states is one of the most significant economic sanctions tools available to the President. The proposed legislation would undermine the President's ability to combat international terrorism and other threats to national security by permitting the wholesale attachment of blocked property, thereby depleting the pool of blocked assets and depriving the U.S. of a source of leverage in ongoing and future sanctions programs, such as was used to gain the release of our citizens held hostage in Iran in 1981 or in gaining information about POW's and MIA's as part of the normalization process with Vietnam.

Second, it would cause the U.S. to violate its international treaty obligations to protect and respect the immunity of diplomatic and consular property of other nations, and would put our own diplomatic and consular property around the world at risk of copycat attachment, with all that such implies for the ability of the United States to conduct diplomatic and consular relations and protect personnel and facilities.

Third, it would create a race to the courthouse benefiting one small, though deserving, group of Americans over a far larger group of deserving Americans. For example, in the case of Cuba, many Americans have waited decades to be compensated for both the loss of property and the loss of the lives of their loved ones. This would leave no assets for their claims and others that may follow. Even with regard to current judgment holders, it would result in their competing for the same limited pool of assets, which would be exhausted very quickly and might not be sufficient to satisfy all judgments.

Fourth, it would breach the long-standing principle that the United States Government has sovereign immunity from attachment, thereby preventing the U.S. Government from making good on its debts and international obligations and potentially causing the U.S. taxpayer to incur substantial financial liability, rather than achieving the stated goal of forcing Iran to bear the burden of paying these judgments. The Congressional Budget Office ("CBO") has recognized this by scoring the legislation at $420 million, the bulk of which is associated with the Foreign Military Sales ("FMS") Trust Fund. Such a waiver of sovereign immunity would expose the Trust Fund to writs of attachment, which would inject an unprecedented and major element of uncertainty and unreliability into the FMS program by creating an exception to the processes and principles under which the program operates.

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

dent for government owned enterprises like the U.S. Overseas Private Investment Corporation ("OPIC").

As the *Washington Post* observed in a fall 1999 editorial, "Victims of terrorism certainly should be compensated, but a mechanism that permits individual recovery to take precedence over significant foreign policy interests is flawed." The proposed legislation would indeed seriously compromise important national security, foreign policy, and other clear national interests, and discriminate among and between past and future U.S. claimants.

For all these reasons, explained in more detail below, the Administration strongly opposes the proposed legislation.

(1) Attachment of Blocked and Diplomatic Property and the Elimination of the Effectiveness of Our Blocking Programs

The Administration has grave concerns with the provisions of the proposed legislation that seek to nullify the President's waiver of the 1998 FSIA amendments and thereby permit attachment of blocked and diplomatic property.

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

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

The Congress has recognized the need for the President to be able to regulate the assets of foreign states to meet threats to the U.S. national security, foreign policy, and economy. In both the International Emergency Economic Powers Act and the Trading with the Enemy Act, the Congress has provided the President with statutory authority for regulating foreign assets. On the basis of this authority and foreign policy powers under the Constitution, Presidents have blocked property and interests in property of foreign states and foreign nationals that today amount to over $3.5 billion.

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

The leverage provided by blocked assets has proved central to our ability to protect important U.S. national security and foreign policy interests. The most striking example is the Iran Hostage Crisis. The critical bargaining chip the United States had to bring to

the table in an effort to resolve the crisis was the almost $10 billion in Iranian Government assets that the President had blocked shortly after the taking of our embassy. Because the return of the blocked assets was one of Iran's principal conditions for the release of the hostages, we would not have been able to secure the safe release of the hostages and to settle thousands of claims of U.S. nationals if those blocked assets had not been available. This settlement with Iran also resulted in the eventual payment of $7.5 billion in claims to or for the benefit of U.S. nationals against Iran.

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

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

However, our blocking programs simply cannot function, and cannot serve to protect these important interests, if blocked assets are subject to attachment and execution by private parties, as the proposed legislation would permit. The need to deal with the increasing demands for information on assets, blocked and unblocked, of these terrorism-list governments as monetary judgments are awarded would seriously disrupt the operations of the Treasury Department in administering the blocking programs. These demands would greatly impair Treasury's investigative functions through the release of deliberative process and enforcement-related materials thereby divulging sensitive operational details and raising important issues of confidentiality with U.S. banks and others who provide information on assets. Additionally, the ability to use blocked assets as leverage against foreign states that threaten U.S. interests is essentially eliminated if the President is unable to preserve and control the disposition of such assets. Private rights of execution against blocked assets would permanently rob the President of the leverage blocking provides by depleting the pool of blocked assets.

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

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

Put simply, permitting attachment of blocked assets would likely seriously undermine the use of our blocking programs as a key tool for combating threats against our national security and, in the Iranian context, would not even achieve the goal of full payment of the compensatory damages of all existing judgments against Iran.

(2) Our Obligation and Interest in Protecting Diplomatic Property

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

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

Likewise, under Article 27 of the Vienna Convention on Consular Relations, the same protection is required for consular premises, property, and archives. Attachment of any of the types of property covered by the Vienna Conventions on Diplomatic and Consular Relations could place the United States in violation of our obligations under international law.

The proposed legislation would only permit the President to ensure the protection of a narrow portion of the property covered by the Vienna Conventions, and would thereby place the United States in violation of our legal obligations. In addition, the proposed legislation as drafted could cause us to breach our obligations to ensure the inviolability of missions to the United Nations, pursuant to the UN Headquarters Agreement and the General Convention on Privileges and Immunities.

Our national interest in the protection of diplomatic property could not be clearer or more important. [Italic for emphasis] The United States owns over 3,000 buildings and other structures abroad that it uses as embassies, consulates, missions to international organizations, and residences for our diplomats. The total value of this property is between $12 and $15 billion.

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

In the specific case of Iran, attachment of Iran's diplomatic and consular properties could also result in substantial U.S. taxpayer liability. Iran's diplomatic and consular properties in the United States are the subject of a claim brought by Iran against the United States before the Iran-U.S. Claims Tribunal. The Iran-U.S. Claims Tribunal is an arbitration court located at The Hague in the Netherlands. It was established as part of the agreement between Iran and the United States that freed the U.S. hostages in Iran and resolved outstanding claims that were then pending between the United States and Iran. Pursuant to this agreement and awards of the Tribunal, Iran has paid $7.5 billion in compensation to or for the benefit of U.S. nationals. The Tribunal also has jurisdiction over certain claims between the two governments.

Although we are contesting Iran's claim vigorously, the Tribunal could find that the United States should have transferred Iran's diplomatic and consular property to it in 1981. If it does so and the properties are not available because they have been liquidated to pay private judgments, the U.S. taxpayer would have to bear the cost of compensating Iran for the value of the properties. Under the Algiers Accords, Tribunal awards against the governments are enforceable in the courts of any country, under the laws of that country.

(3) Equity Among Claimants

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

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

In the case of Cuba, the U.S. Foreign Claims Settlement Commission ("FCSC") has certified 5,911 claims of U.S. nationals against the Government of Cuba, totaling approximately $6 billion with interest, dating back to the early 1960s. Contrary to statements made at the April 13 hearing, these include not just expropriation claims, but also the wrongful death claims of family members of two individuals whom the Cuban Government executed after summary trial for alleged crimes against the Cuban state. Other claims relate to the Castro Government's seizure of homes

and businesses from U.S. nationals. These claimants have waited over 35 years without receiving compensation for their losses. This bill will not help them at all.

The same situation applies with respect to Iran. In addition to the Flatow and Anderson plaintiffs, who have judgments for compensatory and punitive damages totaling $589 million, former hostages who were held captive in Lebanon—David Jacobsen, Joseph Cicippio, Frank Reed, and their families—collectively have won a judgment against Iran totaling $65 million. Additional suits against Iran are currently pending in the Federal District courts.

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

Against this background, in which outstanding judgments for compensatory and substantial punitive damages far exceed available funds, the proposed legislation would permit the first claimants to reach the courthouse to deplete all the available assets of terrorism-list governments, leaving nothing for other similarly situated claimants to satisfy even compensatory damages they are awarded. Satisfaction of the judgments in the Alejandre, Flatow, and Anderson cases would come at the expense of all other claimants against Cuba and Iran, both past and future.

In sum, permitting the attachment of blocked and diplomatic properties in individual cases, as the proposed legislation would do, would undermine our ability to combat threats to our national security, violate our obligations under international law, place our diplomatic and consular properties and personnel abroad at risk, and lead to arbitrary inequities in the treatment of similarly-situated U.S. nationals with claims against foreign governments.

(4) Breaching the Sovereign Immunity of the United States

We are equally concerned about the provision of the proposed legislation that would permit garnishment of debts of the United States. Not only would this provision breach the long-established principle that the United States Government has sovereign immunity from garnishment actions, it would seriously undermine our Foreign Military Sales program, which is an important tool supporting U.S. national security policy and strategy, by creating an exception to the processes and principles under which the program operates that has not existed in the program's 40-year history.

By allowing plaintiffs to attempt to tap the FMS Trust Fund to satisfy their judgments, the entire FMS program would be jeopardized as foreign customers question whether funds they are required to pay under the FMS program might be at risk of diversion or attachment. H.R. 3485 would therefore inject a major element of uncertainty and unreliability into the FMS program.

Additionally, foreign governments make pre-payments into the FMS Trust Fund to ensure payment of U.S. suppliers for products and services provided to foreign governments in USG-approved sales of defense products and services. Under section 37 of the Arms Export Control Act, these funds are available solely for payments to U.S. suppliers, and for refunds to foreign purchasers in

connection with such sales. If the FMS Trust Fund can be exposed to attachment through an act of Congress for purposes other than ensuring payment for arms sales, not only may foreign governments simply question the wisdom of engaging in such transactions with the United States, but payments to U.S. suppliers would be threatened.

The proposed legislation also will negatively affect our defense industrial base. If passed as currently written, not only will U.S. defense firms be uncertain about whether and when they will be paid, but our ability to maintain open production lines needed to support the U.S. military, which the FMS program greatly facilitates, also would be disrupted.

We have heard that the intent of the proposed legislation is to "make terrorist states pay." However, exposing the Iranian FMS Trust Fund account ("Iran FMS account") to attachment will not cause Iran to pay. Here too, at the end of the day, the U.S. taxpayer will bear this burden if this fund is tapped. The United States will have to pay Iran whatever amount in the Iran FMS account is held by the Iran-U.S. Claims Tribunal to be owed to Iran. The current balance of the Iran FMS account, which is approximately $400 million, is the subject of Iran's multi-billion dollar claim against the United States before the Tribunal, arising out of the Iran FMS program. Depleting Iran's FMS account through attachment by the plaintiffs in no way discharges any obligation to Iran the U.S. Government may ultimately be determined to have by the Tribunal. And if Iran prevails on its claims, it can seek to enforce its award against U.S. property anywhere in the world, since the awards of the Iran-U.S. Claims Tribunal are enforceable in the courts of any country. Any Tribunal award that cannot be satisfied from the Iranian FMS account will have to be satisfied with U.S. government funds. Thus American taxpayers, rather than Iran, would actually pay under H.R. 3485. CBO's cost estimate for the bill has been confirmed that the legislation would cost the Treasury, and hence the taxpayer, $420 million, most of which is associated with the FMS Trust Fund.

This provision is also of particular concern because it would prevent the United States from meeting its obligations to make payments in satisfaction of awards the Tribunal renders against the United States. Instead, the proposed legislation would permit private parties to garnish the funds of the U.S. Government in order to collect such payments before they reach Iran. Even without this change in the law, there have been efforts in the Flatow case to garnish the payment of a $6 million Tribunal award in Iran's favor.

It is important to understand that allowing private litigants to garnish amounts we owe Iran under Tribunal awards would not discharge the U.S. Government's liability to Iran to pay such money. For example, if the efforts in the Flatow case had succeeded, the Flatow family would have received $6 million, but the United States still would have owed Iran $6 million under the unpaid award. *And again because the awards of the Iran-U.S. Claims Tribunal are enforceable in the courts of any country, Iran can seek to enforce awards against U.S. property in other countries if we do not pay them voluntarily*. [Italic for emphasis]

Permitting garnishment of the payment of such awards could thus result in the U.S. taxpayer paying twice: once when a private

claimant garnishes the payment, and a second time upon Iran's successful enforcement of the still unsatisfied award against us abroad. Because the judgments against Iran received by these plaintiffs total in the hundreds of millions of dollars, permitting garnishment of debts owed by the United States to Iran as a means of satisfying these judgments could cost the U.S. taxpayer hundreds of millions of dollars.

Finally, while we are vigorously contesting all of Iran's claims at the Tribunal, if we are unable to pay even the smallest awards against us, our position before the Tribunal in all other claims will clearly be undermined.

(5) Eliminating Legal Separateness of Agencies and Instrumentalities

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

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

We are concerned that this proposal to disregard separate legal personality, although limited in the bill to terrorism-list states and their majority owned entities, could create the perception that the United States is unreliable as a location for banking or investment. Especially for companies with linkages to foreign governments, such a provision could be viewed as an expansion of U.S. economic sanctions. It could raise concerns about the United States as a safe financial center and about the likelihood of possible legal actions against their assets in the United States. This perception could undermine the competitive ability of U.S. financial firms to lead privatizations abroad and to attract banking business and investments to the United States.

In addition, if the United States were to "pierce the corporate veil" in this manner, there could well be similar actions in foreign countries. Foreign countries may enact similar changes to their law or foreign courts might disregard the separate status of private, U.S. owned companies in cases where a litigant had a judgment against the U.S. Government.

Compared to the billions of dollars the United States Government and private U.S. interests have invested abroad, the blocked assets of terrorism-list state entities, agencies, and instrumental-

ities located in the United States are small. In the case of Iran, we do not have a comprehensive picture of Iranian assets in the United States that might be affected by this proposed legislation. There is currently no blocking of Iranian assets in the United States (other than the residual of property blocked during the Hostage Crisis), and thus no obligation on the part of U.S. persons to report specific information on them.

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

Finally, disregarding separate legal personality as provided for in this proposal could possibly lead to substantial U.S. taxpayer liability for takings claims in U.S. courts and possibly before international fora.

We are grateful for this opportunity to address a very important subject involving the fight against terrorism, compensation for victims, and critical national interests. Unfortunately, however, the concerns raised here indicate that the 1996 amendment waiving sovereign immunity and creating a judicial cause of action for damages arising from acts of terrorism has not met its goals of providing compensation to victims and deterring terrorism. In fact, if blocked assets were exhausted to compensate the families, which would be the result of this bill, the leverage to affect the conduct of the terrorism-list states would be lost along with the blocked assets. We are not happy that these suits have not led to recovery for families who have brought cases under the 1996 amendment. A system that has to date left no recovery option other than one that conflicts with U.S. national interests and would result in substantial U.S. taxpayer liability is not an acceptable system.

We have been giving this a very hard look and have been working with several members of Congress to address this difficult problem. We are anxious to continue doing so. Together, we hope to formulate immediate and longer-term approaches that will address the concerns—of compensation for terrorist acts and the U.S. national interests and international obligations—that we all share in a much more satisfactory way. Most importantly, we believe that, for a workable and effective solution, we need a careful and deliberative review of the issues, informed by our experience since the 1996 amendment.

As mentioned earlier, we suggested last year that the Administration and Congress commit to a joint commission to review all aspects of the problem, and to recommend to the President and the Congress proposals to find ways to help these families receive compensation, in a way consistent with our overall national interests and international obligations. We believe that this is the best way to deal with these issues and that it therefore merits further consideration. We believe that such a commission should be one of stature and with the right expertise to confront all the hard issues we have discussed today—including the lack of effective remedies

in these cases because of sanctions against terrorism-list countries under U.S. law, which are absolutely necessary to maintain.

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

We hope discussions on the Commission and the broader issue of compensation for victims of terrorism will yield a solution that best addresses all parties' respective interests. Again, we are committed to working together with you, members of this Subcommittee, and others to find non-legislative and legislative means to achieve our shared goal of fair and just compensation for victims of terrorism.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

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CHAPTER 87—DISTRICT COURTS; VENUE

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§ 1391. Venue generally

(a) * * *

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(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) * * *

* * * * * * *

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b)*(1)* of this title; or

* * * * * * *

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

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§ 1603. Definitions

For purposes of this chapter—

(a) * * *

[(b) An "agency or instrumentality of a foreign state" means any entity—**]** *(b) An "agency or instrumentality of a foreign state" means—*

(1) any entity—

[(1)**]** *(A)* which is a separate legal person, corporate or otherwise, and

[(2)**]** *(B)* which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

[(3)**]** *(C)* which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country**[**.**]***; and*

(2) for purposes of sections 1605(a)(7) and 1610 (a)(7) and (f), any entity as defined under subparagraphs (A) and (B) of paragraph (1), and subparagraph (C) of paragraph (1) shall not apply.

* * * * * * *

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) * * *

* * * * * * *

(h) If a foreign state, or its agency or instrumentality, is a party to an action pursuant to subsection (a)(7) and fails to furnish any testimony, document, or other thing upon a duly issued discovery order by the court in the action, such failure shall be deemed an admission of any fact with respect to which the discovery order relates. Nothing in this subsection shall supersede the limitations set forth in subsection (g).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages, except any action under section 1605(a)(7) or 1610(f); if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought. *No Federal or State statutory limits shall apply to the amount of compensatory, actual, or punitive damages permitted to be awarded to persons under section 1605(a)(7) and this section.*

* * * * * * *

§ 1610. Exceptions to the immunity from attachment or execution

(a) * * *

* * * * * * *

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state **[**(including any agency or instrumentality or such state)**]** *(including any agency or instrumentality of such state)* claiming such property is not immune under section 1605(a)(7).

* * * * * * *

(C) Notwithstanding any other provision of law, moneys due from or payable by the United States (including any agency, subdivision or instrumentality thereof) to any state against which a judgment is pending under section 1605(a)(7) shall be subject to attachment and execution, in like manner and to the same extent as if the United States were a private person.

* * * * * * *

(3)(A) Subject to subparagraph (B), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive this subsection in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against the premises of a foreign diplomatic mission to the United States, or any funds held by or in the name of such foreign diplomatic mission determined by the President to be necessary to satisfy actual operating expenses of such foreign diplomatic mission.

(B) A waiver under this paragraph shall not apply to—

(i) if the premises of a foreign diplomatic mission has been used for any nondiplomatic purpose (including use as rental property), the proceeds of such use; or

(ii) if any asset of a foreign diplomatic mission is sold or otherwise transferred for value to a third party, the proceeds of such sale or transfer.

(4) For purposes of this subsection, all assets of any agency or instrumentality of a foreign state shall be treated as assets of that foreign state.

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SECTION 117 OF THE TREASURY DEPARTMENT APPROPRIATIONS ACT, 1999

EXCEPTION TO IMMUNITY FROM ATTACHMENT OR EXECUTION

SEC. 117. (a) * * *

* * * * * * *

[(d) WAIVER.—The President may waive the requirements of this section in the interest of national security.]

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ADDITIONAL VIEWS

I take this opportunity to express my perspective on the committee's consideration of the *Justice for Victims of Terrorism Act*, H.R. 3485 and to describe several amendments I made to the bill. I continue to support Congress's efforts to ensure that victims of terrorism and their families are compensated by the foreign states that have committed such atrocious crimes. Monetary damages can never truly compensate the victims and their families. What Congress can do is ensure that judicial judgements against these terrorist nations are enforced so that monetary awards actually hurt these terrorist states rather than being merely a slap on the wrist.

In considering H.R. 3485, I raised two concerns with provisions under current law that potentially restrict victims ability to obtain compensation for terrorist attacks against them or their family members. Both of these concerns were incorporated in an amendment I offered that was accepted by the Majority. In particular, I was concerned that road blocks put up by foreign states in the course of discovery can severely burden the litigation process to the victims' detriment. Moreover, it is important to ensure that the continuing efforts of Congress and numerous States to implement Federal and State statutory caps on damage awards do not apply to U.S. victims of terrorist attacks. A description of the history of the current law waiving sovereign immunity for certain foreign states that commit terrorist acts and H.R. 3485, as well as the amendment, are detailed herein.

HISTORY OF CURRENT LAW

Until the beginning of the 1900s, the United States afforded foreign states absolute immunity from suit in U.S. courts as a matter of common law. With the rise of Communism and the growth of state owned trading and shipping companies, the United States began to recognize the restrictive theory of foreign sovereign immunity, which permitted suits arising from a foreign states' commercial activities. In 1952, the "Tate Letter" announced that the United States would follow the restrictive theory in making foreign sovereign immunity determinations.[1] In 1976, in order to promote uniform and apolitical determinations, Congress transferred immunity determinations from the State Department to the judiciary and codified the restrictive theory in the Foreign Sovereign Immunities Act ("FSIA").[2]

Since enactment of the FSIA, U.S. courts consistently have refused to extend the scope of the FSIA, and thus, did not find within the FSIA the right to sue foreign states, beyond commercial activi-

[1] *Letter from Jack B. Tate, Acting Legal Advisor, to the Attorney General* (May 19, 1952).

[2] 28 U.S.C.A. §§ 1602–1611. See *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1 (D.C.D.C. 1998).

ties, to reach public acts committed by such foreign states outside the United States. As a result, foreign states used the FSIA as a shield against civil liability for violations of the laws of nations committed against U.S. nationals overseas.[3]

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted in response to a number of terrorist attacks against U.S. citizens abroad.[4] AEDPA amended the FSIA to lift the immunity of foreign states for a certain category of sovereign acts which are repugnant to the United States and the international community—namely acts of terrorism.[5] AEDPA created an exception to sovereign immunity in the case of foreign states officially designated by the State Department as terrorist states when the foreign state commits a terrorist act, or provides material support and resources to an individual or entity which commits such an act, resulting in the death or personal injury of a U.S. citizen.

In the 1997 Omnibus Consolidated Appropriations Act, the "Flatow Amendment" revised the FSIA to expressly provide that punitive damages were available in actions brought under the state sponsored terrorism exception to immunity.[6] This was done to ensure that the state sponsored terrorism exception had a deterrent effect—the potential for substantial civil liability. To further make the immunity exception have a real impact on state sponsored terrorism, in 1998 Congress amended the FSIA to allow plaintiffs holding judgements for acts of terrorism against those states on the terrorism list to bring enforcement actions against any blocked assets of those states. The legislation included a waiver provision which, according to the legislative history, was to be exercised by the President on a limited basis and only when in the national security interest of the United States.[7] President Clinton in 1998 issued a Presidential Proclamation, which was a finding that it is in the national security interest of the United States to waive the eligibility of plaintiffs to attach "blocked" assets in the United States in connection with all judgements against all terrorist states.[8]

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[3] See *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993).

[4] There are several notable cases involving U.S. citizens in the 1980s and 1990s, which spurred Congress' efforts to expand the FSIA to eliminate sovereign immunity for foreign states engaged in state-sponsored terrorism. First, in March 1985, Terry Anderson, an American journalist working in Beirut, was kidnaped by agents of the Islamic Republic of Iran ("Iran"). He was held captive by his kidnappers in deplorable conditions until early December 1991. Second, during the 1980s, three other individuals working in Lebanon, David Jacobsen, an administrator of the American University hospital in Beirut, Joseph Ciccipio, a comptroller of the American University school and hospital, and Frank Reed, the principal of a private secondary school in Beirut, were also held captive by agents of Iran. Third, in April 1995, Alisa Flatow, a 20 year old college student from New Jersey, was on a bus on the Gaza strip going to a Passover holiday celebration. A terrorist from the Iranian-backed Islamic Jihad rammed his car loaded with explosives into the bus, killing Ms. Flatow and seven others. Finally, in February 1996, Cuban MiG aircraft shot down two aircraft flown by the "Brothers to the Rescue" organization in international airspace over the Florida Straits. Three American citizens were killed in the attack.

[5] Pub. L. 104–132, Title II, § 221(a) (Apr. 24, 1996), 110 Stat. 1241 *codified in* 28 U.S.C.A. § 1605 (West 2000 Supp.).

[6] Pub. L. 104–208, Div. A., Title I, § 101(c) [Title V § 589] (Sept. 30, 1996), 110 Stat. 3009–172 *codified in* 28 U.S.C.A. § 1605 note (West 2000 Supp.).

[7] Treasury Department Appropriations Act of 1999, Pub. L. 105–277, Title I, § 117(d) *codified in* 28 U.S.C.A. § 1610 note (West 2000 Supp.).

[8] *Determination to Waive Requests Relating to Blocked Property of Terrorist-List States*, Presidential Determination No. 99–1, 63 Fed. Reg. 59201 (Oct. 21, 1998) *codified in* 28 U.S.C.A. § 1610 note (West 2000 Supp.).

There are several cases pending in U.S. courts by the families of victims of terrorism.[9] The plaintiffs in these actions have been unable to collect on the judgements they received due to impediments in attaching the assets of foreign states. It is argued that the President's national security waiver prevents plaintiffs from attaching certain assets blocked, and thus held by the United States, to prevent such assets from being returned to the foreign state. Further, there are certain "unblocked" assets which are essentially immunized from attachment because they are independent juridical entities (*e.g.*, an Iranian bank that does not have a direct nexus to the terrorist act). As described below, H.R. 3485 amends the FSIA to remove the asserted impediments to plaintiffs attaching the assets of foreign states located in the United States.

SUMMARY OF THE JUSTICE FOR VICTIMS OF TERRORISM ACT, H.R. 3485

H.R. 3485 amends the applicability of the FSIA's definition of an "agency or instrumentality of a foreign state" to make clear that the U.S. located assets of corporations majority-owned by terrorism sponsoring governments would be liable for execution of judgement issued by U.S. courts against that government.

H.R. 3485 directs that moneys due from, or payable by the United States to any foreign state against which a judgment is pending will be subject to attachment and execution in a like manner and to the same extent as if the United States were a private person. This provision waives the U.S. Government's immunity from suit on funds held or collected by the U.S. Government in connection with the activities of a foreign state (*e.g.*, the U.S. Government holds the revenue of certain Iranian properties sold in the United States and are due to be paid to Iran. Such revenue cannot be attached because the United States is immunized from suit).

H.R. 3485 authorizes the President, upon determining on an asset-by-asset basis that a waiver is necessary and in the national security interest, to prevent plaintiffs from attaching the premises of any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations. The presidential waiver would not apply to the proceeds of: (1) any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used for any non-diplomatic purpose (including use as rental property); or (2) a sale or transfer of an asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations. This provision prevents the President from issuing a blanket waiver and prevents the applicability of such a waiver to proceeds from non-diplomatic activities.

H.R. 3485 treats all assets of any agency or instrumentality of a foreign state as assets of that foreign state. This change in the law eliminates the "Bancec" rule which limits the attachment of a

[9] To date, judgements currently have been awarded to families of victims in the following cases: (1) in March 1998, Alisa Flatow's family was awarded $22.5 million in compensatory damages and $225 million in punitive damages; (2) the three Brothers to the Rescue victims' families were awarded in separate, but related judgements, $48 million in compensatory damages and $132 million in punitive damages, plus nearly $20 million in post-judgement interest and costs; (3) in March 2000, Terry Anderson and his family were awarded $41.2 million in compensatory damages and $300 million in punitive damages; and (4) David Jacobsen, Joseph Ciccipio and Frank Reed were awarded a total of approximately $20 million compensatory damages.

foreign states' assets in the United States (e.g., a bank) only to those assets that are connected in a significant fashion with the terrorist act. This provision also would allow the attachment of the assets of certain private non-profit organizations in the United States that are allied with a foreign state and that are known to be involved in terrorist activities.

Thus, H.R. 3485 eliminates many of the remaining barriers to victims and their families seeking to attach the assets of, and executing the judicial judgements against, foreign terrorist states.[10]

CONYERS AMENDMENT TO H.R. 3485

In order to further assist current and future victims of terrorism who file suits under the FSIA, I offered an amendment approved by voice vote that reduces litigation difficulties presented by unresponsive foreign states during the discovery stages of litigation as well as precludes any cap on damages awarded to victims and their families.

In cases involving foreign terrorist states, obtaining discovery from such litigants can be difficult, if not impossible. American citizens are subject to a very burdensome discovery process under the FSIA and Hague Evidence Convention, which requires the involvement of foreign courts and diplomatic offices and are subject to foreign "blocking statutes" designed to thwart our discovery process. Moreover, foreign states have substantial incentives not to respond to discovery requests seeking information about their involvement in terrorist activities. My amendment therefore requires that when a foreign state fails to respond to a discovery order, the foreign state will be deemed to have admitted the facts to which the discovery order pertains.

The amendment also precludes the application of Federal and Statute caps on compensatory, actual and punitive damages awarded to victims of terrorism under the FSIA. Many States and Congress are continually revising the law to cap or preclude damage awards to plaintiffs, regardless of the egregiousness of the offense. It is nearly impossible to keep track of all the cases where this Congress and States have enacted caps on damages, and it is now to the point where we cannot be sure that caps on damage awards do not currently, or will not some day in the future, apply to these

[10] According to Treasury Deputy Secretary Stuart E. Eizenstat, the Administration has several concerns with H.R. 3485: First, the ability to block assets represents one of the primary tools available to the United States to deter aggressions and discourage or end hostile actions against U.S. citizens abroad. The bill therefore would interfere with the President's power to block foreign assets by subjecting the assets to attachment and execution by private parties. Second, H.R. 3485 may result in the United States violating its obligations under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations to prevent the attachment of diplomatic and consular property. Without protecting the diplomatic and consular property of these terrorist-list countries, the Administration argues that we should expect such countries, and possibly others, to target our diplomatic property when they disagree strongly with our polices or actions. Third, the first claimants who reach the courthouse may be able to deplete the available assets of terrorism-list governments, leaving nothing for other similarly situated claimants. Fourth, the Administration argues that permitting the garnishment of debts of the United States would breach the principle that the United States government has sovereign immunity from garnishment actions. Finally, the bill would make corporations that are majority-owned or controlled by a terrorism-list foreign government liable for all of the individual debts of that government. According to the Administration, such an action would saddle the investors of other countries with the debts of foreign governments with which they are co-investors and we should expect U.S. investors to face the same consequences abroad. Letter from Stuart E. Eizenstat, Deputy Secretary of the U.S. Treasury Department, to the U.S. Senate Committee on the Judiciary (Oct. 27, 1999).

types of cases. Therefore, my amendment ensures that caps on damage awards in these cases are not applicable.

The aforementioned changes are fully consistent with Congressional intent regarding the FSIA. I am pleased that this modest and common sense amendment to further help victims of terrorism was adopted on a bipartisan basis.

JOHN CONYERS, Jr.

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