Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. notes	re: Meeting with counsel in Flatow case (2 pages)	07/30/1999	P5 ~~6448~~ 02034
002a. letter	To President Clinton from Sean Maloney and David Goodfriend. Subject: Kyl / Mack / Lautenberg amendment (1 page)	08/02/1999	P5 Dup 2569
002b. memo	To President Clinton from Samuel Berger et al. Subject: Flatow litigation and related amendments appearing in leglislation (Annotations) (4 pages)	08/02/1999	P5 Dup 2570
003. memo	To Charles Ruff from Neal Katyal. Subject: Cuban sanctions (10 pages)	06/16/1999	P5 ~~6449~~ 02035
004. memo	To Jamie Baker from Charles Ruff. Subject: BTTR (1 page)	06/29/1999	P5 ~~6450~~ 02036
005. note	re: Communications strategy (1 page)	n.d.	P5 Dup 02037
006a. note	re: Annotations concerning benefits for families of embassy bombings (1 page)	01/31/2000	P5 ~~6451~~ 02038
006b. memo	To Chief of Staff thru Jacob Lew from Bob Kyle. Subject: Benefits for families of embassy bombings (Annotated) (2 pages)	01/06/2000	P5 ~~6452~~ 02039
007. briefing paper	re: Legislative option Flatow and BTTR case (3 pages)	01/28/2000	P5 ~~6453~~ 02040

COLLECTION:
Clinton Presidential Records
Counsel's Office

OA/Box Number: 20839

FOLDER TITLE:
Brothers to the Rescue: BTTR [Brothers to the Rescue] [Folder 2]

Jamie Metrailer
2009-0342-F
jm672

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

~~6448~~

2034 Dup

Meeting with counsel in Flatow case - July 30, 1999

Stu Eizenstat led and was accompanied by Jim Johnson, Rick Newcomb, Bill Hoffman and Barbara Hammerle (OFAC Counsel), Vince Garvey and Andrea Cohen (Justice Civil Division), and Mark Clodfelter (State/L).

For Flatow, counsel Steve Perles and Thomas Fortune Fay, and Frederic Baron, Lautenberg staff, attended.

Stu was there for an hour and a half, and the meeting went about another half hour beyond that.

Stu's approach, per talking points, was to offer to re-energize the process of assisting plaintiffs with identifying unblocked assets. He wanted to avoid confrontation and work constructively with them, and pointed out that the legislative effort is not helpful in this regard. He cited at least 2 ways we can work to assist: go back over the 5,000 plus documents with them (the ones handed over last November), and provide the additional documents on possible bank assets as soon as the amended protective order is approved by the judge (expected next week).

Perles et al were polite while Stu was there and responded with the following points:

- We, too, want to avoid confrontation - but we need results. We need to demonstrate something tangible to Mr. Flatow.

- We want the discussion to go beyond unblocked property.

- [They indicated little interest in unblocked assets, in part because of the difficulties they have had in litigation attempts to attach Alavi Foundation assets. They don't want 2-3 years of litigation over a writ.]

- We don't see all blocked assets as the same. Some are more important than others. You should prioritize them. In particular, consider the rental proceeds ($5-6 million) from Iranian diplomatic properties.

- We need an "interim measure of closure" for Mr. Flatow. The rental proceeds would be a good start.

- Senator Lautenberg will be looking to us before deciding what to do on the amendment.

- Baron made clear that no matter what Lautenberg decides, it's unclear whether they can get Mack and Kyl to go along. Kyl is particularly dug in.

- In any event, they will not accept moving the amendment to CJS because of the veto threat there.

After Stu left, Under Secretary Johnson set out to turn the discussion into an action plan. Instead, Perles asked for time for a caucus with his side. Returning from their meeting, Perles took a strident position and said the following:

- I have heard nothing from you today that is real. The only reason you are meeting with us today is because there's a crisis for you. I've been trying to get entry into the executive branch for a year. This is a crisis of your own making.

- You're here because you can count votes. I can count votes too, and I'm not accepting movement of the amendment to somewhere where we're not sure of the votes.

- We need interim closure. I'm still willing to work with you on a strategy for interim closure. You know how to reach me between now and Tuesday.

- Think long and hard about the rental proceeds.

Baron stayed awhile after Perles and Fay left.

- Lautenberg really does want to avoid confrontation - can't something be done? We really need to demonstrate something tangible to Mr. Flatow.

- He conceded that, no matter what Lautenberg decides about the amendment, he might not be able to get it moved because of Mack and especially Kyl.

- He referred to a recent rule change, or recommitment to an existing rule, that precludes making authorizing type amendment in appropriations bills. He seemed to think that this development would hamper their ability to get the amendment moved to another appropriations bill.

U. S. Department of Justice

Office of the Deputy Attorney General

~~6449~~
2035 Dup

Washington, D.C. 20530

June 16, 1999

MEMORANDUM FOR CHARLES F.C. RUFF, COUNSEL TO THE PRESIDENT

FROM: NEAL K. KATYAL, ADVISER FOR NATIONAL SECURITY AFFAIRS TO THE DEPUTY ATTORNEY GENERAL

RE: CUBAN SANCTIONS

The following memorandum lays out the possible options that I believe the Federal Government may use to provide money to the *Alejandre* plaintiffs. This document has not been reviewed by others at the Department, though we would engage in that process for any options that you consider worth pursuing.

OPTION 1: PROVIDE HUMANITARIAN ASSISTANCE

Description: The President would order vesting of a humanitarian payment to the surviving relatives of those killed in the BTTR incident. 50 U.S.C. App. 5(b) permits such vesting, and does not establish a limit on the amount that can be distributed to the surviving relatives. The President must certify that such payments are "in the interest of the United States." In his October 2, 1996 memorandum, the President used this mechanism to provide $300,000 to each of the four victims' families.

Note: This option can be combined with others, such as #2 - #5, to create a larger package of total available funds.

Advantages:

- Reaffirms Executive Power -- Allows payments to be made without undermining Presidential power to determine when and if to provide any compensation.

- Avoids legal and political consequences of reversing position on the

Section 117 issue.

◘ Large fund – there is $166 million in blocked Cuban assets.[1] The total amount won by plaintiffs in *Alejandre* is $187 million.

◘ Presents little, if any, legal risk. The decisions to vest blocked assets, to distribute them, and to whom to distribute them are purely discretionary decisions of the President. How the President chooses to exercise that discretion is not a matter for judicial review. *Dalton v. Specter*, 511 U.S. 462, 476 (1994).

◘ Already did it before.

Disadvantages:

◘ Risks depleting fund for other causes. We have filed an affidavit in *Alejandre* stating that the U.S. Foreign Claims Settlement Commission "has certified to the Secretary of State a total of 5,911 valid claims of U.S. nationals against the Government of Cuba, including claims for wrongful death and personal injury, with a current value of nearly $ 6 billion." Declaration of Peter E. Bass, Deputy Asst. Secretary, Dept. of State, at 4.

◘ Plaintiffs in other cases where attachment is precluded, such as *Flatow* (Iran), will inevitably seek a similar outcome.

◘ May appear not to be in the "public interest" since we already provided payments in Oct. 1996 at a much lower dollar figure. Why would an additional, presumably much higher, amount be warranted? (An answer to this is that the 1996 payments were made before the court found liability and entered this large judgment.)

◘ Leaves the district court decision on the books, thereby creating bad precedent. A resolution that makes the appeal moot will likely not allow the parties to have the district court judgment vacated. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 27-29 (1994).

◘ The Civil Division believes that there is some risk that U.S. taxpayers could end up footing part of the bill. A U.S. national who claims his property was inappropriately seized or vested can bring a "post-deprivation" challenge to that seizure. *See* 50 U.S.C. App. § 9(a); *see also*

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[1] In our briefs in Alejandre, we had cited a figure of approximately $178 million. Recent information from the State Department indicates that is an incorrect total, obtained by double-counting some of the blocked assets.

Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 211 (1958); *Stoehr v. Wallace*, 255 U.S. 239, 245-46 (1921). If the seizure is deemed inappropriate, the claim can be paid out of the U.S. Treasury. However, such a claim – in my mind – is not of great worry. The only U.S. national with a claim to blocked assets that I have been able to locate is AT&T – for approximately $30 million of the $166 million in the fund. Moreover, the statute of limitations has arguably run since the relevant event may be the seizure in 1962, and not a vesting (should it occur) in 1999.

OPTION 2: SETTLEMENT OF POTENTIAL TAKINGS CLAIM

Description: Though the plaintiffs have not argued as much, they could contend that the President's waiver constitutes a "takings" of property, and violates the 5th and 14th Amendments. The idea would be that the property interest developed at the time the plaintiffs won their lawsuit. The President, even if he is permitted to execute the broad waiver he has asserted in court – should not be able to single out people for deprivation of their property without compensation. He may forbid attachment, but – should he pursue that course of action – he has to pay the aggrieved party back.

Such a legal claim is bolstered by the fact that the provision authorizing attachment was passed in April of 1996 as part of AEDPA. The plaintiffs won their judgment of $187 million in December of 1997, and the court entered an attachment order at that time. *See* Order of Dec. 17, 1997 ("The total compensatory and punitive damages herewith awarded to Plaintiffs are $187,627,911 for which execution may issue forthwith against the Defendants Cuba and the Cuban Air Force and against any of their assets wherever situated."). Only in 1998 did Congress add the waiver provision ("Section 117") to the FSIA. It appears as though the plaintiffs claim was extinguished by a combination of a subsequent statute and a Presidential waiver. This can give rise to a serious takings issue. *See Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2151 (1998) ("Our Constitution expresses concern with retroactive laws through several of its provisions, including the Ex Post Facto and Takings Clauses."); *United States v. Security Industrial Bank*, 459 U.S. 70, 78-79 (1982) (in case considering Takings Clause challenge to a Bankruptcy Code provision permitting debtors to avoid certain liens, possibly including those predating the statute's enactment, the Court expressed "substantial doubt whether the retroactive destruction of the appellees' liens ... comport[ed] with the Fifth Amendment," and therefore construed the statute as applying only to lien interests vesting after the legislation took effect.) *see also Martin v. Hadix*, – U.S. – (June 21, 1999), slip. op, at 12 (describing the judgment as to whether a statute has an impermissible retroactive effect as one "guided by familiar considerations of fair notice, reasonable reliance, and settled expectations") (punctuation omitted).

Under the substantial time constraints I have been laboring under, I believe that the Department's best answer to the lawsuit is to argue that such a claim is precluded by *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981). In that case, the Court concluded that the President's revocation of a license that the President had previously granted to obtain an attachment did not constitute a takings. Only Justice Powell dissented from that holding. There are, however, some substantial differences between that case and this one. For one thing, the regulations there specified that the licenses could be revoked at any time <u>and</u> that a license would be "null and void" if the President revoked it. *See id.,* at n.6. The "reasonable investment-backed expectations" in that case were almost nil. In this case, by contrast, there is no mandatory "null and void" provision, indeed – as *Alejandre* demonstrates -- it is not even clear whether the President can even waive the amendments to FSIA that permit attachment of property. Such ambiguity in the statute suggests that the reasonable investment-backed expectations are of a different kind than those at issue in *Dames*. Moreover, because the waiver provision postdated the entry of judgment in this case, it is quite difficult to see how it could shape reasonable investment-backed expectations *in 1997* – at the time when plaintiffs pursued their case in court and won their judgment.

A separate answer the Department might use is to argue that, at the time of the shoot-down, the FSIA did not authorize attachment. Because attachment was not authorized, the theory would go, no property interest developed until the government has lifted all of the statutory restrictions on the use of the property. Since the President has not removed the waiver, no property interest has formed. In other words, the plaintiffs must "take the bitter with the sweet" and view the property interest in light of all relevant statutory guideposts. Again, such an argument has strength. But the plaintiffs may respond by arguing that the 1996 AEDPA legislation specifically provided that the FSIA amendments "shall apply to any cause of action arising before, on, or after the date of the enactment of this act." 110 Stat. 1214. Because the plaintiffs secured their judgment in 1997 – well before the 1998 waiver – the property interest developed at that time. The 1998 waiver was an impermissible retroactive taking under *Eastern Enterprises* and *Security Industrial Bank.*[2]

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[2] At this point, the arguments get rather complicated. DOJ may respond to this claim by arguing that this theory of the plaintiffs' – that post-incident legislation can apply retroactively to shape reasonable investment-backed expectations – cuts against them as well. After all, Section 117 (which was passed in 1998) specifically provides that "[t]he amendments made by

In the end, I think that there is a substantial takings claim that the plaintiffs can pursue. And this claim may justify entering into some sort of settlement with them. Obviously, such an assessment of the litigation risk will be a good faith determination of the legal risk, and other factors – such as diplomatic or political sensitivities will be ignored (just as the Department ignored similar considerations with respect to Pakistan F16s). This constraint is necessary to preserve the integrity of the Judgment Fund.

Advantages:

- Provides an avenue to provide plaintiffs with money, and yet maintains legal position in *Alejandre*
- As a policy matter, may be the appropriate course. The President should have the ability to execute a broad waiver, but he shouldn't be able to force individual parties to bear the costs of that waiver.
- Prevents depletion of the seized Cuban assets.

Disadvantages:

- It is not clear whether a legal claim exists.
    - However, even a 1% success on the merits is large money – nearly $2 million.
- Will create follow-on lawsuits from other plaintiffs, such as *Flatow*.

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subsections (a) and (b) shall apply to any claim for which a foreign state is not immune . . . arising before, on, or after the date of enactment of this act." We could thus argue that the 1998 section retroactively altered the plaintiffs' reasonable investment-backed expectations, and that a Presidential waiver does not interfere with a vested property interest. The plaintiffs may argue, in response, that this "effective date" provision of Section 117 does not apply to the final subsection, §117(d), which is the provision authorizing waivers. It only applies to subsections (a) and (b). There may be an argument that Congress did not want to permit retroactive waivers in situations in which a judgment and order for attachment has already issued. While the outcome of this debate is far from clear, at the very least this statutory ambiguity further reinforces my view that there are substantial differences between what was already a hazy Section 117 and the very clear license-revocation scheme at issue in *Dames* – differences that cut in favor of the plaintiffs.

OPTION 3: USE VICTIMS OF CRIME ACT FUND

Description: The Crime Victims Fund, administered by the Office for Victims of Crime (OVC), consists of fines collected from persons convicted of offenses against the United States. The moneys from that fund are used primarily to supplement state efforts to compensate crime victims. States are responsible for establishing guidelines and procedures for applying for crime victim compensation benefits which meet minimal statutory and administrative requirements. See 62 FR 7050, 7052-53. The states appear to have ample discretion, but several requirements do exist. For example, all programs must offer compensation to victims *and survivors of victims* of 'compensable crimes,'" which must include crimes involving terrorism. Id. at 7055.

In 1996, Congress authorized the OVC Director to award supplemental grants to the states, for the purpose of assisting victims of terrorist attacks or mass violence occurring either within or outside the United States. 42 U.S.C.A. § 10603b. The regulations authorize the OVC director to establish a reserve fund of up to $50 million. Because the incident in *Alejandre* occurred outside the United States, the statute requires that compensation be given to a state program, and that moneys cannot flow directly to a surviving family member.[3]

Advantages:

- Allows some funds to go to victims without undermining legal position.
- Doing this with Pan-Am 103 victims.

Disadvantages:

- The State programs cap the amount a victim may receive. In Florida, the maximum amount of compensation is $15,000 per victim. In Washington, DC, the maximum amount is $25,000 per victim. D.C. Code § 3-427. This is obviously not a large amount. We could possibly go to the DC Council and ask for an additional provision for victims of terrorism, with a higher dollar amount.
    - Alternatively, could go to the Hill, as we did in Pan-Am 103, and ask Congress to authorize the direct provision of funds to the victims in *Alejandre*, without going through a state compensation program and being subject to its requirements.

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[3] The regulations specify that the Fund itself is a "payor of last resort with regard to federal or federally financed programs" for which the crime victim might be eligible. 62 FR 7050, 7057. But there is no federal requirement that crime victims pursue other remedies -- civil litigation, for example -- before drawing on money from either the Fund or the reserve fund.

- Fund has limited amount. I am told we only have $30 million left in the fund.

OPTION 4: DEPARTMENT OF STATE COUNTERTERRORISM PROTECTION FUND

Description: This State Department Fund allows reimbursement of "domestic and foreign persons . . . for the protection of judges or other persons who provide assistance or information relating to terrorist incidents primarily outside the territorial jurisdiction of the United States. Before making a payment under this section in a matter over which there is Federal criminal jurisdiction, the Secretary shall advise and consult with the Attorney General."

Advantages:

- Prevents depletion of the seized Cuban assets.
- Maintains legal position in *Alejandre*
- Roughly tracks the facts here. The statute (1) allows payment to domestic persons; (2) is focused primarily on terrorism occurring outside of the territorial US; (3) and contemplates a situation, like this one, in which there is Federal criminal jurisdiction.

Disadvantages:

- Not clear whether or not the victims, or their families, provided assistance or information regarding terrorist incidents. It may be possible to argue that flight data and other information from the shoot-downs is "assistance" provided by a victim. Alternatively, it may be possible to argue that the survivors' families provided assistance regarding the legal case – from background about the victim to involvement with BTTR, forensic information, etc.
- Risks undermining core purpose of fund, and Congressional anger.
- Unclear whether this Fund is currently funded. §2711(b) appropriates $ 1 million for FY1986 and $1 million for FY1987. But there is no indication of any other appropriation.

OPTION 5: DEPARTMENT OF STATE REWARDS PROGRAM

Description: The State Department Rewards Program is "designed to assist in the prevention of acts of international terrorism." 22 U.S.C. §2708(a)(2). It permits a reward "to any individual who furnishes information leading to . . . the arrest or conviction in any country of any individual for the commission of an act of international terrorism against a United States person or United States property."

It is not clear whether or not the victims' families provided the USG with any information that could have helped in the BTTR cases (such as victim identification information, etc.). If they did, then they would qualify. If the victims' families did not, then it may be a stretch to use the fund. I think an alternate theory could be made that the flight data from the victims' planes meets the statutory standard of an "individual" who "furnishes information" to assist in a prosecution -- and that the victims themselves were the ones who earned the reward.

Advantages:

- Prevents depletion of the seized Cuban assets.
- Maintains legal position in *Alejandre*
- Fairly large fund – allows $5 million per reward.

Disadvantages:

- Not clear whether survivors gave USG any information. Nor is it clear that the "alternate theory" outlined above could survive.
- Risks undermining core purpose of fund, and Congressional anger.
- Only $ 5 million per reward can be authorized under the statute.

<u>OPTION 6:</u> **<u>WITHDRAW THE PRESIDENT'S WAIVER OF SECTION 117</u>**

Description: Section 117 contains an exception to the Foreign Sovereign Immunities Act that allows blocked assets and diplomatic property to be subject to execution to enforce a judgment. Section 117 also contains a provision that allows the President to waive its requirements in the interest of national security. If the President withdraws the waiver, Section 117 would permit the *Alejandre* plaintiffs to execute their judgment against blocked Cuban assets, as well as against Cuban diplomatic property.

Because of concerns outlined in the last two "disadvantages" listed below, I would recommend that, if the President were to use this option, he should execute a limited withdrawal of the waiver -- a withdrawal limited to the plaintiffs in *Alejandre*. While this position may not ultimately be legally successful, it might help avoid some potential pitfalls.

Advantages:

- Allows almost a full satisfaction of the judgment.

◘ Does not invalidate our legal position in *Alejandre* – reaffirms Presidential control over waivers.

Disadvantages: ◘ Requires reversal of our policy position. It would raise the question of whether we were serious or exaggerating in our 11th Circuit and district court briefs when we said that the waiver was issued to protect national security and to protect our embassies abroad. We would lose credibility not only before these two courts, but in general, as we would be perceived as minimizing the same national security concerns we had previously described as of paramount importance.

◘ Risks depleting fund and leaving others with claims unsatisfied.

◘ Leaves the district court decision on the books, thereby creating bad precedent.

◘ This option may require attachment of assets in any other pending case, such as *Flatow*. It will be difficult – both legally and politically -- to waive Section 117 with respect only to Cuba, and not to other countries. The text of Section 117 does not seem to admit the possibility that the President can selectively waive it in a certain instance. We can always advance that argument, but it is not clear from the face of the statute that we will be successful. The Civil Division shares this concern.

◘ This option may also require attachment of diplomatic assets, which may violate international law. Again, the face of the statute does not suggest that the President can waive the statute as to nondiplomatic assets, but retain it for diplomatic ones. And the USG has filed briefs in the 11th Circuit and district court stating that attachment of diplomatic assets would violate international law.[4] The Civil Division shares this concern.

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[4] Moreover, such a position would be inconsistent with the position we took in the 11th Circuit regarding the equivalence between diplomatic and nondiplomatic assets. In our brief, we took the position that Congress "left no doubt that it intended blocked property and diplomatic property to be treated the same way under Section 117." To have the President attempt to execute a partial withdrawal of the waiver that treated those two types of property differently would invite an argument that the President violated our own understanding of the statute.

OPTION 7: UTILIZE PHONE COMPANY ASSETS

Description: The United States could drop its opposition to the attachment of phone company assets.

Advantages:

- Prevents depletion of the seized Cuban assets.
- Maintains executive branch power – it is an affirmative act by the Executive to permit attachment of funds.

Disadvantages:

- Requires reversal in position – might prompt embarrassment – particularly since USG made a legal and diplomatic determination that these assets are not attachable because they do not flow to the Government of Cuba.
- Only a small amount of money. The total amount that all U.S. telecommunications companies have paid to a Cuban entity is $39.5 million.
- Risks disrupting phone service with Cuba.

~~6450~~
2036 Dup

June 29, 1999

MEMORANDUM FOR JAMIE BAKER

FROM: Chuck Ruff

SUBJECT: BTTR

It seems to me that the only way to address the President's concerns without giving up our effort to overturn Judge King's decision is to have section 117 amended to make clear that our reading was the correct one – i.e., that the waiver applies to all its elements and that licensed transactions (e.g., telephone payments) should not be subject to attachment unless waived. If the interested senators were willing to do that, we could then agree to vest another chunk of the blocked assets and make an additional payment to the BTTR families, but the King ruling would have been mooted.

As to Flatow, we could agree to legislation providing for a "commercial use" provision to cover rental income, recognizing that we would arguably be infringing accepted international practice in exchange for preserving the core diplomatic property protections.

I am doubtful that this would fly on the Hill, but if NSC thought it worth pursuing, we could take a run at Kyl, Mack and Lautenberg. Give me your thoughts.

~~6451~~
2038 Dup

THE WHITE HOUSE
WASHINGTON

Embassy bombing compensation

To: RUDMAN
DEROSA

FYI

VP

The only thing I would say is that in the case of the embassy bombings and the Ron Brown case, the loss of life is similar to what happened to people in uniform, yet the civilian benefits seem substantially less – perhaps we should have a parity policy when deaths to civilians come from danger in the line of duty – If the wrong and the benefit aren't disparate, then we probably shouldn't do anything

I think whenever this occurs something should be given for college education of all kids. – BC

JACK
Sylvia
Kyle

01/31/00 MON 12:58 FAX APNSA 6452 002

CLD EO
Podesta

THE PRESIDENT HAS SEEN
1-14-00
02039 Dup

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

January 6, 2000 JP

The only thing I would say is that in the case of the embassy bombings and the Ron Brown case, the loss of life is similar to what happens to people in uniform, yet the civilian benefits seem substantially less — perhaps we should have a policy when deaths to civilians come from danger in the line of duty — if there are inadequate benefits and disparate, then we probably should [illegible]

MEMORANDUM FOR THE CHIEF OF STAFF

THROUGH: JACOB J. LEW

FROM: Bob Kyle RK

SUBJECT: Benefits for Families of Embassy Bombings

This memorandum provides information on our past treatment of victim relief for Federal employees. Three subjects are described: 1) the normal course of action to compensate the victims and their families; 2) examples of incidents after which we did nothing beyond current law to compensate; and 3) any special relief bills passed to compensate victims and their families for particular incidents.

I think we should [illegible] something along the lines of college education at least — BK

Benefits Payable under Current Federal Laws

United States law provides survivor and injury benefits for all Federal employees. The attached chart summarizes these authorities. In the case of the military and civilian employees killed in the East Africa bombings, all of the survivors received benefits consistent with existing law.

Survivors of military personnel receive burial assistance and various financial benefits including partial retirement pay if entitled, Social Security death and survivor benefits, and Serviceman's life insurance if entitled.

The survivors of Federal civilian employees receive burial assistance and financial benefits, including death benefits under the Federal Employees Compensation Act (FECA) and Social Security. In response to the Ron Brown plane crash, the Administration proposed and was able to get enacted language allowing additional payments of up to $10,000 (less amounts provided for reimbursement and expenses) for any Federal employee or their survivors. Although this new benefit was enacted in response to a particular incident, it was not a special relief bill, since it applied to all Federal employees that are victims of any incident.

Examples of Past Incidents

The following list of past incidents involving Federal employees indicates the government has never provided special relief for survivors of victims of particular incidents - in all cases we have provided only benefits payable to all employees under current Federal law.

- The bombings of the U.S. Embassy in Beirut in 1983 and 1984 - no victims assistance provisions were legislated or requested;
- The bombing of the Murrah Building in Oklahoma City in 1995 - no victims assistance provisions were legislated or requested;
- The "friendly fire" shootdown of two U.S. helicopters in Iraq in 1994 - no victims assistance provisions were requested or have been legislated, although two have been proposed (see below);
- The bombing of Khobar Towers, Saudi Arabia in 1996 - no victims assistance provisions were legislated or requested;
- The Ron Brown plane crash - in response to this incident, Congress authorized additional death gratuities of $10,000 for civilian employees killed in <u>any</u> incident while in the line of duty (a new benefit for all Federal employees, not just survivors of this incident); and
- The bombing of the U.S. Embassies in Tanzania and Kenya in 1998 - no victims assistance provisions were legislated or requested.

Special Relief Bills

On at least two recent occasions, Congress has tried to enact special relief bills, but has not succeeded. On the first occasion, Congress proposed a bill allowing payments to survivors of Defense employees killed in incidents for which payments were made to foreign nationals killed in the same incident (in this case, the 1994 friendly fire incident in Iraq). This bill did not move beyond committee. On the second occasion, Congress proposed last July another bill authorizing special relief for survivors of the military and civilian employees killed in the 1994 Iraq incident. No action has been taken on this bill, either, except for a subcommittee hearing. The Administration has been consistent in opposing such efforts because they undermine the uniform system of compensation provided for all Federal employees killed or injured while in service.

6453

DELIBERATIVE/PRIVILEGED DRAFT 1/28 2040 Dup

Discussion Paper: Legislative Option Flatow and BTTR Cases

Summary

The Administration would seek legislation authorizing Treasury to pay 15% of compensatory damages to the Flatows and BTTR families (wrongful death), and 5% to the Beirut hostage families (kidnapping, wrongful imprisonment, torture). The legislation would authorize the President to vest blocked assets for this purpose. With respect to the Iranian cases, the legislation would delimit this authority to the present and future rental proceeds from blocked Iranian property.

Background

The congressional session ended without new legislation. Thanks in large part to Senator Stevens, the Executive avoided the negative consequences of the Mack-Lautenberg bill. But we did not garner support for a proposal to make advance payments and create a commission. Funding that proposal with appropriated funds, even with subrogation, was unacceptable to Mack and Lautenberg. (This was not due to lack of available funds, but rather due to the optics of taxpayer funds being used up front.)

In addition, perhaps Members supporting Flatow did not want to commit to a course of action when it was still possible that Judge Lamberth's decision on the President's section 117 waiver would allow Flatow to execute on all of the blocked Iranian diplomatic property. Instead, in December Judge Lamberth upheld the President's waiver with an unexpectedly strong opinion confirming the USG's position.

It's hard to say how Judge Lamberth's opinion (as well as the 11th Circuit's overruling of Judge King's opinion in the BTTR case) will affect the legislative scenario. On the one hand, plaintiffs now have less hope under existing law of collecting blocked assets, so maybe they would be more amenable to our proposal or some variant of it. On the other hand, perhaps they see the court decisions as only temporary setbacks because they feel confident that they can get the law changed -- e.g., to remove much of the President's waiver authority.

Like the Fall 1999 proposal, any new proposal should not only provide support for plaintiffs but also serve other USG interests to the extent possible. For example, the prior proposal avoided use of any blocked assets. Although we understand the need to give serious consideration to exposing some blocked assets, we still want to preserve as much of the President's blocking leverage as we can.

It is also important to press for removal of the punitive damages provision of section 117, which makes terrorist-list states subject to punitive damages in these cases. This violates international law and could cause significant difficulties in regard to normalization talks and retaliatory measures by other countries. (This provision was added to section 117 during the October 1998 Omnibus conference with no notice to or opportunity to comment by the Administration.) In the Fall we also sought a more clear Presidential waiver, which may not be as important now in view of recent court decisions. Finally, we should consider whether to push for a commission or some other mechanism to develop a better long-term approach to compensating victims of terrorism abroad and generally to avoid case-by-case "litigation" of this issue.

Advantages of the Fall proposal's payment mechanism included: (1) equity by providing each judgment creditor the same percentage of court-awarded compensatory damages; (2) a cap on payments; and (3) no need to use the courts for these payments, avoiding a race to the courthouse.

Proposal

1. Legislation would authorize Treasury to pay a percentage of compensatory damages funded with blocked assets. Provide Secretary of the Treasury authority to make payments to existing judgment creditors (3 cases) using blocked assets that the President would be authorized to vest for this purpose.

- Legislation would differentiate between wrongful death cases, where up to 15% of judgment would be authorized, and surviving hostage cases, where up to 5% of judgment would be authorized. (The percentages could be adjusted based on the likely availability of funds. Rounded percentages are better optically and are easier to work with; however, in the case of Iranian assets, they will not correlate perfectly to available blocked assets to vest.)

- For the three BTTR families, this would require use of approximately $7.5M, and it would be fairly easy to identify a blocked account from an existing pool of approximately $160m blocked assets, such as the one used to make the *ex gratia* payments in 1996, from which to make these payments. We would seek specific legislative authority to do so, notwithstanding the President's exercise of authority to otherwise vest Cuban assets pursuant to the TWEA in 1996. This would ensure Congressional commitment and acceptance of the outcome of the process.

- For the Iran cases, this would require use of approximately $6.625M (approximately $3.375M for Flatow family members, and about $3.25M for Cicippio, Jacobsen, and Reed and their family members). The legislation would specifically authorize the use of rental proceeds from blocked Iranian property (approximately $5M) to make these payments along with future rental proceeds (minus administrative USG expenses), which would cover the gap up to 15% and 5%.

2. Repeal section 117(b), which makes foreign countries liable for punitive damages in cases under the 1996 statute.

3. The legislation might also clarify the President's waiver authority under section 117. However, this is not as important now that the waiver has been upheld in both the BTTR and Flatow cases, and may invite more issues than it resolves.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To Samuel Berger thru James Baker from Charles Allen. Subject: Legislative alternatives to proposals on behalf of Flatow and Brothers to the rescue plaintiffs (4 pages)	09/28/1999	P5 Already sent
002. letter	To President Clinton from Sean Maloney and David Goodfriend. Subject: Kyl / Mack / Lautenberg amendment (1 page)	08/02/1999	P5 Already sent
003. memo	To President Clinton from Samuel Berger et al. Subject: Flatow litigation and related amendments appearing in legislation (Annotations) (4 pages)	08/02/1999	P5 Already sent
004. draft	re: Payment of certain antiterrorism judgements (2 pages)	n.d.	P5 6454
005. statement	re: Explanation of proposal (6 pages)	n.d.	P5 Already sent
006. talking points	re: Alejandre et al v. Republic of Cuba (Partial) (1 page)	09/22/1999	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office

OA/Box Number: 20839

FOLDER TITLE:

Brothers to the Rescue: BTTR [Brothers to the Rescue] [Folder 1]

2009-0342-F
jm671

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6454

SEC. 118. PAYMENT OF CERTAIN ANTITERRORISM JUDGMENTS

(a) PAYMENTS. The Secretary of the Treasury is authorized to pay, subject to subrogation of the United States, pursuant to subsection (b), to the underlying claim against a terrorist-list state, each plaintiff in a case brought under section 1605(a)(7) of title 28, United States Code, that has reached final judgment as of September 30, 1999, [five] percent of the compensatory damages awarded by the court to each individual plaintiff, but ~~not to exceed $[2] million for each such plaintiff.~~

(b) SUBROGATION. Such portions of judgments against terrorist-list states paid pursuant to subsection (a) shall become the claims of the United States against respective terrorist-list states, with the United States fully subrogated to all rights of the judgment holder against such states. The President is authorized to take collection action, as appropriate, and to settle such claims with the respective foreign states.

(c) AMENDMENTS.

(1) Section 1610 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(f)(3) WAIVER -- The President may waive subsections (f)(1) and (f)(2 [illegible] interest of national security."

(2) S [illegible] tion 117 of the Omnibus
Cons [illegible] ental Appropriations Act,
1999, [illegible] tion 101(h), Title I, are
repe [illegible]

JM 671

[Not [illegible] e preferred method would be to
esta [illegible] could commit during
disc [illegible] legislation is required, the
foll [illegible]

[(d) [illegible] OR VICTIMS OF TERRORISM.

(1) [illegible] shall establish a commission
to [illegible] ake recommendations on the
following matters.

(A) Experience under Public Law 104-132, specifically the amendment to the Foreign Sovereign Immunities Act permitting private actions against terrorist-list states, including the lack of effective remedies in view of existing sanctions against

relevant states under U.S. law in the national security interest of the United States.

(B) Options for addressing problems that have arisen in pursuing private actions under this amendment, including alternative approaches to victim compensation for terrorist acts that are the subject of such suits.

(2) REPORT. The commission shall report to the President no ~~later than 12 months after establishment. The President shall~~ transmit the report to the Congress no later than 90 days following receipt of the report from the commission. The report shall contain a detailed statement of the findings and conclusions of the commission, together with the commission's recommendations for such actions as the commission considers appropriate.]

(e) APPROPRIATIONS. For the purpose of making payments under subsection (a), $[__________] are hereby appropriated.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. fax	re: Problems presented by this option (1 page)	02/27/1996	P5 6455 Dup
002. fax	re: Problems presented by this option (1 page)	02/27/1996	P5 6455
003. email	To National Security Advisor from Robert Malley. RE: [Cuba] (1 page)	02/28/1996	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Democracy / Human Rights (Robert Malley)
OA/Box Number: 984

FOLDER TITLE:

Cuba Shootdown [3]

2009-0342-F
vz1090

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6455 Dup

PROBLEMS PRESENTED BY THIS OPTION:

-- The United States has no right under international law to use foreign assets to pay amounts for the benefit of the families of political prisoners in that country. We know of no precedent for such use of foreign assets.

-- Cuba would likely have a valid claim against the United States for these payments, which it could, for example, assert as a counter-claim in any U.S. attempt to press claims against Cuba.

-- This action would set an unfavorable precedent for the taking of American assets abroad in response to U.S. Government actions alleged to be oppressive or unlawful.

-- This action might make it more difficult to secure compensation for the families of the shootdown victims if and when we decide to seek such compensation. (The payment of compensation for unlawful actions comparable to the Cuban shutdown is a normal international remedy that both makes the victim whole and deters a repetition of the unlawful conduct. It in no way absolves or excuses the perpetrator for his actions, nor does it preclude any other remedies against the perpetrator.)

-- This action could lead to complaints or suits by other American claimants who wish to recover against the frozen Cuban assets.

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-- This action could lead to complaints or suits by other American claimants who wish to recover against the frozen Cuban assets.

-- The Helms-Burton bill already authorizes direct U.S. humanitarian assistance to victims of political repression and their families. This option is therefore unnecessary.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Partial memorandum for the President. Factual and Legal Background. (6 pages)	02/1996	P1/b(1)
002. draft	Memorandum for the President (part of Record ID: 9601232). (2 pages)	02/1996	P1/b(1)
003. draft	Partial memorandum for the President. (4 pages)	02/1996	P1/b(1)
004. fax	re: Legislation concerning sanctions (1 page)	01/30/1996	P5 6456
005. fax	re: Top Ten reasons to say No to "The Menendez Compromise" (2 pages)	02/16/1996	P5
006. draft	Incomplete and annotated. Duplicate of 001. (1 page)	02/1996	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Democracy / Human Rights (Robert Malley)
OA/Box Number: 984

FOLDER TITLE:

Cuba Shootdown [6]

2009-0342-F
vz1093

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

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file Helms/Burton

From a strictly legal matter, the D'Amato/Iran bill is preferable to Title III of Helms/Burton. This is because of the following three features:

o First, where the "bad" activity (investment in Iran's oil sector/investment in expropriated properties in Cuba) occurs, the USG need only impose one of a number of listed sanctions. All of the sanctions involve denying the sanctioned person access to benefits from the U.S. as to which the sanctioned person has no legal entitlement. It is much easier to defend telling a foreign person that we will deny him, say, EXIM financing if he invests in Cuba than it is to tell him he will be sued in U.S. courts if he invests in Cuba. The foreign person (and his government) has a good argument that he is legally entitled to be free from the reach of U.S. law if he invests in Cuba. He does not have a good argument that he is legally entitled to EXIM financing, or to receive exports from U.S. entities, or the other things he might be denied if D'Amato/Iran sanctions were imposed.

o Second, there's a contract sanctity provision, so the sanctions don't apply to relationships which were established before the "bad" activity became sanctionable under U.S. law.

o Third, there's an "important to the national interest" waiver clause.

From a foreign policy perspective, the D'Amato/Iran version may be worse, since it would be the Executive Branch itself imposing sanctions on foreign persons, and we would be accountable to foreign governments. With lawsuits, we could simply shrug our shoulders and say we (in the Executive Branch) aren't responsible. (Personally, I'm not sure I buy that argument; although the Executive Branch may not be responsible for lawsuits, the USG, as a whole, would be.) On balance, in view of the weakness of sanctions in the D'Amato/Iran bill, our flexibility in selecting sanctions, and the option of a waiver in really hard cases, I would think the foreign policy difficulties could be managed.

The risk of pursuing the D'Amato/Iran approach, of course, is that the sanctions could be significantly toughened and our flexibility could be greatly limited. Thus, the bill could require us to impose sanctions (e.g., import sanctions, restrictions on entry into the U.S.) under which we would have to deny the sanctioned person something as to which he does have a legal entitlement. The bill could go so far as to require us to treat any sanctioned person as an SDN, i.e., make it illegal for U.S. persons to have any economic dealings with them whatsoever. The waiver and contract sanctity clauses could be gutted. If the features of the D'Amato/Iran bill noted above were eliminated, significant legal issues would remain, and the foreign policy considerations would be much more substantial than they would be under D'Amato/Irann itself.

Another risk of pursuing the D'Amato/Iran approach is that of precedent. If we use "foreign person" sanctions for both Iran and Cuba, we're clearly moving beyond the WMD context in using sanctions as a kind of secondary boycott; we'll be hard pressed to fend off the use of sanctions in this way in other foreign policy contexts. The D'Amato/Iran approach would also impose additional burdens on the Administration to track and review data on investment in Cuba, to make determinations, and to impose and enforce sanctions.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. issue paper	re: State support in the Cuba Shootdown families' case (3 pages)	n.d.	P5 6457

COLLECTION:

Clinton Presidential Records
National Secuirty Council
Inter-American Affairs (Caryn Hollis)
OA/Box Number: 2928

FOLDER TITLE:

Cuba BTTR [Brothers to the Rescue] Legal Lautenberg [3]

2009-0342-F
jm1085

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Freedom of Information Act - [5 U.S.C. 552(b)]

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ISSUE

Whether State should support filing a statement of interest in the Cuba Shootdown families' case currently before the United States District Court for the Southern District of Florida to argue that payments due from certain U.S. telecommunications companies to a Cuban telecommunications entity are immune from being garnished in order to satisfy the plaintiffs' judgments.

ESSENTIAL FACTORS

The families of three U.S. citizen Brothers to the Rescue pilots shot down by the Cuban Air Force sued Cuba and the Cuban Air Force in federal district court in Miami and were awarded judgments totaling $187 million. The plaintiff families are now seeking Cuban assets in the United States that could be used to satisfy their judgments. As part of these efforts, the plaintiffs have served writs of garnishment on certain U.S. telecommunications companies seeking to garnish payments due from those companies to Empresa de Telecomuncaciones de Cuba (ETECSA) under service agreements for the provision of telecommunications services between the United States and Cuba. The provision of direct telecommunications services between the two countries is authorized by the 1992 Cuban Democracy Act (CDA) and is a critical element of the Administration's policy of promoting the development of a civil society and a peaceful transition to a stable, democratic Cuba. Cutting off direct telephone communicatins between our two countries would seriously undermine this policy.

Payments to Cuba for settlement of current services are authorized pursuant to specific licenses issued by the Department of the Treasury's Office of Foreign Assets Control (OFAC). Cuban National Assembly President Ricardo Alarcon said on Cuban television on January 8 that if ETECSA does not receive payments due, Cuba will not continue to provide free telecommunications service between the United States and Cuba. The Cuban Interests Section reiterated this point in a diplomatic note delivered to the Office of Cuban Affairs on January 14 which states, in part: "The Cuban Interests Section wishes to clearly state that a situation of this nature would lead to the interruption of the telephone service between both countries, with all the negative consequences that could bring for both both countries. . . . Once again, the Cuban Interests Section appeals to the Department of State to guarantee that the necessary measures these actions are adopted."

In an effort to avoid this outcome, WHA and EB favor having the Department of Justice file a statement of interest on behalf of the United States in the Florida litigation arguing that the telecommunications payments are immune from garnishment. (We have already filed a statement opposing efforts to attach blocked assets. The Lautenberg Amendment, section 117 of the Omnibus Appropriations Act of FY 99, would have authorized attachment of blocked assets to satisfy judgments in this kind of case, but the President waived the provision.)

L and Justice staff attorneys believe that were the United States to file a further statement of interest in this case, the following two arguments could be made:

1. Under section 515.203(e) of the Cuban Assets Control Regulations (CACR), administered by the Treasury Department, because the payments are property in which Cuba or a Cuban national has an interest, any unauthorized garnishment or other judicial process involving such property is "null and void."
2. According to strong case law precedent, including the Letelier case against Chile, because ETECSA, although a parastatal, is a separate juridical entity from the Republic of Cuba and the Cuban Air Force, it cannot be held liable for the debts of the Cuban government or Air Force.

Section 515.203(e) of the CACR provides, in relevant part, "[u]nless . . . otherwise licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the 'effective date' there existed the interest of [Cuba or a Cuban national]." OFAC argues that, although the first argument is available under a plain face reading of the language in section 515.203(e), OFAC has never read that provision to protect from garnishment or other judicial process assets that are transferable pursuant to specific license, as opposed to assets that are blocked. OFAC argues that the purpose of that section was to protect from judicial process only blocked property and that policy concerns (including how the proposed interpretation of the regulation would affect other blocking programs, specifically Libya) mitigate against raising the first argument in a statement of interest. WHA and EB do not believe that OFAC's policy concerns are compelling enough to outweigh the foreign policy interest in maintaining telecommunications between the United States and Cuba, reiterated strongly in the President's January 5 announcement concerning increased direct people-to-people contact between our two countries.

L and Justice staff attorneys agree that both arguments have merit and are reasonably persuasive. Nonetheless, because the judge in this case is highly sympathetic to the plaintiffs, it is not expected that he will issue a ruling favorable to the position the USG would take in a statement of interest. For that reason, OFAC opposes filing any statement of interest in this case and proposes either of two alternatives: (1) file no statement of interest or (2) revoke the specific licenses under which the telecommunications payments are permitted. Under alternative (2), the assets in question would revert to OFAC jurisdiction and could be blocked, permitting the USG to determine how to handle the assets. This alternative also would mean that USG action would bring about exactly what we have been trying to avoid through an unfavorable judicial decision -- ie, the interruption of telecommunications payments to ETECSA which would probably result in a cut off of direct telecommunications between the United States and Cuba. Moreover, this would not solve the problem because plaintiffs would continue to threaten garnishment of these assets if Treasury were to issue new specific licenses.

Filing a statement of interest is the only means by which the United States can attempt to influence the district court not to order garnishment of the telecommunications payments. Failure to file a statement that raises all appropriate legal arguments not only would deprive the USG of that opportunity but also would prejudice our ability to raise arguments against the propriety and legality of such garnishment on appeal. The Cuban government could also exploit a failure to file as implicit USG support for the plaintiffs' efforts.

Immediate policy guidance is needed on whether to file a statement of interest in this matter and, if so, what arguments policymakers would like to make in such a statement. Depending on when the plaintiffs submit their next filing to the court, we have until no later than February 1 -- and possibly as early as January 20 -- to draft and file a statement in time to have it considered by the court in ruling on whether to allow the writs of garnishment.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Charles Allen to Samuel Berger re: Decision in the "Brothers to the Rescue" Case (1 page)	04/07/1999	P5
001b. memo	Charles Ruff and Samuel Berger to President Clinton re: Decision in the "Brothers to the Rescue" Case (4 pages)	n.d.	P5 2559
001c. memo	For the President from Samuel Berger. Re: Phone Links. Record ID: 9901430. (2 pages)	03/08/1999	P1/b(1)
001d. summary	Situation Room summary re: Cuba (1 page)	02/25/1999	P5
001e. memo	Samuel Berger and Larry Stein to President Clinton re: Waiver of Requirements Relating to Blocked Property of Terror-List States (2 pages)	10/21/1998	P5 6458
001f. memo	President Clinton to Secretary of State and Secretary of Treasury re: Determination to Waiver Requirements Relating to Blocked Property of Terrorist-List States (1 page)	10/21/1998	P5 6459
001g. memo	re: Justification for Waiver (1 page)	n.d.	P5 6460
001h. memo	Thomas Pickering to President Clinton re: Waiver of Requirements Relating to Blocked and Regulated Property of Terrorist-List States (2 pages)	10/17/1998	P5 6461

COLLECTION:

Clinton Presidential Records
National Security Council
Inter-American Affairs (Caryn Hollis)
OA/Box Number: 2928

FOLDER TITLE:

Cuba BTTR [Brothers to the Rescue] Legal Lautenberg [5]

2009-0342-F
vz1095

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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2559 Dup

THE WHITE HOUSE

WASHINGTON

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F. C. RUFF
SAMUEL BERGER

SUBJECT: Decision in the "Brothers to the Rescue" Case

This is to provide you with a status report and background information concerning the litigation arising out of the shooting down of "Brothers to the Rescue" (BTTR) pilots by Cuban MIGs in February 1996.

In December 1997, the families of the pilots obtained a $187 million judgment against Cuba, in the Southern District of Florida, under a 1996 amendment to the Foreign Sovereign Immunities Act, allowing civil suits against state sponsors of terrorism notwithstanding the general rule that courts lack jurisdiction over claims brought against a foreign state. There followed the current action in which plaintiffs are attempting to collect on their judgment by attaching blocked Cuban assets and garnishing OFAC-licensed telecom payments.

On March 18, the district court (Judge King) ruled against the telecom companies in an opinion that could undermine U.S. policy with respect to Cuba as well as other terrorist-list countries by, among other things, negating blocking programs. (The total of blocked Cuban assets is $178 million.)

At issue in the BTTR case, as well as in similar judgments against Iran, is section 117 of the Omnibus Appropriations Act for FY99, which amends the Foreign Sovereign Immunities Act (FSIA) to permit holders of judgments against terrorist-list countries to attach properties blocked under various national security statutes, "notwithstanding any other provision of law." Section 117 also requires State and Treasury to assist judgment holders in identifying, locating, and executing against the property of such countries.

cc: Vice President
Chief of Staff

Section 117(d) allows you to waive these attachment and assistance provisions "in the interest of national security." You exercised the waiver (Tab B) on the day of enactment, October 21, 1998, identifying significant national security interests that would be affected by allowing attachment of blocked assets. These include (1) impairment of our ability to administer sanctions programs that involve the blocking of assets of terrorist states to protect national security; (2) as applied to foreign diplomatic property, contravention of international legal obligations upon which we rely to protect diplomats and citizens abroad; and (3) removal of blocked assets as part of an equitable program for settlement of all U.S. claims against a given terrorist state.

The court invalidated your waiver, concluding that Congress did not intend to permit waiver of the part of section 117 that allows plaintiffs to collect from blocked assets or other immune property such as licensed telecom payments. The court held that plaintiffs are entitled to both blocked Cuban assets and over $6 million in telecom payments owed to the Cuban telephone company.

[In March, Sandy sent you an information memo (Tab A) on Cuba's decision to cut off phone links because the telecom companies suspended payments. Because the companies have been able to route calls through third countries, the Cuban action has not had a significant effect on phone service. We are not in a position to judge whether this will have a longer-term effect on consumer costs. Past practice (before direct links) indicates the indirect links bring higher consumer costs and more revenue for the Cuban telephone company.]

The USG has intervened as a party for purposes of appeal. The judge granted the telecom companies' motion to stay the garnishment orders pending appeal, upon payment of bonds. The USG and the telecom companies have filed notices of appeal, and this week the USG plans to file with the Eleventh Circuit a motion for expedited briefing schedule.

Justice believes it has a very good case for upholding the waiver of section 117. State, Treasury, and NSC Legal concur. We argued in the district court that the waiver is proper based on the plain language of the statute, which provides that you may waive section 117 "requirements," including the provision that blocked foreign-state property "shall be subject to execution or attachment in aid of execution." The court held, however, that the waiver authority extends only to the requirement that the USG help judgment creditors locate and execute against unblocked assets of terrorist states. The court drew on a very limited legislative history, consisting of conflicting Members' statements during debate and statements made after passage. There were no hearings and only limited floor action on section 117. Although characterizing the statutory language as "ambiguous," the court limited the scope of the waiver despite the significant foreign policy and national security effects of the decision.

The decision brings to the fore the serious foreign policy and national security concerns that were the basis for exercising the waiver last fall. It would divert the OFAC-licensed telecom payments to plaintiffs and, upon execution of further writs, potentially consume the $178 million in blocked Cuban assets, and would remove our leverage in dealing with Cuba. Should the same result obtain in the Flatow case (involving claims against Iran), it would also squarely implicate the concerns we have about the threat of attachment of diplomatic property and our obligations to the Iran-U.S. Claims Tribunal under the Algiers Accords that ended the hostage crisis.

In addition to undermining blocking programs, the depletion of blocked assets removes any reasonable opportunity for even partial payment of the over $6 billion in other claims against Cuba adjudicated in the early 1970s by the Foreign Claims Settlement Commission (FCSC). Although most of the 5,911 FCSC-certified claims are for expropriation, a few involve wrongful death claims and are as deserving of compensation as those of the BTTR families. One case involved an ex-Marine who was arrested in Cuba along with another American and two Cubans in 1960 for counter-revolutionary activities. They were tried the same day, and the two Americans were sentenced to death. The appeals were dispatched in about five minutes the same day, and the two Americans were executed by firing squad the next day.

We have made clear throughout the BTTR litigation that the need to protect blocked assets is completely separate from the sympathy we all share for the families and our unrelenting commitment against terrorism. The USG took strong steps against Cuba following the shoot-down and marshaled forceful international condemnation of it. Later that same year, you directed Treasury to vest $1.2 million in blocked Cuban assets to make ex gratia humanitarian payments to the four families.

We have been able to provide to plaintiffs in the Iran cases some information on unblocked commercial assets that may be available for attachment; however, there appear to be no similar Cuban assets. Therefore, aside from factoring the BTTR judgment into any global claims settlement that may be reached in the future, plaintiffs have little hope of collecting except from blocked Cuban assets or the licensed telecom payments, which assets we consider immune from attachment and execution by operation of the section 117 waiver.

As with the ex gratia payments made in 1996, it might be possible to direct further payments to the BTTR families, perhaps as part of a settlement of the pending litigation. (This would not be possible in the cases against Iran, however, since the statute under which Iranian property is blocked does not allow vesting of property as does the Trading with the Enemy Act under which Cuban assets are blocked.) It is unclear whether plaintiffs would be interested in settlement for an amount significantly smaller than their judgment. In the interest of fairness to similarly situated certified claimants against Cuba, we could at the same time consider vesting funds for at least partial payment of the FCSC-certified wrongful death claims.

A disadvantage to this approach is that we do not have a way to accomplish the same result in the cases against Iran (i.e., Flatow and Cicippio, Jacobsen, and Reed), and we do not know whether plaintiffs in those cases will succeed in attaching the relatively limited unblocked commercial assets of Iran.

In sum, the legitimate claims of the BTTR families cannot be addressed without seriously undermining important, broader foreign policy concerns and diverting available assets to which other, equally legitimate, plaintiffs have a claim.

Attachments
Tab A Memorandum to the President of March 15, 1999
Tab B PD 99-1 (Waiver of section 117)

6458

7109

THE WHITE HOUSE

WASHINGTON

'98 OCT 21 P3:05

October 21, 1998

ACTION

MEMORANDUM FOR THE PRESIDENT

THROUGH: THE EXECUTIVE CLERK

FROM: SAMUEL BERGER
LARRY STEIN

SUBJECT: Waiver of Requirements Relating to Blocked Property of Terrorist-List States

Purpose

To waive the requirements of a provision in the Omnibus Appropriations Act that would allow certain private claimants to execute court judgments by attaching blocked assets of terrorist-list states.

Background

The omnibus appropriations bill contains a section that amends the Foreign Sovereign Immunities Act (FSIA) to permit holders of judgments against terrorist-list states to attach property blocked under various national security statutes, notwithstanding any other provision of law. It also requires the State and Treasury Departments to assist judgment holders in identifying, locating, and executing against such property. The section includes Presidential waiver authority, which allows you to waive the requirements of these FSIA amendments "in the interest of national security." The Administration vigorously opposed this bill, while highlighting our efforts to combat terrorism through other means as well as our willingness to take reasonable steps to help plaintiffs identify unblocked assets.

This section presents serious constitutional questions as applied to blocked foreign embassy properties, such as those of Iran. In addition, there are significant national security implications. As applied to diplomatic or consular property, it would place the United States in breach of treaty obligations upon which we rely to protect our own personnel and facilities abroad. By allowing private judgment holders to obtain blocked

cc: Vice President
Chief of Staff

property, it would effectively eliminate leverage over such states (as we used in gaining release of hostages held by Iran). Moreover, it could seriously affect our ability to enter into global claims settlements that are fair to all U.S. claimants, and could result in U.S. taxpayer liability in the event of a contrary judgment by the Iran-U.S. Claims Tribunal.

Plaintiffs with judgments against Iran (e.g., Stephen Flatow) and Cuba (families of four shootdown victims) are expected to attempt to use this provision immediately upon enactment. In the Flatow case, for example, writs of attachment against Iran's diplomatic properties are currently in litigation. The attachment of blocked Cuban assets would deny us use of the funds to compensate the thousands of certified claimants to confiscated properties, and would diminish our leverage to influence events in Cuba during a transition. Therefore, it is necessary to exercise the waiver upon signing the bill, which will permit Justice to make immediate use of the waiver in proceedings to prevent attachment of the properties as necessary in the U.S. national security interest.

The statutory waiver can be read as ambiguous in its reach. The executive branch, including Justice (OLC), believes that it reaches attachments as well as the requirements for Treasury and State assistance. However, we can anticipate that plaintiffs will take a more narrow view and seek to litigate the scope of the waiver.

RECOMMENDATION

That you sign the determination at Tab A to effect the waiver.

Attachments
Tab A Determination
Tab B Justification

6459

THE WHITE HOUSE

WASHINGTON

October 21, 1998

Presidential Determination
No. 99-1

MEMORANDUM FOR THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY

SUBJECT: Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 117 of the Treasury and General Government Appropriations Act, 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (approved October 21, 1998), I hereby determine that the requirements of section 117, including the requirement that 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), and proclamations, orders, regulations, and licenses issued pursuant thereto, be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state claiming such property is not immune from the jurisdiction of courts of the United States or of the States under section 1605(a)(7) of title 28, United States Code, would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions, and, therefore, pursuant to section 117(d), I hereby waive the requirements of section 117 in the interest of national security.

The Secretary of State is authorized and directed to publish this determination in the Federal Register.

William J. Clinton

JUSTIFICATION FOR WAIVER

The requirements of section of Public Law 105-XXX would seriously interfere with the ability of the President to effectively block foreign property as a tool of foreign policy. By allowing private judgment holders to have direct access to blocked property, they could, in many instances, eliminate the leverage we have in negotiating with renegade states (as we did in obtaining the release of the American hostages held by Iran from 1979 to 1981). They would also permanently impair our ability to administer current and future sanctions programs that involve the blocking of assets of terrorist states to protect national security. They would diminish our leverage in dealing with a successor or transition government. In addition, the provisions would make such blocked assets available on a first-come, first-served basis rather than as part of an equitable program available to all claimants.

Because the requirements of section of Public Law 105-XXX are, in part, expressly directed at foreign diplomatic property, they could also cause us to contravene important principles of international law upon which the United States relies to protect the interests of American diplomats and citizens abroad. To the extent that these provisions were actually applied to foreign embassy property, they would be invalid intrusions upon the President's constitutional authority over foreign affairs.

Moreover, the requirements of section of Public Law 105-XXX apply to properties which are the subject of claims before the Iran-United States Claims Tribunal. They could thus result in liability to the United States, causing the American taxpayer ultimately to bear the cost of these private judgments, thereby subsidizing the very terrorism we all wish to punish.

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DEPARTMENT OF STATE
WASHINGTON

October 17, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Thomas R. Pickering, Acting

SUBJECT: Waiver of Requirements Relating to Blocked and Regulated Property of Terrorist-List States

The omnibus appropriations legislation which is expected to be enacted shortly includes Section 117 relating to the execution of judgments against terrorist list states for personal injuries or deaths caused by terrorist acts. Section 117 amends the Foreign Sovereign Immunities Act to permit holders of such judgments to attach and execute against any property of such states which has been blocked (or transactions in which are regulated) pursuant to various national security statutes, notwithstanding any other provision of law. It also requires the Departments of State and Treasury to "fully, promptly and effectively assist" such judgment holders in identifying, locating and executing against such property. Finally, it provides for a Presidential waiver of the "requirements" of the amendment "in the interest of national security."

While this administration has been unmatched in its determination to combat terrorism, and while we certainly have the deepest sympathy for the victims of terrorist acts, if allowed to be implemented, this legislation would be seriously detrimental to your ability to use the blocking of foreign property to further significant national security and foreign policy goals, including that of combating terrorism. Since it applies to foreign diplomatic and consular property, it could also cause the United States to violate important international legal principles which we rely upon to protect our own diplomats and citizens abroad. By inviting retaliation, it could thus jeopardize the safety and security of United States premises and personnel abroad. And because much blocked property is the subject of foreign claims against us, it could result in international liability to the United States, causing the American taxpayer ultimately to bear the cost of these private judgments and, in effect, to subsidize terrorist activity.

Attached (Tab A) is proposed language for a Presidential Determination waiving the requirements of the legislation. Also attached (Tab B) is a suggested justification for such a determination. Both of these documents have been cleared with the appropriate officials of the Office of Foreign Assets Control in the Department of the Treasury and the Office of Legal Counsel and the Federal Programs Branch of the Department of Justice. Action to waive the provision is needed immediately upon enactment of the omnibus appropriations legislation in order to allow us to protect the national security interests involved.

Recommendation:

The Department of State recommends that you make the suggested determination.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. memo	Charles Allen thru James Baker to Samuel Berger re: Treasury-Postal Appropriations Bill Ammendment and Flatow Litigation (1 page)	06/25/1999	P5	2561
001b. memo	Samuel Berger, Charles Ruff, and Larry Stein to President Clinton re: Treasury-Postal Appropriations Bill Ammendment and Flatow Litigation (3 pages)	n.d.	P5	6462
001c. attachment	re: Status of Flatow Litigation and Assistance to Mr. Flatow (2 pages)	n.d.	P5	2571
002. memo	Charles Ruff and Samuel Berger to President Clinton re: Decision in the "Brothers to the Rescue" Case (6 pages)	n.d.	P5	6463

COLLECTION:

Clinton Presidential Records
National Security Council
Inter-American Affairs (Caryn Hollis)
OA/Box Number: 2928

FOLDER TITLE:

Cuba BTTR [Brothers to the Rescue] Legal Lautenberg [6]

2009-0342-F
jm1086

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6462

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THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER
CHARLES F. C. RUFF
LARRY STEIN

SUBJECT: Treasury-Postal Appropriations Bill Amendment and Flatow Litigation

Purpose

To obtain your guidance in addressing an amendment to the Senate Appropriations Committee-passed Treasury-Postal bill that would permit attachment of U.S. judgment funds payable by the United States to certain foreign states, permit attachment of foreign diplomatic property other than embassies, and permit attachment of U.S. telecom payments to Cuban entities. And, to keep you informed about our efforts to assist Stephen Flatow and the status of litigation to collect on his judgment against Iran.

Background

Treasury-Postal bill. On June 24, an amendment offered by Senators Kyl, Mack, and Lautenberg was adopted in the Appropriations Committee by voice vote. It is designed to ensure that Flatow and other plaintiffs (e.g., Brothers to the Rescue families) can get blocked assets and U.S. funds owed to terrorist-list states. Although there was no opposition to the amendment in Committee, Chairman Stevens and Ranking Member Dorgan stated that the Administration has serious concerns with the amendment, and Stevens said that these issues should be addressed on the floor or in conference.

The amendment would repeal your waiver authority under section 117, providing in its place authority to waive only the attachment of a foreign embassy ("principal office of a foreign mission"). The amendment also allows attachment of U.S. funds due or payable to a targeted country such as Iran. Thus,

cc: Vice President
Chief of Staff

plaintiffs could attach the Judgment Fund payment of last year's Iran-U.S. Tribunal award (over $6 million) as well as other debts or funds that may be held pending resolution of claims (e.g., the $400 million of Iranian funds that we are holding in the FMS Trust Fund).

We have discussed the serious national security implications of eliminating blocked assets as leverage, which this amendment would do. An express waiver of U.S. sovereign immunity over U.S. judgment funds subject to foreign claims awards is a major problem as well. In the event of an attachment, we would still owe Iran the Tribunal award and could find U.S. assets in third countries attached to collect it, or would have to find some other way to pay it from the U.S. Treasury at taxpayers' expense.

Although the Treasury-Postal bill seems to be free of other major problems, this amendment is of such gravity that we would recommend veto of a bill containing it. For these reasons we will oppose the addition of this Amendment in the House and, if necessary, in conference. It would strengthen our hand if we communicate that our concerns rise to the level of a veto. This may be the only way to avert this amendment or ultimately provide sufficient leverage for a compromise. We lack support on the Hill for our position; a veto threat, however, would force legislators to factor in the risk of veto on an appropriations bill. However, we do not want to oversell our ability to find common ground. Perhaps, for example, we could accept an asset-by-asset waiver authority and take the decision to allow some discrete properties or funds to be exposed (e.g., rental proceeds from Iranian diplomatic properties). (We expect State to argue that this would have serious consequences for the Tribunal process, but tough decisions like this might be necessary to avoid a provision that would eviscerate the Tribunal process.) There is risk, however, that you would be put in the position of waiving repeatedly before plaintiffs are able to identify an appropriate blocked asset to attach.

With respect to the amendment's provision on Cuba, we continue to believe that we need to see our appeal through on Judge King's adverse order with respect to your existing waiver authority before considering possible settlement solutions. Chuck is in frequent contact with Senator Graham on this front.

As a separate matter, while we have identified business-sensitive documents that may help the Flatows attach unblocked

Iranian bank assets, the chain of ownership is often clouded and subject to competitive claims and thus litigation. (A more detailed review of the Flatow litigation is attached at Tab A.)

RECOMMENDATION

That you authorize a veto threat of the Treasury-Postal bill if it contains this amendment.

Approve ________________

Disapprove ______________

Attachment
Tab A Status of Flatow Litigation

BTTR shootdown families

6463

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F. C. RUFF
SAMUEL BERGER

SUBJECT: Decision in the "Brothers to the Rescue" Case

This is to provide you with a status report and background information concerning the litigation arising out of the shooting down of "Brothers to the Rescue" (BTTR) pilots by Cuban MIGs in February 1996.

In December 1997, the families of the pilots obtained a $187 million judgment against Cuba, in the Southern District of Florida, under a 1996 amendment to the Foreign Sovereign Immunities Act, allowing civil suits against state sponsors of terrorism notwithstanding the general rule that courts lack jurisdiction over claims brought against a foreign state. There followed the current action in which plaintiffs are attempting to collect on their judgment by attaching blocked Cuban assets and garnishing OFAC-licensed telecom payments.

On March 18, the district court (Judge King) ruled against the telecom companies in an opinion that could undermine U.S. policy with respect to Cuba as well as other terrorist-list countries by, among other things, negating blocking programs. (The total of blocked Cuban assets is $178 million.)

At issue in the BTTR case, as well as in similar judgments against Iran, is section 117 of the Omnibus Appropriations Act for FY99, which amends the Foreign Sovereign Immunities Act (FSIA) to permit holders of judgments against terrorist-list countries to attach properties blocked under various national security statutes, "notwithstanding any other provision of law." Section 117 also requires State and Treasury to assist judgment holders in identifying, locating, and executing against the property of such countries.

cc: Vice President
Chief of Staff

Section 117(d) allows you to waive these attachment and assistance provisions "in the interest of national security." You exercised the waiver (Tab A) on the day of enactment, October 21, 1998, identifying significant national security interests that would be affected by allowing attachment of blocked assets. These include (1) impairment of our ability to administer sanctions programs that involve the blocking of assets of terrorist states to protect national security; (2) as applied to foreign diplomatic property, contravention of international legal obligations upon which we rely to protect diplomats and citizens abroad; and (3) removal of blocked assets as part of an equitable program for settlement of all U.S. claims against a given terrorist-list state.

The court invalidated your waiver, concluding that Congress did not intend to permit waiver of the part of section 117 that allows plaintiffs to collect from blocked assets or other immune property such as licensed telecom payments. The court ordered garnishment of over $6 million in debts payable by U.S. telecom companies to the Cuban telephone company. The decision interferes with the USG's ability to carry out the purposes of the Cuban Democracy Act of 1992, which permits the special licensing of payments to Cuban entities for telecom services. This policy of fostering communications links between Americans and the people of Cuba enjoys broad bipartisan support. In addition, the court's decision leaves little doubt that the blocked accounts are also subject to execution.

[In March, Sandy sent you an information memo (Tab B) on Cuba's decision to cut off phone links because the telecom companies suspended payments. Because the companies have been able to route calls through third countries, the Cuban action has not had a significant effect on phone service so far. We are not in a position to judge whether this will have a longer-term effect on consumer costs. Past practice (before direct links) indicates the indirect links bring higher consumer costs and more revenue for the Cuban telephone company.]

The USG has intervened as a party for purposes of appeal. The judge granted the telecom companies' motion to stay the garnishment orders pending appeal, upon payment of bonds. The Justice Department and the telecom companies filed notices of appeal seeking review in the Eleventh Circuit. On April 7 the Justice Department moved to consolidate its appeal with those of the telecom companies and requested an expedited briefing schedule.

Justice believes it has a very good case for upholding the waiver of section 117. State, Treasury, and NSC Legal concur. We argued in the district court that the waiver is proper based on the plain language of the statute, which provides that you may waive section 117 "requirements," including the provision that blocked foreign-state property "shall be subject to execution or attachment in aid of execution." The court held, however, that the waiver authority extends only to the requirement that the USG help judgment creditors locate and execute against unblocked assets of terrorist states. The court drew on a very limited legislative history, consisting of conflicting Members' statements during debate and statements made after passage. There were no hearings and only limited floor action on section 117. Although characterizing the statutory language as "ambiguous," the court limited the scope of the waiver despite the significant foreign policy and national security effects of the decision.

The decision brings to the fore the serious foreign policy and national security concerns - which go far beyond interference with Cuban telecommunications links - that were the basis for exercising the waiver last fall. It would divert the OFAC-licensed telecom payments to plaintiffs and, upon execution of further writs, potentially consume the $178 million in blocked Cuban assets. Blocking assets is one of the primary tools at our disposal to combat terrorism and other conduct that threatens the security of the United States and our citizens. The United States relies on blocking assets to seek to modify the conduct of countries that threaten our national security, economic, and foreign policy interests, currently including Iraq, Libya, North Korea, Sudan, the Federal Republic of Yugoslavia, and Cuba. Blocking assets permits the United States to deprive terrorist-list countries of resources they could use to harm our interests, and to disrupt their ability to carry out international financial transactions. Your ability to maintain control over blocked assets is essential to the effectiveness of blocking programs as a policy tool. Any leverage that blocking provides you is severely diminished if blocked assets are subject to execution by third parties.

Should the same result obtain in the Flatow case (involving claims against Iran), it would squarely implicate the concerns we have about the threat of attachment of diplomatic property. Under the Vienna Convention on Diplomatic Relations, the United States has a continuing duty to respect and protect these properties as inviolable. Court-ordered execution on diplomatic property to satisfy private judgments would place the United States in violation of our international responsibilities and would erode a fundamental protection for vital U.S. interests abroad - the principle that diplomatic property is to be protected regardless of bilateral relations with another country. Undermining this legal commitment would put at risk the protection we enjoy at every U.S. embassy and consulate around the world.

Execution on the blocked Iranian diplomatic properties would also place us in breach of our obligations to the Iran-U.S. Claims Tribunal, to which we in the Algiers Accords that ended the hostage crisis. The Iranian diplomatic properties are the subject of disputes before the Tribunal. By agreement of both countries in the Algiers Accords, the awards of the Tribunal are final, binding and enforceable in the courts of any country. As a result, if a U.S. court allowed execution on these assets, the U.S. Government could be liable for the value of the properties pursuant to a Tribunal award.

Certain blocked Cuban bank accounts are licensed for use by Cuba's Permanent Mission to the United Nations. Execution on these accounts would contravene important international obligations owed by the United States to the United Nations and Member States. There would be serious adverse consequences for the conduct of U.S. foreign relations if the United States is prevented from honoring its obligations, under the UN Charter and other applicable agreements, to permit and protect the functioning of UN Missions. This would lead to public criticism from the United Nations and Member States, and impair our ability to advance U.S. policy interests through UN mechanisms. In addition, violations of our obligations could lead to international dispute settlement proceedings under the Headquarters Agreement, and could give rise to claims by Cuba or the United Nations, including claims of pecuniary liability.

The court's decision also opens a channel for private judgment creditors to garnish OFAC-licensed payments by U.S. airline companies to fly through Cuba's three international flight corridors. Execution against these funds would follow the same path plaintiffs have already used regarding the licensed telecom payments, and plaintiffs' counsel have indicated their interest in taking writs against the overflight payments, which total about $8 million annually. Cuba's closure of the flight corridors due to nonpayment of these fees would result in significant added flight times and expense to the airline companies.

Retention of blocked assets also strengthens your hand in efforts to resolve the valid U.S. nationals' claims with a future democratic transition government in Cuba. Past blocking programs similar to the Cuban asset blocking program have been the source of some or all of the funds paid in claims settlement agreements the USG concluded with Yugoslavia, Bulgaria, Hungary, Romania, Czechoslovakia, and Vietnam.

The depletion of blocked assets by court-ordered execution against them removes any reasonable opportunity for even partial payment of the over $6 billion in claims against Cuba adjudicated in the early 1970s by the Foreign Claims Settlement Commission (FCSC). Although most of the 5,911 FCSC-certified claims are for expropriation, a few involve wrongful death claims and are as deserving of compensation as those of the BTTR families. One case involved an ex-Marine who was arrested in Cuba along with another American and two Cubans in 1960 for counter-revolutionary activities. They were tried the same day, and the two Americans were sentenced to death. The appeals were dispatched in about five minutes the same day, and the two Americans were executed by firing squad the next day.

We have made clear throughout the BTTR litigation that the need to protect blocked assets is completely separate from the sympathy we all share for the families and our unrelenting commitment against terrorism. The USG took strong steps against Cuba following the shoot-down and marshaled forceful international condemnation of it. Later that same year, you directed Treasury to vest $1.2 million in blocked Cuban assets to make ex gratia humanitarian payments to the four families.

We have been able to provide to plaintiffs in the Iran cases some information on unblocked commercial assets that may be available for attachment; however, there appear to be no similar Cuban assets. Therefore, aside from factoring the BTTR judgment into any global claims settlement that may be reached in the future, plaintiffs have little hope of collecting except from blocked Cuban assets or the licensed telecom or overflight payments, which assets we consider immune from attachment and execution by operation of the section 117 waiver.

As with the ex gratia payments made in 1996, it might be possible to direct further payments to the BTTR families, perhaps as part of a settlement of the pending litigation. (This would not be possible in the cases against Iran, however, since the statute under which Iranian property is blocked does not allow vesting of property as does the Trading with the Enemy Act under which Cuban assets are blocked.) It is unclear whether plaintiffs would be interested in settlement for an amount significantly smaller than their judgment. In the interest of fairness to similarly situated certified claimants against Cuba, we could at the same time consider vesting funds for at least partial payment of the FCSC-certified wrongful death claims.

A disadvantage to this approach is that we do not have a way to accomplish the same result in the cases against Iran (i.e., Flatow and Cicippio, Jacobsen, and Reed), and we do not know whether plaintiffs in those cases will succeed in attaching the relatively limited unblocked commercial assets of Iran.

In sum, the legitimate claims of the BTTR families cannot be addressed without seriously undermining important, broader foreign policy concerns and diverting available assets to which other, equally legitimate, plaintiffs have a claim.

Attachments
Tab A PD 99-1 (Waiver of section 117)
Tab B Memorandum to the President of March 15, 1999

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. fax	David Newman to Fulton Armstrong re: Statement of the United States of America (Annotations) (1 page)	11/19/1996	P5 6464
001b. statement	re: David Newman's draft statement of the United States of America (Edits) (2 pages)	11/19/1996	P5 6465
002a. note	Fulton to Jim re: Draft statement and guidance (1 page)	n.d.	P5 6466
002b. statement	re: David Newman's draft statement of the United States of America (Annotations) (3 pages)	11/14/1996	P5 6467
002c. press guidance	re: Proceedings before ICAO on the Cuban Overflight Complaint (Annotations) (2 pages)	11/14/1996	P5 6468
002d. memo	David Newman to Fulton Armstrong et al re: Cuban Overflight Complaint (Annotations) (1 page)	10/16/1996	P5 6469
002e. statement	re: Counter-Memorial of the United States of America (Annotations) (5 pages)	10/16/1996	P5 6470
003. memo	Assistant Secretary's [of State] Daily Morning Report. (2 pages)	10/02/1996	P1/b(1)
004. memo	For John Hamilton, Mike Ranneberger and Janice Jacobs. Re: ICAO Status. (2 pages)	10/02/1996	P1/b(1)
005. memo	For Anne. Re: ICAO Status. (2 pages)	09/12/1996	P1/b(1)
006a. memo	For Jim. Re: Options for ICAO. (1 page)	n.d.	P1/b(1)
006b. memo	To Cuban Affairs from Fulton Armstrong. Re: Air Routes. (2 pages)	09/13/1996	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Inter-American Affairs (Caryn Hollis)
OA/Box Number: 2927

FOLDER TITLE:

ICAO [International Civil Aviation Organization]: ICAO Cuban Overflight [2]

2009-0342-F
vz1102

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

- C. Closed in accordance with restrictions contained in donor's deed of gift.
- PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
- RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6464

OFFICE OF THE ASSISTANT LEGAL ADVISER FOR ECONOMIC, BUSINESS AND COMMUNICATIONS AFFAIRS (L/EBC)

FAX COVER SHEET

Date: 11/14

Transmitted to:

Name: FULTON ARMSTRONG

Organization: NSC

Fax number: 456-9130

Telephone:

Transmitted from:

David Newman
Attorney-Adviser for
Economic, Business and Communication Affairs
Department of State
Room 6420
Washington, D.C. 20520
Telephone: (202) 647-7772
Fax: (202) 647-4180

FULTON -

PER TELEPHONE MESSAGE - THE US MISSION TO ICAO ~~SAYS~~ INSISTS WE REMOVE THE ITALICIZED LANGUAGE. THEY SAY WE WILL PREVAIL SO LONG AS WE DON'T RAISE POLITICAL HACKLES. I ADVISED THAT I WOULD NEED NSC CLEARANCE FOR THE CHANGE. I LEAVE ~1:00 TODAY. THANKS

Pages being transmitted (not including cover page): ~~4~~ 2

6465

STATEMENT
OF THE
UNITED STATES OF AMERICA

Thank you Mr. President, I will summarize the U.S. response to the Cuban complaint.

Cuba asserted that the United States causes an injustice by not permitting Cuba's national airline to fly the most economical routes between Havana and points in Canada. Cuba notes that it has raised this issue before the 31st Session of the Assembly, but that months have passed without the issue being resolved. Cuba argues that it cannot be expected to wait forever. Cuba asks for immediate correction of this alleged injustice, without regard for the impact of its own recent gross injustice -- the February 24, 1996, shootdown, in international air space, of two unarmed civilian aircraft of U.S. registration, which killed all four persons on board.

The United States rejects Cuba's assertions that U.S. treatment of Cuban-registered aircraft is illegal or causes "injustice and hardship." Moreover, we believe that Council consideration of these issues now would undermine the process initiated by the 31st Session of the Assembly, in September 1995, in response to Cuba's request for the Assembly's assistance concerning overflights of U.S. territory. At that time, the Assembly determined that the matter "would best be left to continuing diplomatic efforts by the President of the Council and the Secretary General." This conclusion was based, at least in part, upon the Economic Commission's determination that "some progress had been made in addressing the particular difficulties faced by Cuba through the good offices of the President of the ICAO Council."

The President of the ICAO Council pursued the Assembly's mandate through correspondence and personal meetings with senior U.S. Government officials in the United States, on January 22, 1996, accompanied by the U.S. Representative on the Council of ICAO. Relative to those meetings, the President subsequently reported to the Council that the spirit of cooperation and understanding prevailed.

On February 24, 1996, Cuba shattered the spirit of cooperation and understanding that the President found in the United States, when it ordered two of its air force fighter jets to shoot out of the sky, without warning and without any attempt at communication, two unarmed civilian aircraft of U.S. registration. That attack killed four residents of the United States, including three U.S. citizens.

[Further, Cuba compounded the injury by rejecting the findings of the ICAO Fact-Finding Investigation and rejecting the United Nations Security Council Resolution citing Cuba's unlawful shooting down of these two civil aircraft. Cuba has shown no remorse, no willingness to foreswear the use of force against civil aircraft in similar

circumstances in the future, and no willingness to compensate the family members of its victims.]

The United States [*does not refer to these acts of the Cuban Government with the purpose of politicizing the events. Rather, we]* summarizes those events here only to provide the proper context for the Council's consideration of this matter. Cuba argues that it waited long enough for the Council President to resolve through diplomacy the matter that Cuba brought to the attention of the Assembly. However, the United States asks the Council to recognize that the Cuban Government's own actions undermined the Council President's efforts to resolve this matter.

For these reasons, the United States respectfully requests that the Council defer further consideration of the Complaint while the Council President continues diplomatic efforts to resolve the dispute, in accordance with the mandate of the 31st Assembly. Further, the United States respectfully reserves its right to file, at a later date, if necessary, a supplementary counter-memorial addressing the points raised in Cuba's Memorial and providing additional facts, supporting data, and conclusions of law.

DAVID S. NEWMAN
Attorney Adviser
U.S. Department of State

Dated: November 20, 1996

6466

~~Tony-~~

Attached is draft statement + guidance for use at ICAO -- following up on attached counter-memorial we cleared last month.

I have a couple comments.

OK with you? Fulton

Pls. return

6467

Before the Council of the International Civil Aviation Organization (ICAO) under the ICAO Rules for the Settlement of Differences (Doc 7782/2).

STATEMENT OF THE UNITED STATES OF AMERICA

Complaint arising under the International Air Services Transit Agreement done at Chicago on December 7, 1944.

DAVID S. NEWMAN
Attorney Adviser
U.S. Department of State

November 20, 1996

STATEMENT
OF THE
UNITED STATES OF AMERICA

Responding to the Complaint dated July 11, 1996, filed by the Republic of Cuba with the Council of the International Civil Aviation Organization under the ICAO Rules for the Settlement of Differences, the United States of American states the following:

Cuba has filed a complaint asserting that the United States causes an injustice by not permitting Cuba's national airline to fly the most economical routes between Havana and points in Canada. Cuba noted that it had raised this issue before the 31st Session of the Assembly, but that eight months had passed without the problem being resolved. Cuba argues that it cannot be expected to wait forever. Cuba begs for immediate correction of this alleged injustice, without regard for the impact of its own recent gross injustice- the shootdown, on February 24, 1996, of two unarmed civilian aircraft of U.S. registration, in int'l airspace killing all four persons on board.

The United States rejects Cuba's assertions that U.S. treatment of Cuban-registered aircraft is illegal or causes "injustice and hardship." Moreover, we believe that a formal review of these issues would undermine the process initiated by the 31st Session of the Assembly in response to Cuba's plea of last fall. Accordingly, the United States asks that the Council not consider the merits of the Complaint at this time.

– informal dispute settlement process under ICAO Council President Kotaite

In September 1995, Cuba presented to the Economic Commission working papers concerning overflights of the territory of the United States. Cuba requested the Assembly's assistance. The Assembly approved the Report of the Economic Commission, which found that the matter "would best be left to continuing diplomatic efforts by the President of the Council and the Secretary General." This conclusion was based, at least in part, upon the Commission's determination that "some progress had been made in addressing the particular difficulties faced by Cuba through the good offices of the President of the ICAO Council."

Through his good offices, the President of the ICAO Council pursued the Assembly's mandate through correspondence and personal meetings with Senior US Government officials in the United States, on January 22, 1996, accompanied by the U.S. Representative on the Council of ICAO. Relative to those meetings, the President subsequently noted that the spirit of cooperation and understanding prevailed.

Cuba could not have done more to shatter that spirit of cooperation and understanding that the President found in the United States, than what it did on February 24, 1996. On that day, as this Council knows, Cuba ordered two of its air force fighter jets to shoot out of the sky, without warning, without any attempted communication, two unarmed civilian aircraft of U.S. registration. That attack killed four people, including three citizens and one resident of the United States.

in int'l airspace

Further, Cuba compounded the injury by rejecting the findings of the ICAO Fact-Finding Investigation and rejecting the United Nations Security Council Resolution citing Cuba's unlawful shooting down of these two civil aircraft. Cuba has shown no remorse, ~~and~~ no willingness to forswear the use of violence against civilian aircraft, and no desire to compensate the family members of its victims.

The United States does not refer to these acts of the Cuban Government with the purpose of politicizing the events. Rather, we summarize those events here to provide the proper context for the Council's consideration of Cuba's position. Cuba argues that it waited long enough for the Council President to resolve through diplomacy the matter that Cuba brought to the attention of the Assembly. However, we ask the Council to recognize that the Cuban Government's own actions undermined the Council President's efforts to resolve this matter.

For these reasons, the United States respectfully requests that the Council defer further consideration of the Complaint while the Council President continues diplomatic efforts to resolve the dispute, in accordance with the mandate of the 31st Assembly. Further, the United States respectfully reserves its right to file, until a later date, if necessary, a supplementary counter-memorial addressing the points raised in Cuba's Memorial and providing additional facts, supporting data, and conclusions of law.

DAVID S. NEWMAN
Attorney Adviser
U.S. Department of State

Dated: November 20, 1996

6468

L/EBC CONTINGENCY PRESS GUIDANCE
NOVEMBER 20, 1996

PROCEEDING BEFORE ICAO ON THE CUBAN OVERFLIGHT COMPLAINT

Q: Would you explain what is going on at ICAO regarding Cuban overflights of the United States?

A: CUBA HAS FILED A COMPLAINT BEFORE THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION. IN THAT COMPLAINT, CUBA ACCUSES THE UNITED STATES OF CAUSING INJUSTICE AND HARDSHIP TO CUBA BY NOT PERMITTING CUBANA AIRLINES TO FLY THE MOST ECONOMICAL ROUTES BETWEEN HAVANA AND POINTS IN CANADA.

Q: Is Cuba right?

A: THE UNITED STATES REJECTS CUBA'S ASSERTIONS THAT U.S. TREATMENT OF CUBAN-REGISTERED AIRCRAFT IS ILLEGAL OR CAUSES "INJUSTICE AND HARDSHIP." MOREOVER, WE BELIEVE THAT COUNCIL REVIEW OF THESE ISSUES NOW WOULD UNDERMINE THE PROCESS INITIATED BY THE 31ST SESSION OF THE ASSEMBLY IN RESPONSE TO CUBA'S PLEA OF LAST FALL. THAT PROCESS WAS INTERRUPTED BY THE CUBAN AIR FORCE'S BRUTAL SHOOTDOWN OF TWO U.S. REGISTERED CIVIL AIRCRAFT LAST FEBRUARY. ACCORDINGLY, THE UNITED STATES HAS ASKED THE COUNCIL NOT TO CONSIDER THE MERITS OF THE COMPLAINT AT THIS TIME.

Q: Will the United States negotiate with Cuba?

A: IN 1995, IN RESPONSE TO A MANDATE OF THE ICAO ASSEMBLY, THE PRESIDENT OF THE ICAO COUNCIL INITIATED DISCUSSIONS OF THIS ISSUE WITH THE GOVERNMENTS OF THE UNITED STATES AND CUBA. IF THE COUNCIL AGREES TO DEFER CONSIDERATION OF CUBA'S COMPLAINT, THEN THE US GOVERNMENT WOULD BE PREPARED TO CONTINUE THIS PROCESS. ~~We would, however~~, We reserve the right to file a supplementary counter-memorial addressing Cuba's allegations + providing the [illegible] times

We are not, however, committing to any particular solution.

Drafted by: L/EBC - DSNewman
x-76995

Cleared by:
DOT Office of Counsel, International - Peter Schwartzkopf
FAA - Overflight Security Committee - Vince Sharp
FAA Office of Counsel, International - Michael Jennison
NSC - Fulton Armstrong
US-ICAO - Carol Carmody
ARA/CCA - Victor Vockerodt
EB/TRA/AVP - Susan Bennett
IO/T - Anne Blackwood
L/ARA - Haley D. Collums
PM/ISP - Steve Stevens

LEGAL ID:202-736-7115 OCT 16'96 0:39 No.001 P.01

6469

United States Department of State

Washington, D.C. 20520

M E M O R A N D U M

Date: October 11, 1996

FA
OK

TO: ARA/CCA - Michael Ranneberger
EB/TRA/AVP - Susan Bennett
IO/T - Anne Blackwood
L/ARA - Haley D. Collums
PM/ISP - Steve Stevens
US-ICAO - Carol Carmody
DOT Office of General Counsel, International
- Peter Schwartzkopf
FAA - Overflight Security Committee - Vince Sharp
FAA Office of General Counsel, International - Michael Jennison
NSC - Fulton Armstrong

FROM: L/EBC - David Newman DM

RE: Cuban Overflight Complaint

Cuba has filed a complaint before the International Civil Aviation Organization. In its complaint, Cuba alleges that the United States has violated its international obligations and caused injustice and hardship to Cuba by forcing civil aircraft of Cuban registration to fly circuitous routes from Cuba to Canada, whereas civil aircraft of Canadian registration are permitted to fly direct routes.

The United States must file a response to the Cuban complaint by October 22, 1996. Following is a draft pleading in which we request that consideration of the merits of the Cuban complaint be deferred on the grounds that the 31st ICAO Assembly gave a mandate to the ICAO Council president to resolve the overflight dispute through diplomacy. We assert that litigation of the Complaint would disrupt this ongoing effort.

defer, but we accept ICAO President process to resolve dispute. This was process under which deal granting Cuba some overflight was imminent before BTTR shootdown. Note below, that

To ensure timely filing of our response, we will need your comments and/or clearance as soon as possible, but not later than October 17, 1996.

I have been advised by the US Mission to ICAO that this matter will be placed on the ICAO Council's calendar for November 20, 1996, to carry over to November 22, 1996, if necessary (there are no sessions on November 21, 1996). Sessions begin at 10:00 a.m. Before the Council, both Cuba and the US will be given an opportunity to make a statement, after which Council members will be given an opportunity to direct questions to each side. When discussion is closed, the Council President will summarize the case and present it for a Council vote.

If you have any questions, please call me at (202) 647-6995. You may fax comments, or a marked up copy, to (202) 647-4180. Please indicate conditions, if any, for your clearance on the document. Thank you.

6470

Before the Council of the International Civil Aviation Organization (ICAO) under the ICAO Rules for the Settlement of Differences (Doc 7782/2).

COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA

Complaint arising under the International Air Services Transit Agreement done at Chicago on December 7, 1944.

CAROL J. CARMODY

Representative of the United States
on the Council of ICAO

October 22, 1996

COUNTER-MEMORIAL
OF THE
UNITED STATES OF AMERICA

Carol J. Carmody, Representative of the United States on the Council of ICAO, is the designated agent authorized to act for the United States of America in the present proceedings. The Office of the U.S. Representative is at 999 University Street, Suite 14-10, Montreal, Quebec, Canada. The telephone number is (514) 954-8304.

I. Introduction

This Counter-memorial is filed in response to the Complaint (the "Complaint") filed by the Republic of Cuba with the Council of the International Civil Aviation Organization (ICAO) under the ICAO Rules for the Settlement of Differences (Doc. 7782/2). In the Complaint, Cuba asserts that "the actions taken by the Government of the United States in relation to the right to overfly its territory (First Freedom) for Cuban-registered aircraft in their flights to and from Canada are causing injustice and hardship to it." Citing Articles 1(2) and 21 of the ICAO Rules for the Settlement of Differences, Cuba asks the Council to examine this situation.

II. Summary of Argument

The United States rejects Cuba's assertions that U.S. treatment of Cuban-registered aircraft is "unjust and illegal." For the reasons set forth below, however, the Council should not consider the merits of the Complaint at this time, as such consideration would undermine the process already initiated by the 31st Session of the ICAO Assembly in response to a substantively identical Cuban plea to the Assembly. Accordingly, the United States reserves its right to respond to the substance of the Complaint and requests leave to file a supplementary counter-memorial at such time as the Council may deem appropriate.

i.e., return to process but reserving right to address substance later

III. Status of the Ongoing Proceedings.

1995 At the 31st Session of the ICAO Assembly, Cuba presented a working paper (A31-WP/101) concerning alleged difficulties experienced with regard to overflights of the territory of the United States. In its paper, Cuba asked the Assembly to take steps to ensure that signatory states comply, with due seriousness, with the obligations assumed under international agreements.

The Economic Commission of the Assembly considered Cuba's working paper under Agenda Item 35- Review and Outlook for Air Transport and under Agenda Item 36.1- Regulation of International Air Transport Services. Paragraph 35:8 of the Commission's report notes a view that "the issues concerned were extraneous for consideration by ICAO and its Assembly, involving long-standing bilateral differences which directly affect the sovereign rights of States and fall within the area of bilateral relations." Further, the Report relates a view that ICAO should focus its limited resources on more vital issues.

In paragraph 35:9 of the Economic Commission's Report, the Commission noted that "some progress had been made in addressing the particular difficulties faced by Cuba through the good offices of the President of the ICAO Council." It concluded that the matter "would best be left to continuing diplomatic efforts by the President of the Council and the Secretary General." Similar conclusions were reached in paragraph 36.1:11, whereby "[t]he Commission expressed the wish for the continuation and intensification of diplomatic efforts by the Secretary General and the President of the Council to find a satisfactory solution." Relevant portions of the Economic Commission's Report (ICAO Doc. No 9658, A31-EC), which was adopted by the 31st Assembly, are attached as Appendix 1.

In furtherance of the Commission's mandate, the ICAO Council President forwarded to the Representative of the United States on the Council of ICAO a letter dated December 18, 1995, requesting assistance in resolving the problem. The Council President visited Washington, D.C. on January 22, 1996, and met with senior State Department officials, including the Acting Assistant Secretary and Deputy Assistant Secretary for International Organization Affairs, the Deputy Assistant Secretary for Transportation Affairs, and other officials involved in economic affairs, and discussed, among other issues, the overflight of US territory by Cubana Airlines. After that meeting, on February 19, 1996, the ICAO Council President advised the Council of the success of the mission, noting the strong support of the American Authorities for ICAO, and referencing the spirit of cooperation and understanding that prevailed in his meetings. The President's Working Paper (C-WP/10362 9/2/96) is attached as Appendix 2.

However, as discussed below, the efforts of the ICAO Council President and the United States stalled in the aftermath of Cuba's February 24, 1996, killing of four citizens of the United States in its unlawful shootdown of two civilian aircraft of U.S. registration.

IV. Argument on the Procedural Issue.

refers to recent GOC push

Cuba attempts to justify filing its complaint, despite the pendency of the 31st Assembly's mandate and the President's initiative in response to it, on the grounds that eight months have passed since the convening of the 31st Session of the Assembly. Cuba apparently would have the Council believe that either the United States or the Council President (or both) is at fault for failing to resolve the overflight issue. However, it is clearly Cuba, through its acts of disregard for the safety of civil aviation and affronts to the United States in regard to civil aviation, that has created an environment in which the ICAO Council President could not possibly have succeeded

and continuing failure to pledge to observe it! [illegible] in such a short time. Under these circumstances, as detailed below, the United States requests that the Council defer further consideration of the Complaint.

The period following Cuba's plea to the 31st Assembly in September 1995 was marked by the following events representing disregard for the safety of civil aviation and affronts to the United States:

1. In October 1995, just one month after Cuba demanded that ICAO redress its grievance with the United States, the crews of two of Cubana Airlines aircraft, which had received Diplomatic clearance to transport the Cuban president to the United Nations 50th anniversary celebration in New York and then return home, disregarded their authorized routes and diverted to Canada. *See* Stevens Affidavit, attached as Appendix 3.

2. On February 24, 1996, Cuban military aircraft shot down without warning two civil aircraft of U.S. registration in international airspace, killing four U.S. citizens. *See* Resolutions of UNSC and ICAO, attached as Appendices 4 and 5.

3. As a further affront to ICAO, the United Nations Security Council (UNSC), and the United States of America, Cuba rejected, and continues to reject, the findings of ICAO and the UNSC regarding the unlawfulness of Cuba's actions relative to the February shootdowns. Cuba has demonstrated neither remorse, sympathy, nor willingness to compensate the family members of the victims of the February 24, 1996, shootdown.

Cuba's demands on ICAO must be considered in the context of these actions.

V. Conclusion

For the reasons set forth above, the United States asks that the Council, after due consideration of the circumstances of the present Complaint, including the pendency of the 31st Assembly's mandate for the Secretary General and the Council President to attempt to resolve the overflight issue through diplomacy, defer further consideration of the Complaint. In accordance with its request for deferral, the United States respectfully reserves its right to file, until a later date, if necessary, a supplementary counter-memorial addressing the points raised in Cuba's Memorial and providing additional facts, supporting data, and conclusions of law.

CAROL J. CARMODY

Representative of the United States on the Council of ICAO

Drafted by: L/EBC - David S. Newman

Approved by: L/EBC - Joan E. Donoghue

Cleared by: ARA/CCA - Michael Ranneberger
EB/TRA/AVP - Susan Bennett
IO/T - Anne Blackwood
L/ARA - Haley D. Collums
PM/ISP - Steve Stevens
US-ICAO - Carol Carmody
DOT Office of General Counsel, International
- Peter Schwartzkopf
FAA - Overflight Security Committee - Vince Sharp
FAA Office of General Counsel, International - Michael Jennison
NSC - Fulton Armstrong

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Samuel Berger, Charles Ruff, and Larry Stein to President Clinton re: Treasury-Postal Appropriations Bill Amendment and Flatow Litigation (3 pages)	n.d.	P5 6462 Dup
001b. attachment	re: Status of Flatow Litigation and Assistance to Mr. Flatow (2 pages)	n.d.	P5 2571 Dup

Dup
JM1086

COLLECTION:

Clinton Presidential Records
National Security Council
Office of the National Security Advisor (Mara Rudman)
OA/Box Number: 3934

FOLDER TITLE:

Legal Issues: Judgement Fund: Flatow & BTTR [Brothers to the Rescue] [1]

2009-0342-F
jm1087

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

4515

6462 Dup

THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER
CHARLES F. C. RUFF
LARRY STEIN

SUBJECT: Treasury-Postal Appropriations Bill Amendment and Flatow Litigation

Purpose

To obtain your guidance in addressing an amendment to the Senate Appropriations Committee-passed Treasury-Postal bill that would permit attachment of U.S. judgment funds payable by the United States to certain foreign states, permit attachment of foreign diplomatic property other than embassies, and permit attachment of U.S. telecom payments to Cuban entities. And, to keep you informed about our efforts to assist Stephen Flatow and the status of litigation to collect on his judgment against Iran.

Background

Treasury-Postal bill. On June 24, an amendment offered by Senators Kyl, Mack, and Lautenberg was adopted in the Appropriations Committee by voice vote. It is designed to ensure that Flatow and other plaintiffs (e.g., Brothers to the Rescue families) can get blocked assets and U.S. funds owed to terrorist-list states. Although there was no opposition to the amendment in Committee, Chairman Stevens and Ranking Member Dorgan stated that the Administration has serious concerns with the amendment, and Stevens said that these issues should be addressed on the floor or in conference.

The amendment would repeal your waiver authority under section 117, providing in its place authority to waive only the attachment of a foreign embassy ("principal office of a foreign mission"). The amendment also allows attachment of U.S. funds due or payable to a targeted country such as Iran. Thus,

cc: Vice President
Chief of Staff

plaintiffs could attach the Judgment Fund payment of last year's Iran-U.S. Tribunal award (over $6 million) as well as other debts or funds that may be held pending resolution of claims (e.g., the $400 million of Iranian funds that we are holding in the FMS Trust Fund).

We have discussed the serious national security implications of eliminating blocked assets as leverage, which this amendment would do. An express waiver of U.S. sovereign immunity over U.S. judgment funds subject to foreign claims awards is a major problem as well. In the event of an attachment, we would still owe Iran the Tribunal award and could find U.S. assets in third countries attached to collect it, or would have to find some other way to pay it from the U.S. Treasury at taxpayers' expense.

Although the Treasury-Postal bill seems to be free of other major problems, this amendment is of such gravity that we would recommend veto of a bill containing it. For these reasons we will oppose the addition of this Amendment in the House and, if necessary, in conference. It would strengthen our hand if we communicate that our concerns rise to the level of a veto. This may be the only way to avert this amendment or ultimately provide sufficient leverage for a compromise. We lack support on the Hill for our position; a veto threat, however, would force legislators to factor in the risk of veto on an appropriations bill. However, we do not want to oversell our ability to find common ground. Perhaps, for example, we could accept an asset-by-asset waiver authority and take the decision to allow some discrete properties or funds to be exposed (e.g., rental proceeds from Iranian diplomatic properties). (We expect State to argue that this would have serious consequences for the Tribunal process, but tough decisions like this might be necessary to avoid a provision that would eviscerate the Tribunal process.) There is risk, however, that you would be put in the position of waiving repeatedly before plaintiffs are able to identify an appropriate blocked asset to attach.

With respect to the amendment's provision on Cuba, we continue to believe that we need to see our appeal through on Judge King's adverse order with respect to your existing waiver authority before considering possible settlement solutions. Chuck is in frequent contact with Senator Graham on this front.

As a separate matter, while we have identified business-sensitive documents that may help the Flatows attach unblocked

Iranian bank assets, the chain of ownership is often clouded and subject to competitive claims and thus litigation. (A more detailed review of the Flatow litigation is attached at Tab A.)

RECOMMENDATION

That you authorize a veto threat of the Treasury-Postal bill if it contains this amendment.

Approve ________________

Disapprove ______________

Attachment
Tab A Status of Flatow Litigation

2571 Dup

STATUS OF FLATOW LITIGATION AND ASSISTANCE TO MR. FLATOW

Assistance on unblocked assets

- Iranian banks. In March, Justice informed Flatow of Treasury's conclusion that assets of Iranian banks operating in the United States in the 1990s were not blocked. Treasury has identified business-sensitive documents that may be relevant to Flatow's efforts to locate assets of these banks. Upon court approval of a protective order, to which both parties have already agreed, Treasury will turn over the documents to Flatow's counsel.

- Eizenstat briefing. The information on bank assets has been developed through consultations since November 1998, when Stu Eizenstat led an interagency team that provided over 5,000 pages to Flatow and counsel. Many of those documents related to the Mostafazan/Alavi Foundation, against which Flatow has since obtained writs that are currently the subject of litigation.

Stephen Flatow's litigation to collect on his judgment against Iran involves several separate actions. Two cases in the D.C. District Court (Judge Lamberth) directly affect U.S. interests:

- Diplomatic property and bank accounts. Flatow has invoked section 117 to obtain these blocked assets notwithstanding your waiver.

- Judgment fund payment of Tribunal award. As a result of Flatow's writ of attachment, the USG has been unable to pay a June 1998, $6 million Tribunal award to Iran. This matter has been fully briefed since late 1998.

Oral Argument June 22. Judge Lamberth called the hearing after Justice's fourth supplemental memorandum seeking decision on the motion to quash. (Continued delay prejudices U.S. interests at the Tribunal.) He decided to hear argument on both the judgment fund and section 117 issues.

- On the judgment fund payment, the judge seemed persuaded that Congress did not intend to waive U.S. immunity from attachment of such funds in its accounts.

- On section 117 and your waiver, the judge asked whether diplomatic properties could be attached if the waiver were found ineffective. Justice replied that there would remain a constitutional issue of encroachment on Presidential authority to receive ambassadors. The judge asked Justice to brief this issue more extensively. (The U.S. brief is due July 22, and plaintiff has another 30 days to respond.)

- Mr. Flatow's counsel argued that your waiver overreached and should have been selective if national security interests were truly at stake. (E.g., perhaps waive with respect to diplomatic real property, but not bank funds including rental proceeds.) He also indicated his strong belief that Congress will soon enact legislation removing any doubt about availability of these assets and judgment fund payments to satisfy judgments such as Mr. Flatow's.

Mostafazan/Alavi Foundation (Alavi). Mr. Flatow is also pursuing the unblock assets of Alavi.

- Because of his counsel's inquiries about Alavi, last November Eizenstat's team provided Tribunal documents including the decision (for jurisdictional purposes) that the parent Foundation in Iran was owned and controlled by the government of Iran.

- After a May district court hearing in which Alavi defended against the writ, Flatow's counsel informally asked Justice whether the USG could support their position. They have not followed up formally, but Congressman Rothman (D-NJ) has written Eizenstat asking whether State considers Alavi to be an instrumentality of Iran, a question State has not addressed in the past.

- Anticipating further inquiries and possibly a formal request, NSC will convene interagency counsel to explore the matter (e.g., there are a number of difficult issues to address, including the effect of Alavi's tax-exempt status).

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Sean Maloney and David Goodfriend to President Clinton re: Kyl / Mack / Lautenberg ammendment (1 page)	07/17/1999	P5 2569
001b. memo	Samuel Berger, Jacob Lew, Charles Ruff, and Larry Stein to President Clinton re: Flatow Litigation and Related Ammendments Appearing in Legislation (4 pages)	07/15/1999	P5 2570
001c. attachment	re: Status of Flatow Litigation and Assistance to Mr. Flatow (2 pages)	n.d.	P5 2571
002a. note	Chuck to Mara re: Draft statement (2 pages)	05/05/2000	P5 2572
002b. draft	re: Treasury Department statement on Justice for Victims of Terrorism Act (Annotations) (31 pages)	05/02/2000	P5
003. talking points	re: Mack / Lautenberg June 16, 2000 Letter (5 pages)	n.d.	P5 6471

COLLECTION:

Clinton Presidential Records
National Security Council
Office of the National Security Advisor (Mara Rudman)
OA/Box Number: 3934

FOLDER TITLE:

Legal Issues: Judgement Fund: Flatow & BTTR [Brothers to the Resuce] [3]

2009-0342-F
jm1088

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6471

TALKING POINTS RE: MACK/LAUTENBERG JUNE 16, 2000 LETTER

I. Introduction

The Administration remains intent on finding a way to compensate the victims and their families in a manner consistent with other important U.S. interests.

Having carefully considered the June 16 Mack/Lautenberg letter, here are some thoughts on the state of play.

II. Discussion

Areas of General Agreement: We seem to be in general agreement on these issues:

Use of blocked assets: We agree that to fund compensatory payments to litigants holding judgments against the Government of Cuba, the bill should authorize the President to vest and liquidate certain blocked Cuban assets.

Punitive awards: We are moving closer on this issue, but payment of even "token" punitive damages would cause serious problems.

If punitive damages are truly "token," they will do little to help plaintiffs, but will seriously harm other U.S. interests.

Punitive damages are not recognized in international law. We consistently take the position that they are not recoverable against the USG in suits against us abroad.

Therefore, we continue to insist on the repeal of the punitive damages provision contained in section 117(b) of the Treasury and General Appropriations Act, 1999 (as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999).

Diplomatic exception: We are pleased that you want to protect diplomatic and consular property to ensure that the USG does not violate its international legal obligations to protect such property and avoid reciprocal measures.

Note to readers: We should not lose sight of key differences that remain "token" punitive damages and "sanctions."

We are concerned that the bill (even as amended recently in the House) does not clearly protect UN mission property, since the Vienna Conventions on Diplomatic and Consular Relations do not apply directly to the property of missions to international organizations. The UN Headquarters Agreement and the General Convention on Privileges and Immunities obligate us to ensure the inviolability of UN missions.

Presidential waiver authority to protect diplomatic and consular property should not be on an asset-by-asset or case-by-case basis and should not be subject to the issuance of a court order directing attachment in aid of execution or execution.

We could provide language that provides for an effective waiver that addresses these concerns.

<u>Sensitive information</u>: We are glad that you appreciate the importance of protecting sensitive information held by State and Treasury. Your letter asks the Administration for language to address this problem.

The surest approach is to repeal 28 U.S.C. § 1610(f)(2), which contains this requirement.

It is not realistic to segregate "sensitive" information through a waiver. The bulk of the information OFAC receives, for example, comes from businesses that would resist providing the information if protections were removed. Requiring Treasury and State to release specific information concerning blocked assets also creates intelligence and enforcement problems that would seriously degrade sanctions administration and enforcement.

More importantly, the provision would permanently alter the mission and function of OFAC by replacing the Office's historic role of preserving assets in place pending an orderly resolution of a national emergency declared by the President to one of identifying and assisting recovery of assets by private judgment holders.

Areas for Clarification: Second, other issues not squarely addressed in your letter remain of concern to us.

Although haven't agreed on suitable funding we could accept the principle that

<u>Compensatory damages</u>: We agree that all litigants who currently hold judgments for claims brought under amendments to the Foreign Sovereign Immunities Act ("FSIA") should receive 100 percent of compensatory damages from suitable sources of funding.

Your June 16 letter states that payment of compensatory damages would include "post-judgement interest, costs, and sanctions." These terms should be clarified.

should not incl atty's fees

We would concur with legislation that provides for payment to judgment holders of ~~100 percent of~~ compensatory damages, plus post-judgment interest and usual court costs. Usual court costs do not include attorneys' fees.

We need an understanding of "sanctions," as used in your letter. If, for example, they are really punitive damages, we would oppose them.

<u>Status of judgments</u>: Our proposal envisions a complete resolution of the matter of compensation for current judgment holders.

→ who's covered — trans?

By contrast, your letter states that "Court awards must stand intact and remain enforceable." We need a clearer understanding of what your statement means. Judgments should not remain open after payment of compensatory damages.

<u>Legal separateness of state agencies and instrumentalities</u>: The June 16 letter does not address the legal separateness of agencies and instrumentalities of terrorism-list countries.

With 100 percent of compensatory damages paid to judgment holders and agreement between us on punitive damages, there is no need to erode the long-established separate juridical entity doctrine in U.S. law and depart from widely accepted international practice.

Provisions that would change the existing statutory definition of an "agency or instrumentality of a foreign state" and would allow judgment holders to execute against or attach the assets of legally-separate agencies or instrumentalities of terrorism-list states should be eliminated from the bill. Specifically, the proposed amendments to 28 U.S.C. § 1603(b) and 28 U.S.C. § 1610(f)(1)(A) should be eliminated.

Waiver of USG sovereign immunity: Except to the extent that it discusses the Foreign Military Sales ("FMS") Account, the June 16 letter does not mention the waiver of USG sovereign immunity.

We seek clarification that your proposal would not alter U.S. sovereign immunity beyond the FMS Account.

Broader waiver of sovereign immunity would likely thwart the USG from paying binding international obligations, such as awards of the Iran-U.S. Claims Tribunal, which are enforceable against the USG anywhere in the world. It would not discharge those obligations.

Areas of Disagreement: Third, the most significant issue that separates us is the source of compensation for the Iran judgment creditors.

Use of appropriated funds: For litigants holding judgments against the Government of Iran, we support paying 100 percent of litigants' compensatory damages from certain blocked assets (rental proceeds), supplemented by appropriated funds to make up the balance. The bill should subrogate the United States to the Iran judgment creditors. As a subrogee, the United States would be entitled (as part of any normalization negotiations) to recoup from Iran any payments of appropriated funds made to these judgment creditors.

Iran's FMS Account: By contrast, your June 16 proposal would use funds from Iran's FMS Account.

Taking these funds would not make Iran pay or deter further terrorist acts. Instead, it would result in the United States paying its own money. The CBO estimates that the bill would cost the U.S. taxpayer $422 million, largely because it would allow the FMS funds to be tapped.

If the FMS funds are not available to pay any debt the Iran-U.S. Claims Tribunal might find that we owe to Iran, we would have to use additional taxpayer funds to pay the Tribunal's award.

Any use of these funds to pay the judgments would create serious uncertainty among FMS customers worldwide about the reliability of the FMS program, undermining the overall program. The FMS program is critical to our defense infrastructure and to our international relations.

Making FMS monies available to these judgment holders could give ammunition to conservatives in Iran seeking to undermine the moderate forces who are trying to bring about democracy and change.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. talking points	re: Mack / Lautenberg June 16, 2000 Letter (4 pages)	06/26/2000	P5 6472
002. talking points	re: Responding to Mack / Lautenberg 6/16/00 Letter (3 pages)	06/26/2000	P5 6473
003. draft	re: Payment of Certain Antiterrorism Judgements (2 pages)	n.d.	P5 6474
004. talking points	re: For Use with Zahedin Concerning Passage of the Mack - Lautenberg Bill (2 pages)	10/27/2000	P5

COLLECTION:

Clinton Presidential Records
National Security Council
Office of the National Security Advisor (Mara Rudman)
OA/Box Number: 3934

FOLDER TITLE:

Legal Issues: Judgement Fund: Flatow & BTTR [Brothers to the Rescue] [4]

2009-0342-F
jm1089

RESTRICTION CODES

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6472

TALKING POINTS RE: MACK/LAUTENBERG JUNE 16, 2000 LETTER

I. Introduction

- The Administration remains intent on finding a way to compensate the victims and their families in a manner consistent with other important U.S. interests.

- Having carefully considered the June 16 Mack/Lautenberg letter, here are some thoughts on the state of play.

II. Discussion

- ***Areas of General Agreement:*** We seem to be in general agreement on these issues:[1]

  - Compensatory damages: We agree that all litigants who currently hold judgments for claims brought under amendments to the Foreign Sovereign Immunities Act ("FSIA") should receive 100 percent of compensatory damages.

    - Your June 16 letter states that payment of compensatory damages would include "post-judgement interest, costs, and sanctions." These terms should be clarified.

    - We would concur with legislation that provides for payment to judgment holders of 100 percent of compensatory damages, plus post-judgment interest and usual court costs. Usual court costs do not include attorneys' fees.

    - We need an understanding of "sanctions," as used in your letter. If, for example, they are really punitive damages, we would oppose them.

limited to curr. judgment holders?

  - Use of blocked assets: We agree that to fund compensatory payments to litigants holding judgments against the Government of Cuba, the bill should authorize the President to vest and liquidate certain blocked Cuban assets.

  - Punitive awards: We are moving closer on this issue, but payment of even "token" punitive damages would cause serious problems.

    - If punitive damages are truly "token," they will do little to help plaintiffs, but will seriously harm other U.S. interests.

    - Punitive damages are not recognized in international law. We consistently take the position that they are not recoverable against the USG in suits against us abroad.

[1] Note to readers: We should not lose sight of key differences that remain on aspects of this first category of issues, e.g. "token" punitive damages and "sanctions."

- Therefore, we continue to insist on the repeal of the punitive damages provision contained in section 117(b) of the Treasury and General Appropriations Act, 1999 (as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999).

- Diplomatic exception: We are pleased that you want to protect diplomatic and consular property to ensure that the USG does not violate its international legal obligations to protect such property and avoid reciprocal measures.

  - We are concerned that the bill (even as amended recently in the House) does not clearly protect UN mission property, since the Vienna Conventions on Diplomatic and Consular Relations do not apply directly to the property of missions to international organizations. The UN Headquarters Agreement and the General Convention on Privileges and Immunities obligate us to ensure the inviolability of UN missions.

  - Presidential waiver authority to protect diplomatic and consular property should not be on an asset-by-asset or case-by-case basis and should not be subject to the issuance of a court order directing attachment in aid of execution or execution.

  - We could provide language that provides for an effective waiver that addresses these concerns.

- Sensitive information: We are glad that you appreciate the importance of protecting sensitive information held by State and Treasury. Your letter asks the Administration for language to address this problem.

  - The surest approach is to repeal 28 U.S.C. § 1610(f)(2), which contains this requirement.

  - It is not realistic to segregate "sensitive" information through a waiver. The bulk of the information OFAC receives, for example, comes from businesses that would resist providing the information if protections were removed. Requiring Treasury and State to release specific information concerning blocked assets also creates intelligence and enforcement problems that would seriously degrade sanctions administration and enforcement.

  - More importantly, the provision would permanently alter the mission and function of OFAC by replacing the Office's historic role of preserving assets in place pending an orderly resolution of a national emergency declared by the President to one of identifying and assisting recovery of assets by private judgment holders.

- ***Areas for Clarification:*** Second, other issues not squarely addressed in your letter remain of concern to us.[2]
  - Status of judgments: Our proposal envisions a complete resolution of the matter of compensation for current judgment holders.
    - By contrast, your letter states that "Court awards must stand intact and remain enforceable." We need a clearer understanding of what your statement means. Judgments should not remain open after payment of compensatory damages.[3]

    • current judgmt holders
  - Legal separateness of state agencies and instrumentalities: The June 16 letter does not address the legal separateness of agencies and instrumentalities of terrorism-list countries.
    - With 100 percent of compensatory damages paid to judgment holders and agreement between us on punitive damages, there is no need to erode the long-established separate juridical entity doctrine in U.S. law and depart from widely accepted international practice.
    - Provisions that would change the existing statutory definition of an "agency or instrumentality of a foreign state" and would allow judgment holders to execute against or attach the assets of legally-separate agencies or instrumentalities of terrorism-list states should be eliminated from the bill. Specifically, the proposed amendments to 28 U.S.C. § 1603(b) and 28 U.S.C. § 1610(f)(1)(A) should be eliminated.
  - Waiver of USG sovereign immunity: Except to the extent that it discusses the Foreign Military Sales ("FMS") Account, the June 16 letter does not mention the waiver of USG sovereign immunity.
    - We seek clarification that your proposal would not alter U.S. sovereign immunity beyond the FMS Account.
    - Broader waiver of sovereign immunity would likely thwart the USG from paying binding international obligations, such as awards of the Iran-U.S. Claims Tribunal, which are enforceable against the USG anywhere in the world. It would not discharge those obligations.
- ***Areas of Disagreement:*** Third, the most significant issue that separates us is the source of compensation for the Iran judgment creditors.

---

[2] Note to NSC: With respect to the issue of equity among claimants, what view should we take on the applicability of the June 16 proposal to those who do not yet have judgments?

[3] Note to Jock: Does our legislative draft require clarification on this point?

- Use of appropriated funds: For litigants holding judgments against the Government of Iran, we support paying 100 percent of litigants' compensatory damages from certain blocked assets (rental proceeds), supplemented by appropriated funds to make up the balance. The bill should subrogate the United States to the Iran judgment creditors. As a subrogee, the United States would be entitled (as part of any normalization negotiations) to recoup from Iran any payments of appropriated funds made to these judgment creditors.

- Iran's FMS Account: By contrast, your June 16 proposal would use funds from Iran's FMS Account.

  - Taking these funds would not make Iran pay or deter further terrorist acts. Instead, it would result in the United States paying its own money. The CBO estimates that the bill would cost the U.S. taxpayer $422 million, largely because it would allow the FMS funds to be tapped.

  - If the FMS funds are not available to pay any debt the Iran-U.S. Claims Tribunal might find that we owe to Iran, we would have to use additional taxpayer funds to pay the Tribunal's award.

  - Any use of these funds to pay the judgments would create serious uncertainty among FMS customers worldwide about the reliability of the FMS program, undermining the overall program. The FMS program is critical to our defense infrastructure and to our international relations.

  - Making FMS monies available to these judgment holders could give ammunition to conservatives in Iran seeking to undermine the moderate forces who are trying to bring about democracy and change.

6473

State/L draft

Points for Responding to Mack/Lautenberg 6/16/00 Letter

- Thank you for your letter.
- I want to make every effort to achieve a resolution and find a way to compensate the victims and their families.
- We have reviewed your proposal. We still have a number of serious differences.
- Let us try to work these out.

Punitive damages

- We do not believe any amount should be paid for the punitive damages. Our goal is to provide compensation to the victims and their families.
- Punitive damages are not recognized in international law. We consistently take the position that they are not recoverable against the USG in suits against us abroad.
- We cannot accept inclusion of punitive damages and would insist on the repeal of punitive damages provision of section 117 of last year's law. Also, if the damages referred to as "sanctions" in the June 16 letter are really punitive damages, we think those damages need to be dropped as well.

Diplomatic Property

- We are pleased that you want to protect diplomatic and consular property and not place the USG in violation of its international legal obligations to protect such property.
- Since the Vienna Conventions on Diplomatic and Consular Relations do not apply to the property of missions to international organizations, we are concerned that UN mission property is still unprotected. We have obligations to ensure the inviolability of UN missions pursuant to the UN Headquarters Agreement and the General Convention on Privileges and Immunities. We therefore need to have language to take care of this problem.

Separate Juridical Entity

- The June 16 letter does not mention the previous proposal dealing with separate juridical entities.
- We would like to confirm that it has been dropped, because it would sacrifice important legal doctrine and create problems for U.S. financial institutions, U.S. financial markets, and U.S. corporations and entities overseas.

Waiver of USG Sovereign Immunity

- The June 16 letter does not mention the waiver of USG sovereign immunity with respect to obligations owed by the United States to the countries in question, except with respect to the FMS Trust Fund.
- We would like to confirm that it has been dropped.
- Such a waiver would likely prevent USG from paying binding international obligations without any discharge of those obligations, such as awards of the Iran-U.S. Claims Tribunal, which are enforceable against the USG anywhere in the world.

Iran FMS Account

- If we can resolve the foregoing matters, our biggest sticking point with your proposal concerns Iran's FMS Account.
- These are not Iranian funds held in trust, but rather, monies paid to the USG under the FMS program. They are held in what is called the FMS Trust Fund. But they are U.S. funds in the U.S. Treasury; any credit balance in what is called "Iran's FMS Trust Fund" represents a potential USG liability to the Iranian government.
- You want to make a portion of these funds available to the judgment holders.
- We strongly oppose any use of the FMS Trust Fund to pay these judgments and instead believe appropriated funds should be used.
- We are deluding ourselves if we think this scheme will make Iran pay and be a deterrent to further terrorist acts.
- Taking these funds would result in the U.S. paying its own money. Moreover, to the extent the funds

were not available to pay any debt the Iran-United States Claims Tribunal might find we owe Iran, we would have to use additional taxpayer funds to pay the Tribunal's award.

- In fact, the CBO cost estimate confirms that the bill will cost the U.S. taxpayer $422 million, largely because it allows the FMS funds to be tapped.
- From the FMS customers' perspective around the world, any use of these funds for payment of the judgments would interject serious uncertainty about the reliability of the FMS program and seriously undermine overall program.
- Over the long term, this would compromise interests of U.S. defense contractors and USG, which are guaranteed payment for purchases by the FMS Trust Fund.
- We are also concerned that making FMS monies available to the plaintiffs will give ammunition to the conservatives in Iran to undermine the moderate forces who are trying to bring about democracy and change.
- Thus, we ask you again to agree to use appropriated funds instead of the Trust Fund. I know this is difficult for you, but there is no real advantage on any score to using the Trust Fund and there are many real and significant disadvantages.

DRAFT/DELIBERATIVE/PRIVILEGED

SEC. ___. PAYMENT OF CERTAIN ANTITERRORISM JUDGMENTS.

(a) PAYMENTS.--The Secretary of the Treasury is authorized to pay, subject to subrogation of the United States, pursuant to subsection (b), as to the underlying claim against a terrorist-list state, each judgment creditor in a case brought under section 1605(a)(7) of title 28, United States Code, that has reached final judgment as of [ ], [ ] percent of the compensatory damages awarded by the court to each individual judgment creditor.

(b) SUBROGATION.--Such portions of judgments against terrorist-list states paid pursuant to subsection (a) shall become the claims of the United States against respective terrorist-list states, with the United States fully subrogated to all rights of the judgment creditor against such states. The President is authorized to take collection action, as appropriate, and to settle such claims with the respective foreign states. For this purpose, the President is authorized to vest and liquidate accounts of terrorist-list states in the United States or any Commonwealth, territory or possession thereof that have been blocked pursuant to U.S. law. It is the sense of Congress that the [satisfactory] settlement of such claims should be a element of any negotiations conducted to normalize relations with terrorist-list states. ?

(c) AMENDMENTS.--

(1) Section 1610 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(f)(3) WAIVER.--The President may waive subsections (f)(1) and (f)(2) in the interest of national security."

(2) Subsections (b) and (d) of section 117 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, Div. A, section 101(h), Title I, are repealed.

(d) COMMISSION ON COMPENSATION FOR VICTIMS OF TERRORISM.--

(1) ESTABLISHMENT.--The President shall establish a commission to review, evaluate, report and make recommendations on the following matters:

(A) Experience under Public Law 104-132, specifically section 221 amending the Foreign Sovereign Immunities Act to permit private actions against terrorist-list states, including the lack of effective remedies in connection with these actions, in view of existing sanctions under U.S. law against relevant states that serve the national security interest of the United States.

(B) Options for addressing problems that have arisen in pursuing private actions under this amendment, including alternative approaches to victim compensation for terrorist acts that are the subject of such suits.

(C) The need to consider other outstanding claims against terrorist-list states and to avoid serious inequities in the amount of compensation received by similarly situated U.S. nationals.

(2) REPORT.--The commission shall report to the President no later than 12 months after establishment. The President shall transmit the report to the Congress no later than 90 days following receipt of the report from the commission. The report shall contain a detailed statement of the findings and conclusions of the commission, together with the commission's recommendations for such actions as the commission considers appropriate.

(e) APPROPRIATIONS.--For the purpose of making payments under subsection (a), $[__________] are hereby appropriated, of which not to exceed [_____] percent shall be available to pay expenses of the Commission established pursuant to subsection (d).

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Mara Rudman to Deputy Secretary Eizenstat, Deputy Attorney General Holder, Under Secretary Pickering, and Deputy Director Mathews re: Legislative Alternatives to Proposals on Behalf of Plaintiffs in Certain Antiterrorism Litigation (1 page)	10/22/1999	P5 6475
002. draft	re: Payment of Certain Antiterrorism Judgements (2 pages)	n.d.	P5 6476
003. statement	re: Explanation of Proposal (6 pages)	n.d.	P5 2575 Dup
004a. memo	Charles Allen thru James Baker to Samuel Berger re: Legislative Alternatives to the Proposals on Behalf of Flatow and Brothers to the Rescue Plaintiffs (4 pages)	09/27/1999	P5 2574 Dup
004b. attachment	re: Legislation Proposal (2 pages)	n.d.	P5 6477
004c. attachment	re: Explanation of Proposal (6 pages)	n.d.	P5 2575 Dup
005. paper	From Richard Newcomb to Various. Re: Finance. (12 pages)	10/01/1999	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Office of the National Security Advisor (Mara Rudman)
OA/Box Number: 3934

FOLDER TITLE:

Legal Issues: Judgement Fund [1]

2009-0342-F
vz1114

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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6475

THE WHITE HOUSE

WASHINGTON

October 22, 1999

MEMORANDUM FOR DEPUTY SECRETARY EIZENSTAT
DEPUTY ATTORNEY GENERAL HOLDER
UNDER SECRETARY PICKERING
DEPUTY DIRECTOR MATHEWS

SUBJECT: Legislative Alternatives to Proposals on Behalf of Plaintiffs in Certain Antiterrorism Litigation

You will recall the difficulties presented by Senate-passed section 118 in the Treasury-Postal Appropriations bill. In the successful effort to have the provision removed from that bill, we committed to continue to seriously explore alternatives. Our respective staffs have met and studied various aspects of this problem.

NSC staff has prepared a draft legislative alternative to section 118, consisting of legislative language (Tab A) and an explanation of the proposal (Tab B).

As explained in Tab B, the proposal would authorize and provide appropriated funds for a small portion of adjudged compensatory damages to be paid to plaintiffs in the three relevant cases to date (i.e., judgments under the foreign sovereign immunity exception enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996). Importantly, such payments would be fully subrogated to the United States, the President's authority to waive existing section 117 would be clarified, and a commission would be established to address the significant problems -- for both plaintiffs and the USG -- that have arisen under the 1996 statute.

Given the sensitivity of this issue, and the pendency of litigation, we are not distributing the draft language, and we would ask that you minimize distribution of this memo to those persons essential to agency review of this matter.

Mara E. Rudman
Deputy Assistant to the President
for National Security Affairs

Budman Original

DRAFT/DELIBERATIVE/PRIVILEGED

Copy ___ of ~~15~~ 25

6476

SEC. ___. PAYMENT OF CERTAIN ANTITERRORISM JUDGMENTS

(a) PAYMENTS. The Secretary of the Treasury is authorized to pay, subject to subrogation of the United States, pursuant to subsection (b), to the underlying claim against a terrorist-list state, each plaintiff in a case brought under section 1605(a)(7) of title 28, United States Code, that has reached final judgment as of September 30, 1999, [five] percent of the compensatory damages awarded by the court to each individual plaintiff, but not to exceed $[2] million for each such plaintiff.

(b) SUBROGATION. Such portions of judgments against terrorist-list states paid pursuant to subsection (a) shall become the claims of the United States against respective terrorist-list states, with the United States fully subrogated to all rights of the judgment holder against such states. The President is authorized to take collection action, as appropriate, and to settle such claims with the respective foreign states.

(c) AMENDMENTS.

(1) Section 1610 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(f)(3) WAIVER -- The President may waive subsections (f)(1) and (f)(2) in the interest of national security."

(2) Subsections (b) and (d) of section 117 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, Div. A, section 101(h), Title I, are repealed.

[Note: Regarding a commission, the preferred method would be to establish it by E.O., to which we could commit during discussions on this proposal. If legislation is required, the following could be used.]

[(d) COMMISSION ON COMPENSATION FOR VICTIMS OF TERRORISM.

(1) ESTABLISHMENT. The President shall establish a commission to review, evaluate, report and make recommendations on the following matters:

(A) Experience under Public Law 104-132, specifically the amendment to the Foreign Sovereign Immunities Act permitting private actions against terrorist-list states, including the lack of effective remedies in view of existing sanctions against

relevant states under U.S. law in the national security interest of the United States.

(B) Options for addressing problems that have arisen in pursuing private actions under this amendment, including alternative approaches to victim compensation for terrorist acts that are the subject of such suits.

(2) REPORT. The commission shall report to the President no later than 12 months after establishment. The President shall transmit the report to the Congress no later than 90 days following receipt of the report from the commission. The report shall contain a detailed statement of the findings and conclusions of the commission, together with the commission's recommendations for such actions as the commission considers appropriate.]

(e) APPROPRIATIONS. For the purpose of making payments under subsection (a), $[__________] are hereby appropriated.

6477

SEC. 118. PAYMENT OF CERTAIN ANTITERRORISM JUDGMENTS

(a) PAYMENTS. The Secretary of the Treasury is authorized to pay, subject to subrogation of the United States, pursuant to subsection (b), to the underlying claim against a terrorist-list state, each plaintiff in a case brought under section 1605(a)(7) of title 28, United States Code, that has reached final judgment as of September 30, 1999, [ten] percent of the compensatory damages awarded by the court to each individual plaintiff, but not to exceed $[4] million for each such plaintiff.

(b) SUBROGATION. Such portions of judgments against terrorist-list states paid pursuant to subsection (a) shall become the claims of the United States against respective terrorist-list states, with the United States fully subrogated to all rights of the judgment holder against such states. The President is authorized to take collection action, as appropriate, and to settle such claims with the respective foreign states.

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(e) APPROPRIATIONS. For the purpose of making payments under subsection (a), $[__________] are hereby appropriated.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	For Samuel Berger from James Baker. Re: Victims of Terrorism. Record ID: 0001153 (1 page)	02/18/2000	P1/b(1)
001b. memo	For the President from Samuel Berger. Re: Victims of Terrorism. Record ID: 0001153 (7 pages)	02/18/2000	P1/b(1)
001c. memo	For the President from Madeline Albright. Re: Mack-Lautenberg Legislation. (2 pages)	02/08/2000	P1/b(1), P5
001d. memo	For Robert Bradtke. Re: State Department Response. (3 pages)	02/14/2000	P1/b(1)
001e. paper	State Department response to NSC memo. (9 pages)	02/14/2000	P1/b(1), P5
002. memo	Samuel Berger and Charles Brain to President Clinton re: Compensation for Victims of the Embassy Bombings (Annotated) (3 pages)	12/20/1999	P5 6478
003a. note	President Clinton to John Podesta re: Embassy bombings (1 page)	01/31/2000	P5 Dup 672
003b. memo	Bob Kyle to Chief of Staff re: Benefits for Familes of Embassy Bombings (Annotated) (2 pages)	01/31/2000	P5 Dup 672
003c. table	re: Benefits Payable Under Current Federal Laws (1 page)	01/31/2000	P5

COLLECTION:

Clinton Presidential Records
National Security Council
Office of the National Security Advisor (Mara Rudman)
OA/Box Number: 3934

FOLDER TITLE:

Legal Issues: Victim's Compensation

2009-0342-F
vz1116

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Copied
Podesta

→ MARA / JAMIE
If you can follow the notes, it leads to our recommendation. Can you follow-up?

THE PRESIDENT HAS SEEN
1-3-00

9138

6478

THE WHITE HOUSE

WASHINGTON

December 20, 1999

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL R. BERGER
CHARLES M. BRAIN CMB

SUBJECT: Compensation for Victims of the Embassy Bombings

Podesta
What do you think about this? Maybe most of the compensation is adequate

WHAT DO YOU THINK ABOUT THIS? MAYBE MOST OF THE COMPENSATION IS ADEQUATE
BC

→ John P
I'd like to proceed w/ the modest proposition posed in the recommendation. Any problem?

I'm fine with your proceeding with this
John

Purpose

To decide whether to seek funding and authority to make payments to the families of American U.S. Government employees who were victims of the East Africa embassy bombings.

Background

At a recent Congressional Black Caucus event you were asked whether you would support additional compensation for the families of the 12 Americans killed in the East Africa bombings. Before OMB started work on such a proposal, we thought it important to lay out the issue for your decision.

The victims' families have received some benefits and compensation from the government, including a monthly annuity, death gratuity, funeral and administrative expenses, and income tax relief. We do not currently have the authority to provide more.

Some of the families are seeking legislation that would provide them additional compensation, in the $1-2 million range. They argue that the U.S. failed to protect adequately the security of embassy personnel and suggest that, for that reason and because we have offered reparations to families of Chinese citizens who lost their lives in the bombing of their embassy in Belgrade, the U.S. government should provide additional compensation to these families.

We have significant policy concerns with legislation that would provide special compensation to the families of these 12 victims. First, it would be inconsistent with positions that

cc: Vice President
Chief of Staff

the U.S. Government has taken in the wake of similar tragedies. As recently as June 1998, for example, the Department of Justice testified against a bill that would have awarded $100,000 payments to survivors of DOD and civilian employees killed in the 1994 "friendly fire" shootdown of two U.S. helicopters of Iraq. At the same hearing, DOJ testified against a second bill designed to authorize extra compensation for survivors of U.S. Government employees killed in the Ron Brown plane crash.

Second, apart from the problem of inconsistency, advocating special relief for survivors of these 12 families would discriminate not only against families of foreign national U.S. government employees who were victims of the same bombings, but also against the families of U.S. Government employees killed in other tragedies, such as Khobar towers, the Oklahoma City bombing, the "friendly fire" shootdown, the Ron Brown plane crash, and other, less highly publicized incidents. We would very soon be fielding requests from the families of these other victims, and future victims, and would have an extraordinarily difficult time drawing distinctions. What about the hundreds of soldiers who are killed each year in training accident?

Finally, proposing legislation for victims of this tragedy could be perceived to be an admission that the U.S. Government is in some way responsible for the East Africa bombings, which would have litigation consequences in these and other similar cases.

The State and Justice Departments have been reviewing possible improvements in the current system for assistance to and compensation for U.S. Government employees who are victims of tragedies, and for victims of terrorism generally.
In addition, the State Department Authorization Act for the year 2000 contained a provision (section 340), which requires you to submit a report to Congress in 180 days on the general subject of benefits and compensation paid to the survivors U.S. Government employees killed in the performance of duty abroad as a result of terrorist acts.

Instead of proposing special compensation for these victims, we believe the Administration should use the process of preparing this report to evaluate and propose recommendations for changes to the existing statutory scheme that would enhance, in an even-handed and fair way, assistance to families of U.S. Government employees that fall victim to terrorism. Potential legislative fixes could involve increasing the level of funding provided under one or more existing statutes, or creating new types of benefits to cover specific expenses. We could explore making these fixes retroactive, so the families of the East Africa bombing victims could receive these benefits as well.

RECOMMENDATION

That you do not seek funding and authority for special compensation to the families of the victims of the Embassy bombings. That, instead, you direct NSC/OMB to lead an interagency task force to review the existing scheme for compensation of families of U.S. Government employees who are victims of terrorism and develop recommendations for legislation to enhance those benefits.

Approve ________________

Disapprove ______________

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	From Richard Nuccio to Alan Kreczko. Subject: Cuba compensation (1 page)	03/02/1996	P5 2578
002. email	From Alan Kreczko to Jane Baker, Kenneth Baldwin, Peter Bass, et al. Subject: Cuba-Criminal Law. (2 pages)	03/04/1996	P1/b(1)
003. email	From Elizabeth Verville to Alan Kreczko. Subject: Cuba, Chicago Convention (3 pages)	03/04/1996	P5 6479

COLLECTION:

Clinton Presidential Records
NSC Emails
MSMail-Record (Sept 94-Sept 97) ([Cuba, BTTR, Shootdown])
OA/Box Number: 590000

FOLDER TITLE:

[03/01/1996-03/04/1996]

2009-0342-F
vz1165

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6479

MSMail

DATE-TIME 04 March 96 15:37

FROM Verville, Elizabeth G.

CLASSIFICATION UNCLASSIFIED

SUBJECT RE: Cuba, Chicago Convention [UNCLASSIFIED]

TO Kreczko, Alan J.

CARBON_COPY NO CC's on THIS MESSAGE

TEXT_BODY

My only comments on this very good piece are:

(1) Your arguments that Peru/Colombia shootdowns are consistent with both customary law and 3 bis might be enhanced by noting that the negotiating history of 3bis makes clear that it was not intended to change customary international law but only to reflect or codify it.

(2) I don't think I would publicly refer to the Iran air shootdown as why 3 bis wasn't ratified. We are committed to the principles underlying 3 bis, view it as consistent with customary international law and perhaps have not viewed it necessary or useful to ratify.

From: Kreczko, Alan J.
To: @UP - APNSA Special Assistants
CC: /R, Record at A1; Baker, James E.; Beers, Rand R; Danvers, William C.; Johnson, David T.; Nuccio, Richard A.; Verville, Elizabeth G.
Subject: Cuba, Chicago Convention [UNCLASSIFIED]
Date: Friday, March 01, 1996 08:16 PM

FOR SANDY

You asked how we would respond to questions about Article 3bis to the Chicago Convention in light of our support for Colombia/Peru shootdowns of drug planes. There are actually a number of difficult legal issues raised by that support, given our past statements that the Chicago Convention, customary international law and Article 3bis prohibit use of force against civil aircraft except in self-defense. (These problems were clearly identified when we adopted the shootdown policy.) Since these issues may come up during ICAO's consideration of our resolution condemning Cuba, I gathered relevant counsel (DOT, State, Defense) to talk the issues through.

Our conclusions:

1. Our international law condemnation of Cuba's action should not focus on Article 3bis. Focusing on 3bis gets us into distracting side debates since

it is an amendment to ICAO which has not yet entered into force, and neither Cuba nor we are party to it. Cuba's action violated fundamental obligations in ICAO Charter requiring States to show due regard for the safety of civil aviation and to follow designated procedures when approaching civil aircraft. They also violated customary international law.

2. We should try to keep the focus off Colombia and Peru. There is no analogy between their actions, which follow procedures and which are motivated by extraordinary threats to their security, and Cuba shooting down a nonthreatening plane with no real warning.

3. If Colombia and Peru shootdown nonetheless becomes an issue, we will need to defend their policies as consistent with customary international law, given our material support to them. This is tricky, given our long history of statements that customary international law precludes use of force against civil aircraft except in self defense against an armed attack by another State or to stop imminent loss of life (e.g. a psycho's plane is about to be rammed into a building). All agree that we should not try to justify Colombia and Peru on the self-defense basis. Their problem is not one of external attack by another country, and we would do more damage to the concept of self-defense (and persuade no one internationally) trying to advance this argument. Rather, our agreed line of argumentation is that customary international law was not developed to deal with the type of extraordinary security situation faced by Colombia and Peru, where loss of control of territory to drug lords has put large portions of their territory beyond reach of normal, ground law enforcement. Given the extraordinary situation, and the rigorous procedures that Col/Peru follow before actually shooting at an aircraft, we take the view that Col./Peru policies are not inconsistent with international law. (DOD/GC said it would not join in this consensus, although it understood that State/L would need to make the argument. Very convenient.)

4. 3 bis -- as noted above, this should not be made a centerpiece of our argument. Apart from fact it has not entered into force, and therefore is not binding on Cuba, it is problematic for us with respect to Col/Peru. The negotiating record and our subsequent statements indicate 3bis was meant to ban the use of force against civil aircraft, absent Article 51 armed attack or imminent threat to life. Moreover, we have a pre-existing 10 year record of "supporting" 3bis, but not having transmitted it to the Senate. 3bis raises more questions for us than we need, particularly since we have alternative bases for finding Cuba in violation of international law.

State Department could find no public explanation for long delay in transmitting 3bis to the Senate. Repeated public line was "we have the matter under review". However, internal papers demonstrate a strong concern, particularly in the aftermath of the Nicaragua ICJ case, about the fact that the ICAO Charter would allow 3bis disputes to be brought to the World Court. This concern was heightened when Iran took us to the ICJ for

Iran Airbus.

Whatever our past private reservations about 3bis, we need to be doubly cautious about it now, given our support for Peru/Col. At the same time, however, we can expect ICAO, like the UNSC, to want to reconfirm 3bis.

You asked for press guidance on 3bis. Repeating the introductory caveat that we should not make 3bis the centerpiece of our criticism of Cuba, the group recommended the following guidance to the questions you posed:

Q: What is the USG attitude toward 3bis?

A: The USG is firmly committed to the principles underlying article 3bis.

Q: Will the Administration be submitting it to the Senate for ratification?

A: That question has not been looked at during this Administration. We intend to review that question.

Q: Why didn't previous Administrations transmit it to the Senate?

A: It appears that the matter was kept under review. Prior Administrations appear to have been influenced in that decision by certain events which potentially implicated the Article, such as the downing of the Iranian Airbus in the Gulf.

Q: Does the Administration believe Colombia's and Peru's shootdown policies are consistent with 3bis?

A; Yes, but given that the extraordinary situation in those countries was not contemplated when 3bis was developed, we would want to consult with other countries on this conclusion.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	From White House Situation Room to Various. Subject: Log for 8 March 1996. (4 pages)	03/09/1996	P1/b(1)
002. email	From White House Situation Room to Various. Subject: Log for 9 March 1996. (6 pages)	03/10/1996	P1/b(1)
003. email	From Alan Kreczko to Joan Hunerwadel. Subject: shootdown (5 pages)	03/10/1996	P5 6480
004. email	From Richard Nuccio to Robert Malley. Subject: Points for POTUS. (2 pages)	03/11/1996	P1/b(1)
005. email	From Robert Malley to Richard Nuccio. Subject: POTUSHB.doc. (2 pages)	03/11/1996	P1/b(1)
006. email	From Joan Hunerwadel to Marion Blieberger. Subject: 1623 Package (2 pages)	03/13/1996	P5
007. email	From Robert Malley to Richard Nuccio and Eric Schwartz. Subject: Cuba Migration. (6 pages)	03/14/1996	P1/b(1)
008. email	From James Fetig to Brian Cullen. Subject: Meeting. (2 pages)	03/15/1996	P1/b(1)
009. email	From White House Situation Room to Log for 16 March 1996. (3 pages)	003/17/1996	P1/b(1)
010. email	From Robert Malley to Mary Peters. Subject: SRB Meeting. (3 pages)	03/18/1996	P1/b(1)
011. email	From Mary Peters to Helen Walsh. Subject: Brittan. (3 pages)	03/18/1996	P1/b(1)

COLLECTION:
Clinton Presidential Records
NSC Emails
MSMail-Record (Sept 94-Sept 97) ([Cuba, BTTR, Shootdown])
OA/Box Number: 590000

FOLDER TITLE:
[03/09/1996-03/22/1996]

2009-0342-F
vz1151

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6430

MSMail

DATE-TIME	10 March 96 21:34
FROM	Kreczko, Alan J.
CLASSIFICATION	UNCLASSIFIED
SUBJECT	shootdown [UNCLASSIFIED]
TO	Hunerwadel, Joan S.
CARBON_COPY	Kreczko, Alan J.
TEXT_BODY	

Jo,

Please put in final, package form.

[[SHTDN.DOC : 5399 in SHTDN.DOC]]

ATTACHMENT FILE DATE	10 March 96 21:32
ATTACHMENT FILE NAME	SHTDN.DOC

TO: ANTHONY LAKE

FROM: ALAN KRECZKO

SUBJECT: 3Bis of the Chicago Convention

As discussed, I put a hold on a statement by Amb. Albright indicating we would transmit to the Senate Article 3bis of the Chicago
Convention. Afterward, I spoke with Conrad Harper and with Amb. Albright.

Conrad shares my reservations about moving forward with 3Bis, given
the uncertainty of international reaction to the Colombia/Peru shootdowns of drug planes. He spoke with Secretary Christopher, who
said he had not told Amb. Albright we could move ahead with 3Bis.

Amb. Albright said she made it through the UN debate all right without having to indicate we would move 3bis forward to the Senate.
She acknowledged it was hard for Cuba to make a big deal of our non-ratification of 3bis when Cuba also had not ratified it. She

said the problem was that most other States had ratified it and therefore tended to make it the focus of attention.

To recap: Article 3bis need not be, and should not be, the focus of
our criticism of Cuba.

--need not be, because Cuba's actions clearly violated the Chicago
Convention and customary international law without regard to 3bis.
Both clearly require due regard for civil aircraft; the Convention
identifies specific procedures for the interception of civil aircration. No way Cuba's action met these standards.

--should not be, because 3bis is not in force and neither we nor Cuba have ratified it. (You commented that you had only learned a
few days ago that we had not ratified 3Bis. That fact was included
in the memo I did the night of the shootdown, and attached to the paper for the President.)

FUTURE COURSE OF ACTION

3Bis has broad international support, and our nonratification will
become more awkward -- particularly given our role in its elavoration
-- when it enters into force.

The problem with moving forward now on 3Bis is its impact on our support for the Colombia and Peruvian shootdown policies. 3Bis begins with a categoric prohibition on the use of force against civil
aircraft. This is followed by a reference to the UN Charter. While
arguably broader, the negotiating record inciates this reference was
intended to preserve the Article 51 right of self-defense. During
negotation of 3bis, several States reportedly sought a law enforcement exception. This was rejected, however, because most shootdowns of civil aircraft (e.g. KAL 007) were "justified" on this
basis.

It is one thing for us to argue that the drug shootdowns are consistent with the Chicago Convention, which requires only "due

care", since both Colombia and Peru comply with ICAO procedures for
the interception of civil aircraft. It is also possible to argue consistency with customary international law, given the vagueness of
customary international law and the "break/make" character of customary international law.

It is far more difficult to argue consistency with 3Bis, given its
text and negotiating record (and the fact it is subject to World Court adjudication) True, an argument of consistency can be made,
given the extraordinary situation faced by Colombia and Peru. However, without knowing where more countries stand on COlombia/Peru's
actions, I believe all agency counsel would argue against sending 3bis forward to the Senate.

Where do other countries stand? We do not have much of a sense. When the Secretary of State joined with NSC and ONDCP in recommending
that we seek legislation to enable support to Colombia and Peru, he
recommended that it be combined with an aggressive diplomatic campaign to garner international support. Nonetheless, not much happened. We did notify our major civil aviation partners of our decision; none were supportive, most did not react. We also approached Colombia and Peru to make a "national emergency" declaration to ICAO. This action would do more than anything else to
improve our international law posture (including under 3Bis), since
the Chicago Convention acknowledges that States can exempt themselves
from Convention obligations by filing such an exemption.

However, it was our sense that State's efforts to build international support were lukewarm, apparently out of concern that
seeking to build support would attract criticism. (In a memo to
you of Nov. 1994, Global and I recommended that you take this up Christopher; Sandy wrote on it that he would follow-up with Tarnoff.
A few months later, Global and I again recommended that you take it
up with Christopher. Given the involvment of its personnel in the
shootdown operations, DOD was particularly concerned by the

failure
to broaden support for Colombia and Peru's programs.

The Cuba shootdown may motivate State to do more to protect our position re Colombia and Peru. I recommend you authorize Andy Sens
to sign out the attached tasker to State, requesting information on
efforts to obtain international support for the Colombia/Peru shootdown.

Recommdendation

That you authorize Andy to sign out the attached memorandum to the
State Deparmtnet.

Attachment

International consideration of the Cuba shootdown has refocused attention on amendment 3Bis to the Chicago Convention, and US non-ratification of it. One factor relevant to USG consideration of
ratification 3Bis is the international attitude toward the policies
of Colombia and Peru to intercept, and if necessary, shootdown drug
trafficking planes.

When the president decided in 1994 to support a change in domestic
law to decriminalize use of force against civilian aircraft in narrow
circumstances, he also decided that we would work concurenntly to gain diplomatic support for this position.

The State Department is requested to report by April 15 on what efforts it has taken in this regard, and with what results. It should also report, in coordination with the Department of Transportation, on what additional steps, if any, it recommends to
build additional support for the position. In particular, it should
indicate whether another higher level effort should be made to get

Colombia and Peru to file an Article 89 Declaration of Emergency
with
ICAO.