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 2032
002. letter	To President Clinton from Sean Maloney and David Goodfriend. Subject: Kyl / Mack / Lautenberg amendment (1 page)	08/02/1999	P5 2033
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
004. draft	re: Payment of certain antiterrorism judgements (2 pages)	n.d.	P5
005. statement	re: Explanation of proposal (6 pages)	n.d.	P5
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]

Jamie Metrailer
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]
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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]

7198

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

September 28, 1999

ACTION

MEMORANDUM FOR SAMUEL R. BERGER

THROUGH: JAMES E. BAKER JB

FROM: CHARLES A. ALLEN CA

SUBJECT: Legislative Alternatives to Proposals on Behalf of Flatow and Brothers to the Rescue Plaintiffs

We would like to obtain your approval to share the attached legislative alternative with a small policy group with a view to presenting a cleared proposal to the President.

Background

Prior to the August recess, we faced the prospect of enactment of section 118 (offered by Senators Kyl, Mack and Lautenberg) as part of the Treasury-Postal bill. Section 118 would have exposed blocked assets by repealing the President's waiver authority under section 117 from last year's bill, and would have allowed attachment of U.S. funds payable to a foreign country such as Iran or Cuba. On August 2 the President indicated his agreement that a bill with such a provision could rise to the level of a veto (Tab I), and the Secretary of State and Attorney General concluded that week that they would recommend a veto.

As a result, section 118 was removed from the Treasury-Postal bill during conference, but it has been understood all along that the provision could reappear in another bill this session. Mindful of the President's views, and motivated by our desire to maintain the President's national security tools while at the same time condemning terrorism, we have considered possible alternative approaches. We worked informally with agency experts (State, Treasury, Justice, OMB) on technical matters, and NSC staff developed out of this effort some ideas for alternatives. Although we have discussed our proposal only within a small interagency group (Stu, OMB, OLC), we have not formally vetted it out of concern that any leaks could effectively abrogate the President's policy options.

In recent days the issue has reemerged, with statements by Senator Mack about his resolve to raise his amendment anew, and plaintiffs' statements to the press that the Administration's opposition to the legislation and appearances in court to protect the President's waiver mean that we support terrorist states at the expense of American victims.

NSC/Legal's draft legislative proposal, Tab II (statutory language) and Tab III (description of proposal), would provide a near-term solution to the intractable problem created by the 1996 amendment to the Foreign Sovereign Immunities Act allowing private actions against terrorist-list states. The proposal assumes that some near-term payment to the three existing judgment holders is necessary to head-off an unacceptable provision such as section 118. At the same time, the proposal protects blocked assets in the national security interest by funding "advance payments" to judgment holders using appropriated funds.

The proposal also recognizes that the 1996 amendment conferring jurisdiction against terrorist-list states has not balanced the country's broader interest in an important national security tool with our shared desire to provide redress for outrageous acts of terrorism. As a result, plaintiffs have been unable to collect on their judgments, and extraordinary pressure has been placed on the Administration to allow collection from blocked assets. Therefore, we believe that there is a need for a broad, deliberative review of the problem of compensating American victims of terrorism before settling on a more permanent solution to these cases and others that may arise in the future.

The proposal at Tab II would accomplish the following:

- Authorize advance payments to judgment holders as of September 30, 1999 (three cases), limited to 5 percent of adjudged compensatory damages, not to exceed $2 million per plaintiff. (The maximum payout would be about $7 million, based on adjudged compensatory damages as follows: Flatow -- $25 million; Brothers to the Rescue -- $49 million; and Ciccipio, Jacobson, and Reed -- $65 million.)

- Subrogate the United States to these claims against terrorist-list states to the extent of advances paid.

- Provide for a Presidentially appointed commission to study how best to resolve the difficulties inherent in suits under the 1996 amendment. The commission should be guided by the need to preserve blocked assets while providing means of effective compensation for American victims of terrorism abroad. The commission would report findings and make recommendations for legislative solutions within 18 months of enactment.

- Amend section 117(d) of the Omnibus Appropriations Act for FY 1999 to confirm the President's authority to waive section 117 and thus protect blocked assets.

As an alternative to use of appropriated funds to make the advance payments, we have also considered a provision to authorize use of existing victim compensation and assistance accounts. These accounts are funded with penalties and fines, and they provide Federal support for a portion of the states' victim compensation and assistance programs. OMB advises that legislation to tap the DOJ victim funds would not require scoring, since budget estimates each year already assume that these funds will be depleted. However, use of these funds for the first time to pay compensatory damages adjudged by courts would likely be opposed by governors, among others, since these funds have only been used to provide modest payments to victims for such things as expenses to attend trials. Precedent setting legislation in this area could deplete the Victims Compensation Fund and, without substantial additional appropriation, draw its resources away from traditional assistance activities to compensatory functions.

We have also considered legislation that would accomplish the same objective by authorizing the vesting of frozen assets to make the 5 percent payments. This has the advantage of not requiring additional appropriations, but the same national security disadvantages of section 118, albeit on a different scale. Moreover, unlike Cuba, Iran's frozen assets, which might be used in the Flatow and Ciccipio cases, consist of diplomatic property and property subject to the Iran Claims Tribunal, raising all the international legal problems previously identified.

We continue efforts to help plaintiffs locate unblocked assets for possible attachment. In the Flatow case, some 900 additional pages were turned over in August pursuant to protective order. In addition, Justice recently provided Flatow's counsel a document from OFAC regarding a $750,000 California land sale by an Iranian bank that was due to close on

September 15. Despite our providing such information, plaintiffs to date have not recovered assets. Flatow's counsel has signaled a lack of interest in further protracted litigation to show the necessary connection between Iranian commercial entities and the Government of Iran as required to prevail in court. Thus, despite our continued efforts in this area, information on unblocked assets will not obviate the need for a legislative remedy.

For your information, following the recess Stu Eizenstat asked his people at Treasury to draft a memo for him to send to the White House laying out legislative options and ways we might expand support to plaintiffs on unblocked assets. He intends to circulate the memo in a small interagency group (including NSC staff) before he finalizes it, but we have not yet seen the draft.

Concurrence by: Miles Lackey CAH/for

RECOMMENDATION

That you authorize circulation of the attached proposal to Stu Eizenstat, Tom Pickering, Eric Holder, Jack Lew and Beth Nolan with a view to presenting to the President a legislative alternative to section 118.

Approve _____ Disapprove _____

Attachments
Tab I Memorandum for the President
Tab II Legislative Proposal
Tab III Explanation of Proposal

After being allowed to intervene for the purposes of appeal, we, along with other affected parties, appealed. On August 11, 1999, Judge King's decision was overturned by the Eleventh Circuit. The appellate court ruled only on the second ground, holding that ETECSA was a separate juridical entity from the government of Cuba and hence not subject to garnishment for the Cuban government's debts. The Eleventh Circuit's opinion, however, leaves open the question of whether assets held in the name of other Cuban entities, in particular, ETECSA's predecessor, the nationalized telecommunications company known as EMTELCUBA (now, RADIOCUBA), may properly be garnished to satisfy a judgment against the government of Cuba. It also leaves open the question of more interest to the United States, whether the President's waiver of Section 117 is valid. Accordingly, in the district court, plaintiffs continue to pursue garnishment of the blocked bank accounts holding Cuban assets, including assets of EMTELCUBA, and also are asserting the right to take additional discovery on ETECSA's relationship with the Cuban government and with EMTELCUBA.

Although plaintiffs have not yet acted to attach or garnish any other assets, the possibility exists that they may attempt to do so, and the Justice Department has sought to be prepared to forestall any such attempts. Of current interest, a risk exists that plaintiffs may attempt to attach the airplane that will be used to transport Cuba's foreign minister, currently visiting the United Nations, back to Cuba next week. Although we suspect that plaintiffs are aware of the visit and have chosen not to act (since they did not act when the plane delivered the foreign minister to this country), we suggest that this possibility not be mentioned to them.

Questions and Answers

Q: What interests is the United States seeking to protect by participating in these cases?

In exercising his authority to waive Section 117, the President identified significant national security interests that would be affected by allowing attachment or garnishment of blocked assets. These include: (1) impairment of our ability to use sanctions programs that involve the blocking of assets of terrorist-list states for leverage to protect national security; (2) as applied to foreign diplomatic property (not directly involved in this case but involved, e.g., in the Flatow case against Iran), contravention of international legal obligations upon which we rely to protect diplomatic personnel and other U.S. citizens abroad; and (3) preclusion of the use of blocked assets as part of an equitable program for settlement of all U.S. claims against a given terrorist-list state. For example, there are currently over $6 billion in claims by U.S. nationals against Cuba, including some for wrongful death, which were adjudicated in the early 1970s by the Foreign Claims Settlement Commission.

In addition, allowing garnishment of the debts owed ETECSA would interfere with the ability of the United States to carry out important foreign policy goals enshrined in the Cuban Democracy Act of 1992. This Act authorizes direct telecommunications services between the United States and Cuba and permits the special licensing of payments due to Cuba or Cuban entities of amounts due "as a result of the provision of telecommunications services." Direct telecommunications service fosters contacts between residents of the United States and the people of Cuba, and is a critical element of our policy of supporting the Cuban people and fostering a

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 2034
002a. letter	To President Clinton from Sean Maloney and David Goodfriend. Subject: Kyl / Mack / Lautenberg amendment (1 page)	08/02/1999	P5 2033 Dup.
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
003. memo	To Charles Ruff from Neal Katyal. Subject: Cuban sanctions (10 pages)	06/16/1999	P5 2035
004. memo	To Jamie Baker from Charles Ruff. Subject: BTTR (1 page)	06/29/1999	P5 2036
005. note	re: Communications strategy (1 page)	n.d.	P5 2037
006a. note	re: Annotations concerning benefits for families of embassy bombings (1 page)	01/31/2000	P5 2038
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 2039
007. briefing paper	re: Legislative option Flatow and BTTR case (3 pages)	01/28/2000	P5 2040

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]
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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.

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National Security Council
The White House

PROOFED BY: ______ LOG # 7116

URGENT NOT PROOFED: ______ SYSTEM PRS NSC INT ARS

BYPASSED WW DESK: ______ DOCLOG ______ A/O ______

	SEQUENCE TO	INITIAL/DATE	DISPOSITION
Harmon			
Dohse			
Sens	1	DS	
Soderberg			
Berger	2	SN	NOTE
Lake	3		
Situation Room			
West Wing Desk	4	ERS 9/21	D
Records Mgt.			
Malley/Armstrong		4	FE I

A = Action I = Information D = Dispatch R = Retain N = No Further Action

cc:

COMMENTS:

Unrealistic to expect this to be private. If we don't control disclosure, likely to be reaching Cubans, Florida radio leaders etc. Would suggest that we agree with families to very low-key statement from McCurry.

Also, since President made this commitment, inevitably will be questioned.

Exec Sec Office has diskette

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Address (Partial); Phone No. (Partial) (1 page)	03/26/1999	P6/b(6)
002. memo	To President Clinton from Samuel Berger and Charles Ruff. Subject: Decision in the "Brothers to the Rescue" case (Annotations) (4 pages)	05/07/1999	P5 2041

COLLECTION:
Clinton Presidential Records
Counsel's Office

OA/Box Number: 20839

FOLDER TITLE:
Brothers to the Rescue: [Litigation Information]

Jamie Metrailer
2009-0342-F
jm673

RESTRICTION CODES

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

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UNCLASSIFIED with
~~CONFIDENTIAL Attachment~~

2584

THE WHITE HOUSE

WASHINGTON

April 29, 1999

5-7-99

copied
Berger
Ruff
Podesta

INFORMATION

MEMORANDUM FOR THE PRESIDENT

we need to discuss this — w/ NSC & counsel's office before May 10

FROM: SAMUEL BERGER
CHARLES F. C. RUFF

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

You have had a number of animated conversations with us about the litigation related to the shoot-down of "Brothers to the Rescue" (BTTR) pilots in February 1996. Following is some background on the legal and policy aspects of the case.

Litigation. In December 1997, the families of the pilots obtained a $187 million judgment against Cuba, under a 1996 amendment to the Foreign Sovereign Immunities Act which allows civil suits against state sponsors of terrorism despite the general rule that courts lack jurisdiction over claims brought against a foreign state. Plaintiffs are attempting to collect on their judgment by attaching blocked Cuban assets and garnishing OFAC-licensed telecom payments. (The total of USG-blocked Cuban assets is $178 million.) On March 18, Judge King, Southern District of Florida, ruled against the telecom companies and ordered garnishment of over $6 million in debts payable by U.S. telecom companies to the Cuban telephone company. Subsequently, the judge granted the telecom companies' motion to stay the garnishment order pending appeal. The USG intervened as a party for purposes of appeal and DoJ and the telecom companies sought review in the Eleventh Circuit. On April 27, the circuit judge set the schedule, with briefs due May 17.

Legal Aspects. The core issue in the BTTR case, as well as in similar cases involving blocked Iranian assets, is section 117 of the Omnibus Appropriations Act (FY 99). Section 117 amends the Foreign Sovereign Immunities Act (FSIA) to allow holders of judgments against terrorist-list countries to attach properties blocked under various national security statutes, "notwithstanding any other provision of law." It also requires State and Treasury to assist judgment holders in identifying, locating, and executing against the property of such countries.

UNCLASSIFIED WITH
~~CONFIDENTIAL Attachment~~

cc: Vice President
Chief of Staff

Section 117(d) allows you to waive these 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 if the attachment provisions were invoked. 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).

Justice believes it has a very good case for upholding the waiver of section 117. State, Treasury, and NSC Legal concur. We argued in 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 related to blocked foreign-state property. The court held, however, that the waiver extends only to the requirement that the USG help *locate unblocked assets* of terrorist states. The court drew on a very limited legislative history, based on conflicting statements by Members of Congress. (There were no hearings and only limited floor action on Section 117.) Though the court characterized the statutory language as "ambiguous," it proceeded to limit the scope of the waiver anyway.

Policy Considerations. The district court's decision highlights the serious policy and national security risks -- which go far beyond interference with Cuban telecommunications links -- that were the basis for exercising the waiver last fall.

First, the court decision will encourage efforts by the plaintiffs to attach the entire $178 million in blocked Cuban assets. Blocking assets is one of the primary policy tools at our disposal to combat conduct by hostile states against the security of the United States. It disrupts the ability of terrorist-list countries to carry out international financial transactions using those assets and -- to the degree the Governments seek the return of these funds -- gives us significant leverage. The Supreme Court has recognized blocking to be a "critical" tool in dealing with hostile countries. (For example, our release of virtually all blocked Iranian assets was the critical leverage in securing the release of American hostages from Iran.) Retaining the blocked assets also strengthens your hand in efforts to normalize relations, including resolution of valid claims once a different government is in place. Past blocking programs have been the source of funds paid in claims settlements with Yugoslavia, Bulgaria, Hungary, Romania, Czechoslovakia, and Vietnam. If we were to allow blocked assets to be doled out to private creditors now, we would literally eliminate blocking as a foreign policy tool.

5-7-99

Second, it would be unfair to allow the BTTR claimants to attach blocked Cuban assets without treating the other 5,911 certified U.S. claimants in a similar fashion. Over $6 billion in claims against Cuba were adjudicated in the early 1970s by the Foreign Claims Settlement Commission (FCSC). These claimants have waited for decades for compensation for the expropriation of property, wrongful deaths and personal injuries caused by the Cuban government in the 1960s. Claimants could rightfully demand compensation out of blocked Cuban assets as well. In fact, when you authorized an earlier payment of $1.2 million in blocked Cuban assets for *ex gratia* humanitarian payments to the four families affected in the BTTR shoot-down, representatives of the certified claimants expressed their opposition to your action.

isn't there a distinction as to type of assets

Third, a similar decision in the Flatow or Jacobson, Cicippio and Reed case (involving claims against Iran) would lead to execution on blocked diplomatic property. Allowing private judgment creditors to attach diplomatic assets would be in violation of the Vienna Convention on Diplomatic Relations, which requires the U.S. to respect and protect these properties as inviolable. It would erode the principle that diplomatic property must always be protected regardless of bilateral relations and risk protections the U.S. currently enjoys at every embassy abroad. Furthermore, under the Algiers Accords that ended the hostage crisis, the awards of the Iran-U.S. Claims 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 USG could be liable for the value of the properties. Similarly, the decision opens a channel for attachment of blocked Cuban bank accounts which are licensed for use by Cuba's Mission to the United Nations. Granting access to these accounts would violate our obligations under the UN Charter to permit and protect the functioning of UN Missions. It could also lead to claims by Cuba or the UN, and a potentially embarrassing international legal case against the United States.

That answer (now [illegible]) doesn't fit

Finally, the district court's decision interferes with our ability to implement the 1992 Cuban Democracy Act, which permits the special licensing arrangements for telecom services. Communications links between Americans and the Cuban people enjoy broad bipartisan support. Court proceedings related to the garnishment order prevented the telecom companies from making payments to the Cuban telephone company, prompting the Cuban government to cut direct phone links. (See TAB B for March 15 memo on this subject.) Since then, calls have been routed through third countries. Beyond the effects on phone service (higher costs/degraded service), the decision also paves the way for judgment creditors to garnish OFAC-licensed payments by U.S.

airline companies to fly through Cuba's three international flight corridors. (Plaintiffs' counsel have indicated their interest in moving against these payments.) Cuba would likely close flight corridors, resulting in additional flight times and significant expense to the airlines.

End-Game. We have made clear throughout the BTTR litigation that the need to protect blocked assets is completely separate from our commitment against terrorism and sympathy for the families. The USG took strong steps against Cuba following the shoot-down and in late 1996 you directed Treasury to vest $1.2 million in blocked Cuban assets to make *ex gratia* humanitarian payments to the four families.

While not certain, we are confident the USG will win the BTTR telecom case on appeal. Nonetheless, it may be possible to settle the pending litigation with additional payments similar to the *ex gratia* payments made in 1996. Plaintiffs' counsel have indicated a desire for an out-of-court settlement, but it is unclear whether plaintiffs would accept a settlement that protects most of the blocked assets and telecom accounts. In the interest of fairness to similarly situated claimants against Cuba, we could at the same time consider vesting funds for at least partial payment of the few FCSC-certified wrongful death claims (but not the larger number of expropriation cases).

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). Unlike the Cuban case, the statute under which Iranian property is blocked does not allow vesting of property. While we have been able to provide plaintiffs with some information on unblocked commercial assets that may be available for attachment, it is unclear if the plaintiffs will ultimately be successful in attaching these assets.

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

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Draft for Maria Echaveste from Fulton Armstrong re: Cuba Shootdown Families' Efforts to Attach Frozen Funds (Annotations) (4 pages)	11/06/1998	P5 2556
002. email	Charles Allen to National Security Advisor re: Attempts to attach Iranian and Cuban assets (1 page)	11/24/1998	P5 2557

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 [2]

2009-0342-F
jm1084

RESTRICTION CODES

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

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

XXXX

DRAFT

Jim –
(1) For approval. Legal felt more detailed explanation was necessary.
(2) Can send directly, or have to do via Front Office?
Fulton

November 6, 1998

MEMORANDUM FOR MARIA ECHAVESTE

THROUGH: JAMES F. DOBBINS

FROM: FULTON T. ARMSTRONG

SUBJECT: Cuba Shootdown Families' Efforts to Attach Frozen Funds

We understand that Jorge Mas Santos told the President last week that the families of the "Brothers to the Rescue" shootdown victims sought to attach blocked Cuban Government "commercial" funds, not "diplomatic" funds. The families apparently believed that the President's waiver of the Lautenberg Amendment to the Omnibus Appropriations Act covered *only* diplomatic properties and accounts.

The Lautenberg amendment would permit holders of judgments against terrorist-list countries to attach properties blocked under various national security statutes, "notwithstanding any other provision of law." The amendment includes a waiver provision allowing the President to waive this requirement "in the interest of national security." Because of significant national security concerns, the President waived the Lautenberg amendment upon signing the Omnibus Appropriations Act into law.

In fact, the waiver prevents the attachment of all blocked assets of terrorist-list countries, including over $170 million in frozen Cuban assets. Plaintiffs in the shootdown case have attempted to use the new law to attach blocked Cuban assets that have been held by AT&T for years. (These are funds that AT&T owed Cuba at the time the embargo was put in force and therefore has been unable to transfer to Cuba.) They are challenging the President's waiver, claiming that the law only allows the President to waive a provision that calls on State and Treasury to assist judgment holders in identifying assets to satisfy their judgments.

The fact that the blocked Cuban assets are not diplomatic properties as are those at issue in the Flatow case does not put the Cuban assets outside the waiver's coverage. Although diplomatic properties present additional concerns, the President waived the amendment because it would effectively eliminate use of blocked assets of terrorist countries in our national security interest, including as leverage against those countries. It would also disadvantage the thousands of U.S. certified claimants to properties confiscated by the Cuba Gov't in the 1960s, who have claims to the frozen assets.

FYI, we are not aware of any unblocked assets of Cuba. However, Treasury (OFAC) licenses payments from U.S. companies to Cuba each year for overflight rights (about $20 million) and telecommunications services (about $72 million). The latter payments are reported to Congress under the Cuba Democracy Act, and Treasury has shared this information with plaintiffs in the

COPY

shootdown cases. It is uncertain whether these payments could be attached. To do so would keep Cuba from receiving the funds and could result in disruptions in communications between the American and Cuban people -- a mainstay of our policy that is widely supported by the Cuban-American community. Also, the overflight rights are critical to many different routes flown by U.S. airline companies.

Points for your call to Mr. Mas:

- President enjoyed exchange with you, and appreciated your clarification of desires of shootdown victims' families regarding attachment of frozen Cuban funds.

- As you know, President exercised waiver authority in Omnibus Appropriations Act due to important national security interests. Had he not used the waiver, the "Lautenberg Amendment" would have allowed holders of judgments against countries on the U.S. Government's terrorist list to attach frozen assets.

- President did so in interest of national security. If not waived, the amendment would effectively eliminate use of blocked assets of terrorist-list countries, such as Cuba, as leverage against them.

- In cases like Iran, where diplomatic properties are involved, attachment would also put at risk the protection of American personnel and properties abroad.

- Also important in case of Cuba is that attachment by a small number of judgment creditors would deny us use of funds to compensate or secure compensation for the thousands of certified claimants to confiscated properties.

- In case of Cuba, there is no "diplomatic" property at issue. Nevertheless, as I said before, there are important national security interests at stake with regard to all blocked assets of terrorist-list countries. The President's waiver preserves these interests.

- President deeply sympathizes with families of four shootdown victims. We have taken strong steps against Cuba for brutal act, and marshaled forceful international condemnation.

- President also arranged $1.2 million in humanitarian compensation for families.

- [if pressed on AT+T funds] The blocked assets under AT+T's control -- which are funds it owed Cuba when the embargo prevented the company from [illegible] them to Cuba -- are covered by the waiver. We are not aware of any unblocked [illegible]

Clearance: Chuck Allen

Armstrong, Fulton T.

From: Allen, Charles A.
Sent: Tuesday, November 24, 1998 8:47 PM
To: @NSA - Natl Security Advisor
Cc: @LEGAL - Legal Advisor; @LEGISLAT - Legislative Affairs; Armstrong, Fulton T.; Dobbins, James F.; Marty, Joseph H.; Riedel, Bruce O.; Simon, Steven N.
Subject: Attempts to attach Iranian and Cuban assets [UNCLASSIFIED]

Please pass to Sandy, Jim, and Don:

Summary. Since the President's waiver of section 117 of the Omnibus Act, there have been several developments in ongoing litigation -- judgment holders have stepped up efforts to attach Iranian and Cuban assets. First, the Florida court that decided the shootdown case last year issued a writ against AT&T for blocked Cuban funds. Next, Flatow filed a supplemental brief with the DC court claiming the waiver is invalid and seeking the blocked diplomatic properties of Iran. Also, Flatow obtained a writ against Treasury to attach credits held by the U.S. for Iran, including $6.5 million from the judgment fund being processed to pay an award of the Iran-U.S. Claims Tribunal. Justice is resolutely defending the President's waiver in all cases.

Background

- Section 117 permits attachment of blocked property to satisfy judgments under the 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) against Iran, Cuba and other state sponsors of terrorism. The President exercised section 117's waiver provision in the national interest.

- Shootdown case. Judge King, the Florida judge who entered the $187 million judgment against Cuba last December, issued a writ against AT&T for blocked Cuban assets just a few days after section 117 became law. AT&T holds about $93 million (of the total $178 million in blocked Cuban assets) at Chase Manhattan Bank in New York. AT&T moved for a protective order in light of the President's waiver, and Justice indicated the USG's intention to file a statement of interest to uphold the waiver. Since the assets are held in a New York account, it is unclear where litigation on Judge King's writ will take place.

- Flatow case - diplomatic properties. Flatow's lawyers have filed a supplemental brief with Judge Lamberth claiming that section 117 resolves all questions relating to Flatow's writs of attachment on blocked diplomatic properties of Iran. They argue that the President's waiver cannot reach the part of section 117 that makes blocked assets subject to attachment. They refer to floor statements on the amendment and the effort by the Administration to seek a clearer waiver provision. (FYI, the record shows conflicting floor statements, with one exchange by Hoyer and Kolbe confirming that the waiver is intended to reach the entire section.) Justice, including OLC, has consistently maintained that the waiver is effective to protect the blocked assets and will so argue in its brief in response to be filed in the next few weeks.

- Award of Iran-U.S. Claims Tribunal. The June 1998 binding award requires the USG to pay Iran some $6.5 million. Before processing the payment from the Judgment Fund, Justice determined that it was necessary, to avoid misunderstanding, to inform plaintiffs in the Flatow and Cicippio/Jacobsen/Reed cases and the respective courts that the payment would be made in the coming days. In response, Flatow served a writ of attachment on Treasury seeking all credits held by the USG for Iran, including specifically amounts due under the June Tribunal award. This week Justice will file a motion to quash the writ on sovereign immunity grounds. (Absent an express statutory waiver, a creditor cannot reach Federal funds owed to a judgment debtor.) Longstanding case law supports the USG position, but Flatow is likely to argue that section 117 effectively waives sovereign immunity in this case. The payment to Iran will be further delayed until the matter is resolved.

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
001c. attachment	re: Status of Flatow Litigation and Assistance to Mr. Flatow (2 pages)	n.d.	P5
002. memo	Charles Ruff and Samuel Berger to President Clinton re: Decision in the "Brothers to the Rescue" Case (6 pages)	n.d.	P5

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]
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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]

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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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

4515 Redo

June 25, 1999

ACTION

MEMORANDUM FOR SAMUEL R. BERGER

THROUGH: JAMES BAKER JB

FROM: CHARLES ALLEN CA

SUBJECT: Treasury-Postal Appropriations Bill Amendment and Flatow Litigation

In light of Senate Appropriations Committee action this week, adding an amendment to the Treasury-Postal bill that poses major difficulties, we need the President's guidance regarding a possible veto threat. We therefore pulled the Flatow update memo we had done and attached that information to the memo to the President at Tab I.

Concurrence by: Miles Lackey CA/for and Mara Rudman CA/for

RECOMMENDATION

That you sign the memorandum for the President at Tab I.

Attachments
Tab I Memorandum for the President
Tab A Status of Flatow Litigation

Fulton – FYI, Chuck

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. cable	re: Iran Air Flight 655. [partial] (1 page)	06/06/1989	P6/b(6)
002a. fax	Ronald Bettauer to Alan Kreczko re: Vesting Cuban Assets (1 page)	05/09/1996	P5 2562
002b. attachment	Draft re: Vesting Cuban Assets to Pay the Families of the Victims of the Cuban Shootdown (7 pages)	05/09/1996	P5 2563 - 2566

COLLECTION:

Clinton Presidential Records
National Security Council
Legal Advisor (John Sparks)
OA/Box Number: 1007

FOLDER TITLE:

Ex Gratia / Cuba Shootdown

2009-0342-F
vz1160

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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facsimile
TRANSMITTAL

to: NSC - Mr. Kreczko
fax #: 456-9110
re: Vesting Cuban Assets
date: May 9, 1996
pages: 8 page(s) total, including this cover sheet

Conrad asked me to send you the attached paper. He said he would call you to talk with you about it.

From:

Ronald J. Bettauer
Assistant Legal Adviser for International
Claims and Investment Disputes
United States Department of State

Washington, D.C. 20520

tel: 202-776-8360
fax: 202-776-8389

DRAFT

Vesting Cuban Assets to Pay the Families of the Victims of the February 24, 1966, Cuban Shootdown

On February 26, the President announced that he would seek legislation to provide immediate compensation to the families of the victims out of Cuba's blocked assets in the United States. We are informed that the President recently met with the families and restated his commitment to provide compensation to them out of blocked Cuban assets. We also understand that at least one of the families of the victims may not be U.S. nationals.

Reasons for Seeking a Reversal or Postponement of this Decision

In most circumstances, the taking of alien or foreign government property without prompt, adequate and effective compensation violates international law. Historically, vesting has not been a common or generally accepted means for resolving interstate claims (there may be only one instance in U.S. history, for example). In part this is because liability is determined unilaterally and extra-judicially by the party in interest. Some states may argue this is not permitted under international law and assert, at a minimum, a prior requirement to offer to go to arbitration or other binding third-party dispute resolution. Widespread vesting would also put at risk government (and private) assets all around the world and discourage investment, something which could cause particular damage to the U.S. financial system. Customary practice would be to retain the assets in a blocked status until there is a claims settlement. If Cuban assets are vested in this case without a prior U.S. demand to Cuba for compensation (or if Cuba were to respond to such a demand by offering to negotiate or arbitrate), we would not be able to argue that we had undertaken reasonable diplomatic efforts to resolve the claims first. (Nor would we be able to argue that Security Council resolutions legitimate our action, as we did in the cases of Iraq and Libya.)

Vesting assets for payment to non-nationals presents an additional difficult problem under international law. Unless the foreign government agrees, there is no recognized basis under international law for the U.S. Government to espouse claims of non-nationals, and there would thus be no basis for taking Cuban assets unilaterally for a non-national.

Pressing a claim with Cuba directly, however, would present risks if Cuba were to make a reasonable offer to resolve the claims. For example, under agreements concluded in the 1920s and 1930s to which both Cuba and the United States are parties, the Government of Cuba could take the United States to a fact-finding procedure. Although there would be no legally binding result, this would delay acting on the claims and runs the risk of adverse conclusions. At the same time, these procedures would also be available to Cuba if we were preemptively to vest its assets.

Any level of compensation we provide -- whether fixed amounts or tailored to the families circumstances -- is subject both to criticism by the families of the victims and to challenge in the courts. The recent amendments to the FSIA made by the Counter-Terrorism Act would provide jurisdiction for suits by U.S. nationals against Cuba in the United States for extra-judicial killing and aircraft sabotage. The 5911 holders of claims certified by the Foreign Claims Settlement Commission in 1972 might also complain about the use of blocked Cuban assets for the satisfaction of claims other than theirs.

If the decision is to proceed, there are the following options for implementing it.

Options for Implementing the President's Offer

1. Ask the Justice Department, in consultation with the State Department, to obtain necessary information and documentation from the U.S. nationals who are survivors and determine the amount of compensation each should receive. Ask Treasury, upon receipt of a waiver, to vest sufficient assets and pay that amount to those survivors.

Comment: Under this option the Justice Department (presumably the Torts Branch of the Civil Division), in consultation with State (L), would be asked to determine the appropriate amount of compensation since we can reasonably anticipate litigation in domestic courts concerning the amount. Flexibility is maintained by not articulating in advance whether the standard applied to determine the amount of compensation is drawn from international or domestic law. Only U.S. nationals would be eligible for payments. A waiver would be sought to protect the U.S. Government, to seek to forestall suits, and to enable us to argue to third countries and, eventually, to Cuba, that in taking Cuba's assets we settled the claims. If the claimants sought a higher recovery against Cuba in the courts, the waiver could be used as a justification for not licensing an additional release of blocked assets.

2. Ask the Treasury Department to vest and pay fixed amounts (e.g., $250,000) to the family members of the victims that are identified by the NSC in its memorandum to Treasury.

Comment: This is the option that can be implemented most quickly. Under this option, the amounts would be characterized as a humanitarian gesture by the President and not as full compensation. (Note that in the case of the 1992 C-130 shootdown, Peru paid the U.S. airman's family $317,000; in the recent settlement with Iran concerning the 1988 Iran Air 655 shootdown, we agreed to pay families of non-wage earning victims $150,000 each and families of wage earning victims $300,000 each.) No waiver would be sought from the families, leaving them free to bring suit for additional amounts under the new amendments to the FSIA. We could assess whether to license any court award from the blocked assets based on the amount of the award and the level of complaints received from certified claimants about recourse to further amounts of blocked assets. While the taking of assets would be hard to justify under international law, there is no guise that the action taken is an analogue to espousal and settlement of claims of U.S. nationals.

3. Ask the State Department to obtain necessary information and documentation from the U.S. nationals who are survivors and determine, in accordance with international law, which survivors are eligible beneficiaries and the amount of compensation each should receive. Ask Treasury to vest sufficient assets and, upon receipt of a waiver, pay that amount to those survivors.

Comment: Under this option the State Department would be asked to determine the appropriate beneficiaries and the amount of compensation, applying international law principles. We would justify our action under the principle that the Department may espouse and settle claims of nationals under international law (although there is only one WW II precedent for doing this without agreement of the other country or a U.N. Security Council resolution establishing liability). The logic of this option requires that recovery be available only to U.S. nationals found eligible under international law criteria and that they waive all death claims arising out of the incident in return for the payments. We anticipate the families would recover less under this option than under option 1. The claimants would thus have more incentive to reject the offered amounts, refuse to give a waiver, and sue. If the claimants sought a higher recovery against Cuba in the courts, the waiver could be used as a justification for not licensing an additional release of blocked assets.

Evaluation

We believe the first of these options is the preferable one. Providing only the amount justified under international law (option 3) would likely draw intense criticism as providing an inadequate amount, compared to what they would expect to receive in U.S. courts; it would thus increase the likelihood of suit in U.S. courts and pressure on the U.S. Government to release sufficient assets to satisfy the resulting large verdicts; and proceeding with option 3, in the absence of a waiver, would defeat its whole purpose -- that of limiting U.S. exposure beyond what could be justified under international law. Providing a fixed amount (option 2), while the most expeditious route, could not be credibly represented as full compensation, since the amount selected would necessarily be arbitrary (although we could point to precedent) and in any event would likely be far less than the claimants would probably expect to receive in U.S. courts (although it could in some cases actually exceed entitlements under international law); therefore, it may also stimulate suit in U.S. courts and pressure on the U.S. Government to release the funds to pay the resulting verdicts. Providing an amount determined by Justice (option 1) is likely to be more credible, because Justice's judgment on compensation is likely to command more public credence than State's, and therefore there would be a better chance of either avoiding suit in U.S. courts or resisting pressure to release additional assets.

Draft for Option 1

Memorandum to the Departments of Justice, State and the Treasury

The President has determined that compensation should be paid out of Cuban assets blocked in the United States to nationals of the United States who have claims against the Government of Cuba arising out of the death of persons killed in aircraft destroyed by Cuba on February 24, 1996.

The Department of Justice, in consultation with the Department of State, is instructed to:

1. obtain necessary information and documentation from the survivors and determine the amount of compensation each such beneficiary should receive; and

2. transmit to the Department of the Treasury the names of such beneficiaries and the amount of compensation to which each beneficiary is entitled.

The Department of the Treasury is instructed, subject to receipt of written confirmation from the Office of Legal Counsel of the Department of Justice of authority to do so under the Trading with the Enemy Act and a waiver of all death claims arising out of the incident in question, to:

1. vest assets of the Government of Cuba blocked in the United States sufficient to pay the amounts of compensation to each of the beneficiaries notified by the Department of Justice; and

2. pay the amount of compensation notified by the Department of Justice to each beneficiary.

[signed]
[NSC]

Draft for Option 2

Memorandum to the Department of the Treasury

The President has determined that compensation should be paid out of Cuban assets blocked in the United States to nationals of the United States who have claims against the Government of Cuba arising out of the death of persons killed in aircraft destroyed by Cuba on February 24, 1996.

The Department of the Treasury is instructed, subject to receipt of written confirmation from the Office of Legal Counsel of the Department of Justice of authority to do so under the Trading with the Enemy Act, to vest [$----] of the assets of the Government of Cuba blocked in the United States and to pay [$----] to each of the following individuals:
---.

[signed]
[NSC]

Draft for Option 3

Memorandum to the Departments of State and the Treasury

The President has determined that compensation should be paid out of Cuban assets blocked in the United States to nationals of the United States who have claims against the Government of Cuba arising out of the death of persons killed in aircraft destroyed by Cuba on February 24, 1996.

The Department of State is instructed to:

1. obtain necessary information and documentation from the survivors and determine, in accordance with international law, which survivors are eligible beneficiaries and the amount of compensation each such beneficiary should receive; and

2. transmit to the Department of the Treasury the names of such beneficiaries and the amount of compensation to which each beneficiary is entitled.

The Department of the Treasury is instructed, subject to receipt of written confirmation from the Office of Legal Counsel of the Department of Justice of authority to do so under the Trading with the Enemy Act and a waiver of all death claims arising out of the incident in question, to:

1. vest assets of the Government of Cuba blocked in the United States sufficient to pay the amounts of compensation to each of the beneficiaries notified by the Department of State; and

2. pay the amount of compensation notified by the Department of State to each beneficiary.

[signed]
[NSC]

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 2573
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]
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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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8-2-99

copied
Berger
NSC, WW Desk
Lew
Ruff
Stein
Podesta

THE WHITE HOUSE
WASHINGTON

July 17, 1999

S

MR. PRESIDENT:

The attached Berger/Lew/Ruff/Stein memo, which we recommend you read, seeks your guidance on how to approach a Kyl/Mack/Lautenberg amendment to permit attachment of (1) U.S. judgment funds payable by the U.S. to certain foreign states; (2) foreign diplomatic property other than embassies; and (3) U.S. telecom payments to Cuban entities.

As you know, the amendment -- which could be attached to any number of bills -- is designed to ensure that Stephen Flatow, Brothers to the Rescue families, and other plaintiffs can attach blocked assets and U.S. funds owed to terrorist-list states. The memo explains why your advisors believe your position could rise to the level of a veto; explains why a compromise provision probably is untenable; and gives you a detailed update of the Flatow litigation.

The Senate-passed Treasury/Postal Appropriations bill includes the provision but the House bill does not; the bill may go to conference as early as next week, contributing to your advisors' desire to gauge you willingness to consider a veto threat.

Sean Maloney SM
David Goodfriend DG

8-2-99

THE WHITE HOUSE

WASHINGTON

July 15, 1999

ACTION

MEMORANDUM FOR THE PRESIDENT

See my note at end

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

SUBJECT: Flatow Litigation and Related Amendments Appearing in Legislation

Purpose

To obtain your guidance in addressing an amendment that is and will be attached to various pieces of legislation important to the Administration. The amendment 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

Legislative efforts. Senators Kyl, Mack, and Lautenberg have offered an amendment designed to ensure that Flatow, Brothers to the Rescue families, and other plaintiffs can attach blocked assets and U.S. funds owed to terrorist-list states.

The amendment would repeal your waiver authority under section 117 of the Omnibus Appropriations Act for FY99, 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, 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

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cc: Vice President
Chief of Staff

8-2-99

$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. Sandy and Madeleine continue to believe strongly that, despite the sympathetic plaintiffs, we should not accept further erosion of your authority and flexibility to deal with terrorist-list countries. Blocking assets is one of the primary policy tools at our disposal to combat conduct by hostile states against the security of the United States. This amendment could clear the way for plaintiffs' to attach virtually all blocked assets of Cuba and Iran--worth hundreds of millions of dollars. As a result, blocked assets would not be preserved as a bargaining chip for negotiations to deter aggression, prevent WMD development, and discourage or end hostile actions against U.S. citizens abroad (as in the release of American hostages in 1981). Retaining blocked assets also strengthens your hand in efforts to normalize relations, including resolution of valid claims once a different government is in place.

An express waiver of U.S. sovereign immunity over U.S. judgment funds to be used to pay foreign claims awards is a major problem as well. In the event of an attachment, we would still owe Iran the Tribunal award, and U.S. assets in third countries could be attached to collect it, or we would have to find some other way to pay it from the U.S. Treasury at taxpayers' expense (funds which would themselves be at risk of attachment).

This amendment will be attached to bills largely free of other major problems; it also could well be offered on more than one bill. If your view included the possibility of a veto, with that understanding, we could take appropriate action to remove or modify the provision. Without that possibility, we are much less likely to be able to garner the necessary support for reasonable compromise language. Larry Stein and Jack Lew think it is important to note that there could be appropriations bills where we fully support the bill and would have little Hill support for a veto. However, both agree that it is important for us to understand the strength of your opposition to the Flatow amendments.

Whether a compromise is possible is open to doubt. One possibility would be to agree to legislation permitting you to prevent attachment on an asset-by-asset basis, allowing you, for example, to permit access to rental proceeds from Iranian diplomatic properties, while protecting the diplomatic

8-2-99

properties themselves. Although State may argue, with merit, that even this limited waiver would have serious consequences for the ongoing Tribunal process, as well as for future efforts to solve claims disputes, it may be necessary to give some ground in order to avoid total evisceration of your waiver authority. Moreover, even if we were to agree to some asset-by-asset waiver provision, there is a substantial risk that you would be put in the unappealing position of then exercising that authority to prevent the attachment of most, if not all, of the assets the plaintiffs identified.

With respect to the efforts by the Brothers to the Rescue families to attach the telephone company payments and other blocked Cuban assets, we have, as you requested, been exploring possible alternative solutions with Justice. We face a serious problem, however, in dealing with Judge King's decision abrogating your waiver authority under section 117. The appeal from that ruling is pending in the Eleventh Circuit, with oral argument scheduled for July 15, and any settlement before the court of appeals rules would leave Judge King's decision standing as the only -- and adverse -- judicial interpretation of section 117.

Senators Graham and Mack have been pressing Chuck Ruff and Stu Eizenstat to do something for the Brothers to the Rescue families and have argued that section 117 was passed in response to your statement, at the time of the shoot-down, that you needed legislative authority to make payments out of the blocked Cuban assets. Chuck and Stu have explained that you were subsequently advised that you could make use of those funds on your own authority and did so in the form of $1.2 million dollars in *ex gratia* payments. They have also explained to the senators that section 117 actually went well beyond authorizing use of the Cuban assets and that the Administration had, and continues to have, serious concerns with the scope of the legislation insofar as it undermines your power to use the blocking of foreign assets as a foreign policy tool -- concerns that were ameliorated only by the availability of the broad waiver provision. It is fair to say that neither senator is convinced.

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 agree that legislation carrying such a provision could rise to the level of a veto.

Approve ✓

Disapprove ____________

Let's discuss ____________

Yes but we need to make a deal and get some $ to the Flatows - the trick is to give reasonable reimbursement without letting these claims eviscerate foreign policy -> we've been so stuck on the "camel's nose in the tent" problem that we haven't done enough to resolve the hot cases —

BC

Attachment
Tab A Status of Flatow Litigation

Yes but we need to make a deal and get some $ to the Flatows - the trick is to give reasonable reimbursement without letting these claims eviscerate foreign policy -> we've been so stuck on the "camel's nose in the tent" problem that we haven't done enough to resolve the hot cases

BC

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. Court briefs by both sides were completed in late 1998.

Oral Argument June 22. Because of the delay in paying the Tribunal award, Justice has filed four supplemental memoranda seeking decision on the U.S. motion to quash the writ. The most recent memorandum explained the concern that further delay will prejudice U.S. interests at the Tribunal, particularly in view of upcoming hearings. Judge Lamberth called a hearing when the Tribunal hearing was imminent, and 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.) Reflecting advance knowledge of the Kyl Amendment, 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 unblocked assets of Alavi.

- Because of his counsel's inquiries about Alavi, last November Eizenstat's team provided Flatow Tribunal documents including the Tribunal's 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).

NATIONAL SECURITY COUNCIL

5/5/00

Mara -

Holly sent me this draft statement (proposed for Stu to provide to House Judiciary).

The proposal they are floating is on pp. 29-30: Full compensatory damages payments to Iran plaintiffs using appropriated funds; and to BTTR plaintiffs using blocked funds.

Even this major shift (20% to 100%) would cost less than Mack-Lautenberg,

NATIONAL SECURITY COUNCIL

both in actual dollars and in terms of preserving foreign policy interests. Seems to me we would need a way to ensure this would finally settle the cases — i.e., plaintiffs should not be able to go ahead with the same effort to collect punitive damages out of blocked or U.S. Treasury assets.

In light of CBO's estimate (also attached), maybe a proposal such as Stu's could break the logjam. I suggest we discuss internally.

— Chuck

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DRAFT

Mr. Chairman and Members of the Committee:

We are submitting this joint testimony as envisaged by the letters of Deputy Secretary Eizenstat of April 12 to Committee Chairman Hyde and Subcommittee Chairman Smith in response to letters to Secretary Summers and Secretary Albright from Chairman Hyde, inviting them or their designees to testify before this subcommittee on April 13 concerning H.R. 3485, the "Justice for Victims of Terrorism Act." Deputy Secretary Eizenstat has worked extensively on this issue for the Administration over the past 18 months, and we, on behalf of our Departments, join him in presenting our views on this proposed legislation. We share your goal

DRAFT

that U.S. victims of terrorism and their families receive justice and compensation for their suffering. We also appreciate the opportunity to submit this statement into the record.

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

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

As much as we join the sponsors of this bill in desiring to have victims of international terrorism compensated, it would be unwise in the extreme to ignore these reasons and forgo the interests of all our citizens for this purpose. This question is complex and fraught with difficulties. For this reason, last year, we proposed, among other things, that a commission be established to review all aspects of the problems presented by acts of international terrorism, and specifically study the issue of compensation and recommend proposals to the President and to the Congress to help the victims and their families receive compensation in a manner that would not impinge upon important U.S. national interests. Though this proposal received little support, we believe it still has merit. Especially when combined with a short-term approach that would pay the full amount of compensatory damage awards to those with judgments against the Government of Iran and the Government of Cuba, using appropriated funds in the case of Iran and blocked funds that appear to be titled in the name of the Government of Cuba in the case of Cuba.

not rental proceeds?

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

First, blocking of assets of terrorist states is one of the most significant economic sanctions tools available to the President. The proposed legislation would undermine

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the President's ability to combat international terrorism and other threats to national security by permitting the wholesale attachment of blocked property, thereby depriving the U.S. of a source of leverage in ongoing and future sanctions programs, such as was used to gain the release of our citizens held hostage in Iran.

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

Third, it would create a race to the courthouse benefiting one small group of Americans over a far larger group of Americans, many of whom have waited decades to be compensated by Cuba and Iran for both the loss of property and the loss of the lives of their loved ones, and would leave no assets for their claims and others that may follow.

Why doesn't this still apply if Cuba settles or smaller US similarly obligated under agmts for other Iranians?

Fourth, it would breach the long-standing principle that the United States Government has sovereign immunity from attachment, thereby preventing the U.S. Government from making good on its debts and international obligations and potentially causing the U.S. taxpayer to incur substantial financial liability. In particular, such a waiver of sovereign immunity would expose the Foreign Military Sales

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("FMS") Trust Fund to writs of attachment, which would inject a major element of uncertainty and unreliability into the FMS program by creating an exception to the processes and principles under which the program operates.

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

As The Washington Post observed in an editorial, "Victims of terrorism certainly should be compensated, but a mechanism that permits individual recovery to take precedence over significant foreign policy interests is flawed." The proposed legislation would indeed seriously compromise important national security, foreign policy, and other clear national interests, and discriminate among and between past and future U.S. claimants. Moreover, in the Iranian context, it would not achieve the stated goal of forcing Iran to bear the burden of paying compensatory and punitive damage awards to U.S. victims and their families. Under long established principles of international law and the Algiers Accords, the U.S. taxpayer would have to pay these claims. For these reasons, explained in more detail below, the Administration strongly opposes the proposed legislation.

Attachment of Blocked and Diplomatic Property

The Administration has grave concerns with the provisions of the proposed legislation that seek to nullify the President's waiver of last year's Foreign Sovereign Immunities Act ("FSIA") amendments and thereby permit attachment of blocked and diplomatic property.

Let us be entirely clear: wholesale attachment of blocked or diplomatic property would compromise our national security and would seriously prejudice a number of important national interests. These interests include: our interest in the effective functioning and preservation of our asset blocking programs to combat threats to our national security and to the safety of American citizens abroad; our legal obligation to protect the diplomatic property of foreign states, regardless of the status of our relations with those states, and our clear national interest in upholding the international legal regime that protects U.S. diplomatic property and personnel abroad; and our interest in avoiding laws that would create gross inequities in the amounts of

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compensation received by similarly-situated U.S. nationals with claims against foreign governments. Each of these concerns is addressed in turn below.

Elimination of the Effectiveness of Our Blocking Programs

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

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

The Congress has recognized the need for the President to be able to regulate the assets of foreign states to meet threats to the U.S. national security, foreign policy, and economy. In both the International Emergency Economic Powers Act and the Trading with the Enemy Act, the Congress has provided the President with statutory authority for regulating foreign assets. On the basis of this authority and foreign policy powers under the Constitution, Presidents have blocked property and interests in property of foreign states and foreign nationals that today amounts to over $3.5 billion. Of this amount, approximately $176 million is blocked property in which Cuban entities have an interest. Of this $176 million, approximately $54.0 million appear to be probable Government of Cuba blocked funds. The approximately $23.3 million of Government of Iran property which remains blocked from the Hostage Crisis of 1979-81 consists entirely of blocked diplomatic real estate and related accounts.

The Supreme Court has also recognized the importance of the President's blocking authority, stating that such blocking orders "permit the President to maintain the

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foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a 'bargaining chip' to be used by the President when dealing with a hostile country," Dames & Moore v. Regan, 453 U.S. 654, 673 (1981).

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

In the case of Vietnam, the leverage provided by approximately $350 million in blocked assets, combined with Vietnam's inability to gain access to U.S. technology and

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trade, played an important role in persuading Vietnam's leadership to address important U.S. concerns in the normalization process. These concerns included full accounting of POWs and MIAs from the Vietnam War, accepting responsibility for over $200 million in U.S. claims which had been adjudicated by the Foreign Claims Settlement Commission, and moderating Vietnamese actions in Cambodia.

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

However, our blocking programs simply cannot function, and cannot serve to protect these important interests, if blocked assets are subject to wholesale attachment and execution by private parties, as the proposed legislation would permit. The ability to use blocked assets as leverage against foreign states that threaten U.S. interests is essentially eliminated if the President is unable to preserve and control the disposition of such assets. Private rights of execution against blocked assets would permanently rob the President of the leverage blocking provides by depleting the pool of blocked assets.

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

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

Put simply, permitting wholesale attachment of blocked assets would eliminate the use of our blocking programs as a key tool for combating threats against our national security and, in the Iranian context, it would not achieve the goal

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of full payment for compensatory damages awarded against Iran.

Our Obligation and Interest in Protecting Diplomatic Property

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

The United States' legal obligation to prevent the attachment of diplomatic property could not be clearer. Protection of diplomatic property is required by the Vienna Convention on Diplomatic Relations, to which the United States and all of the states against which suits presently may be brought under the 1996 amendments to the FSIA are

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parties. Under Article 45 of the Vienna Convention on Diplomatic Relations we are obligated to protect the premises of diplomatic missions, together with their real and personal property and archives, of countries with which we have severed diplomatic relations or are in armed conflict. This would include diplomatic residences owned by the foreign state.

Likewise, under Article 27 of the Vienna Convention on Consular Relations, the same protection is required for consular premises, property, and archives. Attachment of any of the types of property covered by the Vienna Conventions on Diplomatic and Consular Relations could place the United States in violation of our obligations under international law. The proposed legislation would only permit the President to ensure the protection of a narrow portion of the property covered by the Vienna Conventions, and would thereby place the United States in violation of our legal obligations. In addition, the proposed legislation as drafted could cause us to breach our obligations to ensure the inviolability of missions to the United Nations, pursuant to the UN Headquarters Agreement and the General Convention on Privileges and Immunities.

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Our national interest in the protection of diplomatic property could not be clearer or more important. The United States owns over 3000 buildings and other structures abroad that it uses as embassies, consulates, missions to international organizations, and residences for our diplomats. The total value of this property is between $12 and $15 billion.

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

In the specific case of Iran, attachment of Iran's diplomatic and consular properties could also result in substantial U.S. taxpayer liability. Iran's diplomatic and consular properties in the United States are the subject of

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a claim brought by Iran against the United States before the Iran-U.S. Claims Tribunal. The Iran-U.S. Claims Tribunal is an arbitration court located at The Hague in the Netherlands. It was established as part of the agreement between Iran and the United States that freed the U.S. hostages in Iran and resolved outstanding claims that were then pending between the United States and Iran. Pursuant to this agreement and awards of the Tribunal, Iran has paid $7.5 billion in compensation to or for the benefit of U.S. nationals. The Tribunal also has jurisdiction over certain claims between the two governments. Although we are contesting this claim vigorously, the Tribunal could find that the United States should have transferred Iran's diplomatic and consular property to it in 1981. If it does so and the properties are not available because they have been liquidated to pay private judgments, the U.S. taxpayer would have to bear the cost of compensating Iran for the value of the properties. Such an award against the United States would be enforceable in the courts of any country, under the laws of that country.

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Equity Among Claimants

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

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

However, the Alejandre and Flatow cases do not represent the only claims of U.S. nationals against Cuba and

Iran. No other claimants would benefit at all from the proposed legislation; indeed this legislation would seriously prejudice their interests.

In the case of Cuba, the U.S. Foreign Claims Settlement Commission has certified 5,911 claims of U.S. nationals against the Government of Cuba, totaling approximately $6 billion with interest, dating back to the early 1960s. Contrary to remarks made at the April 13 hearing, these include not just expropriation claims, but also the wrongful death claims of family members of two individuals whom the Cuban Government executed after summary trial for alleged crimes against the Cuban state. Other claims relate to the Castro Government's seizure of homes and businesses from U.S. nationals. These claimants have waited over 35 years without yet receiving compensation for their losses. This bill will not help them at all.

The same situation applies with respect to Iran. In addition to the Flatow case, former hostages who were held captive in Lebanon -- David Jacobsen, Joseph Cicippio, Frank Reed, Terry Anderson and their families -- collectively have won judgments for compensatory and punitive damages against Iran totaling $406 million (see chart). Additional suits against Iran are currently pending in the Federal District courts.

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

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

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

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

Breaching the Sovereign Immunity of the United States

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

By allowing plaintiffs to attempt to tap the FMS Trust Fund to satisfy their judgments, the entire FMS program would be jeopardized as foreign customers question whether

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funds they were required to pay under the FMS program might be at risk of diversion or attachment. H.R. 3485 would therefore inject a major element of uncertainty and unreliability into the FMS program.

The FMS Trust Fund is used to ensure payment of U.S. suppliers for products and services provided to foreign governments in USG-approved sales of defense products and services. Under section 37 of the Arms Export Control Act, these funds are available solely for payments to U.S. suppliers, and for refunds to foreign purchasers in connection with such sales. If the FMS Trust Fund can be exposed to attachment through an act of Congress for purposes other than ensuring payment for arms sales, foreign governments may simply question the wisdom of engaging in such transactions with the United States.

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

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

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

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

Permitting garnishment of the payment of such awards would thus result in the U.S. taxpayer paying twice: once

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

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

Eliminating Legal Separateness of Agencies and Instrumentalities

There are also significant problems with the provision of the proposed legislation that would change the way the FSIA defines a foreign state's agencies and instrumentalities for terrorism-list countries where there is a terrorism-related judgment against it. This provision would overturn the Congress's own considered judgment when it passed the FSIA in 1976, as well as existing Supreme Court case law and basic principles of corporate and

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international law. In addition, it would prejudice the interests of U.S. citizens and corporations who invest abroad.

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

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

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

Compared to the billions of dollars the United States Government and private U.S. interests have invested abroad, the blocked assets of terrorism-list state entities, agencies, and instrumentalities located in the United States are small. In the case of Iran, we do not have a comprehensive picture of Iranian assets in the United States that might be affected by this proposed legislation. There is currently no blocking of Iranian assets in the United States (other than the residual of property blocked during the Hostage Crisis), and thus no obligation on the part of U.S. persons to report specific information on them.

U.S. citizens, corporations, the United States Government, and taxpayers have far more money invested abroad than those of any other country, and thus have more to lose if investment protections such as those provided by the presumption of separate status is eroded. If we saddle the investors of other countries with the debts of foreign governments with which they are co-investors, as the proposed legislation would do, then we can expect U.S. investors and taxpayers to pay a considerably higher price when other governments follow our example. Finally, disregarding separate legal personality as provided for in this proposal, could lead to substantial U.S. taxpayer liability for takings claims in U.S. courts and possibly before international fora.

We are grateful for this welcome opportunity to address a very important subject involving the fight against terrorism, compensation for victims, and critical national interests. Unfortunately, however, the concerns raised here indicate that the 1996 amendment waiving sovereign immunity and creating a judicial cause of action for damages arising from acts terrorism has not met its purposes of providing compensation to victims and deterring terrorism. In fact, if blocked assets were exhausted to compensate the families,

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which would be the result of this bill, the leverage to affect the conduct of the terrorist-list states would be lost along with the blocked assets. We are not happy that these suits have not led to recovery for families who have brought cases under the 1996 amendment. A system that has to date left no recovery option other than one that conflicts with U.S. national interests and would result in substantial U.S. taxpayer liability is not an acceptable system.

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

As mentioned earlier, we suggested last year that the Administration and Congress commit to a joint commission to review all aspects of the problem, and to recommend to the

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President and the Congress proposals to find ways to help these families receive compensation, in a way consistent with our overall national interests and international obligations. While this idea was rejected, we still believe that this is the best way to deal with these issues long-term. We believe that such a commission should be one of stature and with the right expertise to confront all the hard issues we have discussed today -- including the lack of effective remedies in these cases because of sanctions against terrorism-list countries under U.S. law, which are absolutely necessary to maintain.

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

rulings policy statement

Apart from this, we recognize the need to provide immediate and full compensation for compensatory damage awards to these victims and their families. We propose making advance payments from rental proceeds & appropriated funds of the full amount of compensatory damage awards to those with judgments against the Government of Iran. Appropriated funds are needed because we do not believe there are any other sources of funds that are adequate and appropriate for the purpose. There is no feasible remedy to pay those claims that, in the final analysis, is not of the same source, i.e. the U.S. taxpayer. The amounts paid will be subrogated to the United States, which will be entitled and authorized to pursue reimbursement from Iran. Recognizing and addressing this at the outset gives the United States the greatest leverage and opportunity to settle these claims at the government to government level before normalization of relations.

We also propose making advance payments from blocked assets of the Government of Cuba of the full amount of compensatory damage awards to those with judgments against the Government of Cuba. As noted on page 6 of this testimony, there are approximately $54.0 million in blocked property that appears to be titled to the Government of Cuba and is available for such a one-time purpose. Of all the proposals to use blocked funds, we believe this to be the least damaging to national interests and one that could be done under existing Presidential authority.

In sum, we are committed to working together with you, members of this Subcommittee, and others to find legislative

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and non-legislative means for addressing these complex issues.

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 ~~2574~~
002. draft	re: Payment of Certain Antiterrorism Judgements (2 pages)	n.d.	P5 ~~2574~~
003. statement	re: Explanation of Proposal (6 pages)	n.d.	P5 2575
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 2576
004b. attachment	re: Legislation Proposal (2 pages)	n.d.	P5
004c. attachment	re: Explanation of Proposal (6 pages)	n.d.	P5
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)]

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

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~~Copy __ of 15~~ N/A

EXPLANATION OF PROPOSAL

I. Issue. The following describes an option for a near-term legislative solution to the Flatow and BTTR-type judgments under the 1996 FSIA amendments. (See also accompanying draft legislative language.) These are default judgments against terrorist-list states for which there are no reasonably available assets to satisfy the judgments. This proposal assumes that some near-term payout to judgment holders is necessary to avoid a completely unacceptable provision such as section 118 of the TP bill.

II. Elements. This solution involves (a) advance payments with appropriated funds to certified judgment holders; and (b) establishment of a commission to study and complete a report on the problem during FY 2000, with recommended legislative proposals for long-term solutions.

Supporting rationale for this two-pronged approach:

- If current judgment holders could receive some funds allowing all parties to step out of the contentious, reactive situation we now have while the study takes a broad look at all issues that flow from the 1996 amendment conferring jurisdiction against terrorist-list states.

- These suits have not met the intended purpose of the amendment -- plaintiffs have been unable to collect on their judgments, and extraordinary pressure has been placed on the Administration to allow collection (via the Omnibus Act's section 117 mechanism) from blocked assets.

- Paradoxically, the depletion of blocked assets would only harm our interests vis a vis terrorist-list states by eliminating leverage to affect their conduct.

- Thus, there is a need for a deliberative review of the problem of compensating American victims of terrorism, and that review should be informed by the three years of experience under the 1996 amendment.

III. Prong One -- "Advance" Payments. Payments would be limited to a percentage, up to a given maximum payment, of compensatory damages to persons currently holding judgments pursuant to the 1996 FSIA amendments (there are three existing judgments: $25M in Flatow, $49M in BTTR, and $65M in Ciccipio). Thus, a 5% advance would cost no more than $7M.

- Representative Duncan Hunter's proposal in H.R. 2189 is a similar provision, authorizing the Secretary of State to approve payments to each hostage victim-plaintiff in the Ciccipio case (up to $10M for a former hostage, and up to $4M for a spouse).

- Subrogation. The provision should make the United States fully subrogated to all rights of the judgment holder for recoupment of these payments from the terrorist-list state. In so doing, this proposal would make these judgments an issue between the United States and terrorist states, and not simply a matter of private parties versus terrorist states.

- Although recoupment is not certain either in time or fact, it will be important to show that this is by no means solely a U.S. payout to compensate for the acts supported by a terrorist-list state.

  - There are various options available to maximize the chances of collection on these advances. (E.g., there could be a fallback provision directing that, if the advances are not recouped prior to normalization, they will be collected from blocked assets.)

III. Prong Two -- Commission. The statute would establish a commission or urge the President to do so.

- The commission provision could follow the form of similar legislative initiatives to study related issues in the past.

  - One is 22 U.S.C. 5510, which called for the President's recommendations on whether or not legislation should be enacted to authorize the United States to provide compensation to U.S. citizens who are victims of terrorism. (The report was to be submitted no later than November 1991, but we have been unable to determine whether it was completed.)

  - Significantly, 22 U.S.C. 5510(b) authorized the President to "establish a board to develop criteria for compensation and to recommend changes to existing laws to establish a single comprehensive approach to victim compensation for terrorist acts." A similar provision in this year's bill could have the President focus on and provide proposals in regard to the specific problem that has resulted from practice under the 1996 exception to the FSIA.

- Another example is found in the 1996 Antiterrorism and Effective Death Penalty Act, which authorized a commission with a very broad charter involving questions of Federal law enforcement in the future, with terrorism being one of the priorities for the commission's inquiry. Hearings have been held, but the commission has not yet concluded its work.

- Options the commission might consider include repeal of the FSIA exception in favor of a claims adjudication process, or a more permanent "advance payment" mechanism with several possible options to fund it (e.g., victims compensation and assistance accounts such as that established under 42 U.S.C. 10601, using excess fines and penalties).

- The value of establishing such a commission is that, by committing to this serious effort, we can perhaps remove pressure to obtain blocked assets and avoid setting up an ill-advised permanent mechanism this year. That is, Congress would provide advances to current judgment holders who have through significant effort and expense pursued cases against terrorist-list states, and would commit to formulating a longer term solution to benefit plaintiffs currently pursuing cases (e.g., Terry Anderson).

- Ideally the Commission would be appointed by the President. More likely, the legislative process would result in a mixed executive-legislative commission. It will be important that membership, at minimum, be equally divided between the branches. Given the requirement to vet any members of the Commission who are not already full-time federal employees, the Commission should be given at least 18 months to complete its work. (Alternatively, the Commission could have one year to do so from the date of establishment rather than enactment.)

IV. Related Measures

- The above option in response to section 118 would provide some compensation and commit to reaching a longer term solution. This should be viewed as a complete alternative to section 118 -- the thrust of which is to make blocked assets and judgment fund debts of the United States available to plaintiffs. Thus, section 118 (in the Senate-passed FY00 Treasury Postal bill) should be withdrawn from further consideration in favor of this approach that would be supported by both the Administration and key Members of Congress.

- In addition, we should seek an amendment to section 117(d) (last year's bill) to make clear the President's broad waiver authority to protect blocked assets.
  - This should be palatable because the above solution provides advance payments and commits to a longer term solution.
  - A future proposal could conceivably involve the limited use of blocked assets, but the current situation where the USG must defend in various courts against the elimination of blocked assets is unacceptable.
    - ♦ In exchange for near-term payments, it should be made clear that the President has the authority to protect all blocked assets. This would moot the current litigation involving writs on blocked assets and telecom payments in the Flatow and BTTR cases. Those cases focus directly on the President's waiver authority under a purposefully vague waiver provision, and this has been costly not only to the United States but also, importantly, to plaintiffs who have yet to recover a dollar.
    - ♦ It is possible that the commission's recommendation might be to repeal all of section 117, the primary purpose of which is to expose blocked assets. Although it is highly unlikely that section 117 could be repealed this year, we should at least insist upon a clear provision for broad waiver authority in exchange for providing advance payments on the judgments.

V. Summary. This substitute legislation for section 118 would be a fairly simple section that would accomplish the following:

- Authorize advance payments to judgment holders under 28 U.S.C. 1605(a)(7) as of September 30, 1999, limited to 5% of adjudged compensatory damages, not to exceed $2M per plaintiff.
- Subrogate the United States to these claims against terrorist-list states to the extent of advances paid.

- Provide for a Presidentially chartered commission to study how best to resolve difficulties flowing from suits under 28 U.S.C. 1605(a)(7), recognizing important needs of preserving blocked assets in the national security interest and providing avenues of effective compensation for American victims of terrorism abroad. The commission would report findings and make recommendations for legislative solutions within 18 months of enactment.

- Amend section 117(d) of the Omnibus Appropriations Act for FY 1999 to confirm the President's authority to waive subsections (a), (b), and (c) of section 117.

VI. Other options for funding advance payments. Although capping advance payments and limiting qualified claimants to existing judgment holders would keep the cost relatively low, it simply may not be possible to identify the required funds in this year's budget.

- Blocked assets. Provide the President authority to vest blocked assets of terrorist-list states to fund advances not to exceed the same or similar limits (e.g., 5% of compensatory damages not to exceed $2M per plaintiff).

  - Note: Arguably authority to vest blocked Cuban assets exists because they are blocked under the Trading with the Enemy Act (TWEA). However, limited use of this authority for *ex gratia* payments in 1996 was controversial, and further use could subject the United States to litigation risk. Moreover, clearly there is no authority to vest assets blocked under IEEPA, as in the case of Iran. Thus, clear legislative intent to provide the President vesting authority for these purposes would be preferred.

  - Significant disadvantages: (a) depletion of blocked assets and thus diminution of bargaining chips for use in dealing with terrorist-list states; (b) the President would continue to receive inordinate pressure to use blocked assets to pay judgments.

  - If this approach is chosen, it would be preferable to leave discretion in the President, but Members would probably require the President's political commitment to vest some assets and make payments before they agree to withdraw section 118.

* Victim compensation and assistance accounts. Although we are aware of some funds in existing accounts, there are obstacles to their use this year. There is a reserve fund managed by DOJ's Office for Victim Compensation (OVC) and consisting of excess fines and penalties paid into OVC's principal fund and not needed for other purposes. OMB advises that legislation to open the funds to this use would not be a scoreable event, since budget estimates have assumed that the fund would be depleted each year. Nevertheless, there would be significant political resistance to the use of this program, which is oriented towards the states. Governors would be likely to complain that these funds were being made available for the first time to pay compensatory damages when heretofore victims of domestic terrorist acts have received only modest payments such as to enable them to attend trials.

VII. Unblocked assets. In any event, ongoing efforts to assist plaintiffs in locating unblocked assets for possible attachment would continue. In the Flatow case, some noteworthy progress was made in August (e.g., turnover of some 900 additional pages on August 13 pursuant to protective order).

Judgement Fund / Legal Issue File

September 27, 1999

ACTION

MEMORANDUM FOR SAMUEL R. BERGER

THROUGH: JAMES E. BAKER

FROM: CHARLES A. ALLEN

SUBJECT: Legislative Alternatives to Proposals on Behalf of Flatow and Brothers to the Rescue Plaintiffs

Purpose

To obtain your approval to share the attached legislative alternative with a small policy group with a view to presenting a cleared proposal to the President.

Background

Prior to the August recess, we faced the prospect of enactment of section 118 (offered by Senators Kyl, Mack and Lautenberg) as part of the Treasury-Postal bill. Section 118 would have exposed blocked assets by repealing the President's waiver authority under Section 117 from last year's bill, and would have allowed attachment of U.S. funds payable to a foreign country such as Iran or Cuba. On August 2 the President indicated his agreement that a bill with such a provision could rise to the level of a veto (Tab I), and the Secretary of State and Attorney General concluded that week that they would recommend a veto.

As a result, Section 118 was removed from the Treasury-Postal bill during conference, but it has been understood all along that the provision could reappear in another bill this session. Mindful of the President's views, and motivated by our desire to maintain the President's national security tools while at the same expressing condemnation of terrorism, we have considered possible alternative approaches. Although we have discussed the issues within a small interagency group (Stu, OMB, OLC), we have not formally vetted ideas out of concern that any leaks could effectively abrogate the President's policy options.

In recent days the issue has reemerged, with statements by Senator Mack about his resolve to raise his amendment anew, and plaintiffs' statements to the press that the Administration's opposition to the legislation and appearances in court to protect the President's waiver mean that we support terrorist states at the expense of American victims.

NSC/Legal has drafted a legislative proposal, Tab II (statutory language) and Tab III (description of proposal), that would provide a near-term solution to the intractable problem created by the 1996 amendment to the Foreign Sovereign Immunities Act allowing private actions against terrorist-list states. The proposal assumes that some near-term payment to the three existing judgment holders is necessary to head-off an unacceptable provision such as Section 118. At the same time, the proposal protects blocked assets in the national security interest by funding "advance payments" to judgment holders using appropriated funds.

Finally, the proposal recognizes that the 1996 amendment conferring jurisdiction against terrorist-list states has not balanced the country's broader interest in an important national security tool with our shared desire to provide redress for outrageous acts of terrorism. As a result, plaintiffs have been unable to collect on their judgments, and extraordinary pressure has been placed on the Administration to allow collection from blocked assets. Therefore, we believe that there is a need for a broad, deliberative review of the problem of compensating American victims of terrorism before settling on a more permanent solution to these cases and others that may arise in the future.

The proposal at Tab II would accomplish the following:

- Authorize advance payments to judgment holders as of September 30, 1999 (three cases), limited to 5 percent of adjudged compensatory damages, not to exceed $2 million per plaintiff. (The maximum payout would be about $9 million, based on adjudged compensatory damages as follows: Flatow - $25 million; Brothers to the Rescue - $49 million; and Ciccipio, Jacobson, and Reed - $65 million.)

- Subrogate the United States to these claims against terrorist-list states to the extent of advances paid.

- Provide for a Presidentially appointed commission to study how best to resolve the difficulties inherent in suits under the

1996 amendment. The commission should be guided by the need to preserve blocked assets while providing means of effective compensation for American victims of terrorism abroad. The commission would report findings and make recommendations for legislative solutions within 18 months of enactment.

- Amend Section 117(d) of the Omnibus Appropriations Act for FY 1999 to confirm the President's authority to waive Section 117 and thus protect blocked assets.

As an alternative to use of appropriated funds to make the advance payments, we have also considered a provision to authorize use of existing victim compensation and assistance accounts. These accounts are funded with penalties and fines, and they provide Federal support for a portion of the states' victim compensation and assistance programs. OMB advises that legislation to tap the DOJ victim funds would not require scoring, since budget estimates each year already assume that these funds will be depleted. However, use of these funds for the first time to pay compensatory damages adjudged by courts would likely be opposed by governors, among others, since these funds have only been used to provide modest payments to victims for such things as expenses to attend trials. Precedent setting legislation in this area could deplete the Victims Compensation fund and, without substantial additional appropriation, draw its resources away from traditional assistance activities to compensatory functions.

We have also considered legislation that would accomplish the same objective by authorizing the vesting of frozen assets to make the 5 percent payments. This has the advantage of not requiring additional appropriations, but the same national security disadvantages of Section 118, albeit on a different scale. Moreover, unlike Cuba, Iran's frozen assets, which might be used in the Flatow and Ciccipio cases, consist of diplomatic property and property subject to the Iran Claims Tribunal, raising all the international legal problems previously identified.

We continue efforts to help plaintiffs locate unblocked assets for possible attachment. In the Flatow case, some 900 additional pages were turned over in August pursuant to protective order. In addition, Justice recently provided Flatow's counsel a document from OFAC regarding a $750,000 California land sale by an Iranian bank that was due to close on September 15. Despite our providing such information, plaintiffs to date have not yet recovered assets. Flatow's counsel has signaled a lack of interest in further protracted litigation to show the necessary connection between Iranian commercial entities and the Government of Iran as required to prevail in court. Thus, despite our continued efforts in this area, information on unblocked assets will not obviate the need for a legislative remedy.

Concurrence by: Miles Lackey

<u>RECOMMENDATION</u>

That you authorize circulation of the attached proposal to Stu Eizenstadt, Tom Pickering, Eric Holder, Jack Lew and Beth Nolan with a view to presenting a the President with a legislative alternative to Section 118.

Approve _____ Disapprove _____

Attachment
Tab I Memo to the President
Tab II Legislative Proposal
Tab III Explanation of Proposal

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

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]
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RR. Document will be reviewed upon request.

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

MSMail

DATE-TIME	02 March 96 09:30
FROM	Nuccio, Richard A.
CLASSIFICATION	UNCLASSIFIED
SUBJECT	RE: Cuba - compensation [UNCLASSIFIED]
TO	Kreczko, Alan J.
CARBON_COPY	NO CC's on THIS MESSAGE
TEXT_BODY	

Without knowing Sandy's reaction, I agree with you.

From: Kreczko, Alan J.
To: @UP - APNSA Special Assistants
CC: /R, Record at A1; Baker, James E.; Nuccio, Richard A.
Subject: Cuba - compensation [UNCLASSIFIED]
Date: Friday, March 01, 1996 08:21 PM

FOR SANDY BERGER

An attorney for "Brothers to the Rescue" has asked State/L for a briefing on claims practice generally and how we intend to implement POTUS commitment to
seek legislation to compensate victims of Cuba shootdown. State/L has asked for guidance for Monday morning (the attorney wants to come in on Tuesday) on whether to have the meeting and what to say on POTUS commitment.

My recommendation:

-- they agree to the meeting but limit their comments to a general description of our claims practice, past examples, etc.

-- re POTUS commitment, they say that how it will be implemented is still under consideration.

OK?