Testimony of

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Mr. Chairman, I am honored to testify before you and your colleagues today. I commend you for calling this hearing to discuss what more the federal government can and should do to promote justice for American victims of Iranian and Palestinian terrorism. I will begin with an overview of the challenge, and conclude with several specific recommendations. I will focus my remarks on Iran, including those acts of Palestinian terrorism which it has sponsored, because that is an area of expertise for me and I know there are other witnesses who will focus on Palestinian terrorism not sponsored by Iran.

Iran has long been the world's leading state sponsor of terrorist attacks. Iran has typically acted through Palestinian or other proxies. These terrorist attacks have frequently killed U.S. citizens. Iran has rarely paid a price for these terrorist attacks.

That assessment is reflected in a remarkable record of federal court judgments against Iran. Over the last two decades, U.S. federal courts have issued some 85 judgments finding Iran liable for specific acts of terrorism which claimed American victims.[1] These judgments have resulted in the award of some $20 billion in compensatory damages and some $24 billion in punitive damages against Iranian entities and officials.[2] Iran has, to my knowledge, never willingly paid a penny of these judgments. Victims and families of victims have received a total of about $225 million in judgments thanks to Iranian assets blocked by the U.S. government.[3] Some $43.5 billion in judgments against Iran remain outstanding.[4] Interestingly, over $1 billion of these damages were awarded against Iran's current Supreme Leader Ayatollah Ali Khamenei himself.

The list of U.S. federal court judgments against Iran, and the cases underlying them, make for remarkable reading. They include, but are not limited to, the following:

- The April 1983 Hezbollah truck bomb which killed 63 people at the U.S. Embassy in Beirut.[5]
- The October 1983 Hezbollah truck bomb which struck a barracks housing U.S. Marines participating in a multinational peacekeeping force in Beirut. The bombing killed 241 Marines.[6]
- The abduction and torture in Lebanon by Hezbollah during the 1980s of several U.S. citizens who were working in Beirut, including two journalists,[7] a priest,[8] and three administrators of educational institutions.[9]

[1] Jennifer K. Elsea, *Terrorism Judgments Against Iran*, Congressional Research Service Memorandum to the House Financial Services Committee (July 20, 2015).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Dammarell v. Islamic Republic of Iran, 281 F. Supp. 2d 105 (U.S. D.D.C. 2003).
[6] Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46 (U.S. D.D.C. 2003).
[7] Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (U.S. D.D.C. 2000); Levin v. Islamic Republic of Iran, 529 F. Supp. 2d 1 (U.S. D.D.C. 2007).
[8] Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27 (U.S. D.D.C. 2001).
[9] Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (U.S. D.D.C. 1998).

- The April 1995 and February 1996 murders of five U.S. citizens during two terrorist bombings of Israeli buses. The US District Court judge who decided these cases held Ayatollah Khamenei personally responsible for the attacks.[10]
- The June 1996 killing of 19 U.S. servicemen in a truck bombing at Khobar Towers, a residence on a U.S. military base in Saudi Arabia. The US District Court judge who decided the cases singled Ayatollah Khamenei out for responsibility, stating that "the terrorist attack on the Khobar Towers was approved by Ayatollah Khamenei, the Supreme Leader of Iran at the time."[11]
- The July 1997 Hamas bombing of an outdoor market in Jerusalem which killed a U.S. citizen. The U.S. District Court judge who decided the case found the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and Ayatollah Khamenei himself to be liable for the killing.[12]
- The August 1998 truck bombings which destroyed the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, killing more than 300 persons and wounding more than 5,000.[13]
- The October 2000 bombing of the U.S.S. Cole in Yemen, which resulted in the death of 17 American sailors.[14]
- The September 11, 2001 hijacking by Al Qaeda terrorists of four U.S. passenger airplanes, which killed and injured nearly 3,000 people on the planes and in the World Trade Centre and Pentagon. In December 2011, after an extensive trial, U.S. District Court Judge George B. Daniels, in a case brought by injured victims and families of the deceased, held responsible for the attacks a group of defendants including Al Qaeda, the Taliban, the Islamic Republic of Iran, and Ayatollah Ali Hoseini Khamenei.[15] The court's lengthy opinion included extensive evidence of the Islamic Revolutionary Guard Corps (IRGC) providing "funding and/or training for terrorism operations targeting American citizens, including support for Hizballah and al Qaeda" and evidence that IRGC activities were controlled by Iran's Supreme Leader Khamenei. The opinion also included evidence, including quotes from the 9/11 Commission report, that "Iran furnished material and direct support" for travel by "at least eight (8) of the 9/11 hijackers." In October 2012, Khamenei and the other defendants were ordered to pay damages totaling $6,048,513,805.[16]

Over the decades, there has been a persistent tension regarding these judgments between Congress (which has passed laws facilitating them), the judiciary (which has applied those laws to the facts and repeatedly found Iran liable), and administrations of both parties (which typically see these lawsuits as depriving them of control over aspects of foreign policy). I describe this

[10] Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (U.S. D.D.C. 1998); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1 (U.S. D.D.C. 2000).
[11] Rimkus v. Islamic Republic of Iran, 575 F. Supp. 2d 181 (U.S. D.D.C. 2008); Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40 (U.S. D.D.C. 2006); Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229 (U.S. D.D.C.).
[12] Stern v. Islamic Republic of Iran, 271 F. Supp. 2d 286 (U.S. D.D.C. 2003).
[13] Owens v. Republic of Sudan, 826 F. Supp. 2d 128 (U.S. D.D.C. 2011) (both Sudan and Iran were found liable).
[14] Flanagan v. Islamic Republic of Iran, 87 F. Supp. 3d 93 (U.S. D.D.C. 2015).
[15] Havlish v. Laden, 2011 U.S. Dist. LEXIS 155899 (U.S. D.N.Y. 2011).
[16] Havlish v. Laden, 2012 U.S. Dist. LEXIS 143525 (U.S. D.N.Y. 2012).

tension in great detail in my book titled Lawfare: Law as a Weapon of War, which will be published by Oxford University Press on December 1.

In my book, I assess that U.S. civil lawsuits against state sponsors of terrorism, terrorists, and their material supporters have been notably effective at times in achieving various objectives. These include: (a) seizing assets of and otherwise putting financial pressure on terrorist-supporting states, including Iran; (b) deterring private individuals and NGOs from contributing to terrorist groups; (c) deterring banks from providing financial services to terrorist groups; (d) compensating victims; (e) bringing public and governmental attention to the harm done by terrorists to Americans; and (f) using the American judicial system to find facts and make determinations as to the connections between countries such as Iran and terrorist attacks by groups such as Hezbollah. I conclude that the U.S. executive branch, rather than treating such lawsuits mostly as a nuisance, ought to see them as an opportunity, and engage with them in a much more sophisticated, systematic, and proactive manner, including, in some cases, through public/private partnerships between the executive branch and terror victims' families.

The following are some options for how the federal government might more effectively work with U.S. victims of terrorism to achieve some measure of justice for the victims while also advancing broader U.S. foreign policy interests including deterring and constraining future terrorist attacks.

1. **The U.S. government should place a much higher priority on pushing Iran to settle with victims of Iranian-sponsored terrorism.**

A model for this is the successful U.S. effort to persuade Libya to settle with victim families of the Pan Am 103 bombing and other acts of Libyan-sponsored terrorism. Working closely with the victim families and their representatives, the U.S. government insisted that substantial Libyan compensation payments were essential to better relations with the United States. This effort resulted in 2008 in a comprehensive claims settlement agreement between the U.S. and Libyan governments.[17] Due to this and other measures, Libya paid a total of some $4 billion to U.S. victims of Libyan-sponsored terrorism[18] and halted its sponsorship of international terrorism.[19]

As the U.S. implements the Joint Comprehensive Plan of Action (JCPOA) with Iran, the U.S. will be lifting nuclear-related secondary sanctions which deter European and other foreign companies from doing business with Iran. However, most U.S. companies will continue to be prohibited from doing business with Iran, as a result of remaining sanctions on Iran for its state sponsorship of terrorism and other illicit activities. It unfortunately appears that Iran's state sponsorship of terrorism is not diminishing but rather accelerating in the wake of the JCPOA. In order to both promote justice for past U.S. victims of Iranian-sponsored terrorism and deter

[17] Christopher M. Blanchard and Jim Zanotti, *Libya: Background and U.S. Relations* (Congressional Research Service, February 18, 2011), http://fpc.state.gov/documents/organization/157348.pdf
[18] Nicole Hong, *Terror Victims Eye Thawing with Iran*, WALL STREET JOURNAL, August 2, 2015, http://www.wsj.com/articles/terror-victims-eye-thawing-with-iran-1438556669
[19] Orde Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing Its Deterrence Capacity and How to Restore It*, 28 MICHIGAN JOURNAL OF INTERNATIONAL LAW 337, 409 (2007), http://ssrn.com/abstract=996953 .

future Iranian-sponsored terrorist attacks, the U.S. government should work to maximize the ability of U.S. victims to seize appropriate Iranian assets in foreign countries. To the extent necessary, Congress should consider clarifying or amending relevant U.S. law. In one example of the challenge, the Italian Supreme Court reportedly refused recently to domesticate (enforce against Iranian assets in Italy) the U.S. federal court judgments against Iran in the *Flatow* and *Eisenfeld* cases. To the extent necessary, the U.S. government should take appropriate steps to ensure that allied governments' courts do not inappropriately discriminate against U.S. federal court judgments versus state sponsors of terrorism. U.S. pressure on Iranian assets overseas can contribute significantly to pushing Iran to settle with victims of Iranian-sponsored terrorism.

2. **The U.S. government should use and expand its remission authorities to compensate U.S. terrorism victims and their families.**

The Attorney General's "remission authority" enables the Department of Justice to "restore forfeited assets to the victims of any offense that gave rise to the forfeiture."[20] For example, the remission authority enables the use as victim compensation of the $8.9 billion forfeited to the U.S. Department of Justice by BNP Paribas as a result of the bank's guilty plea to laundering money for Cuba, Iran, and Sudan.[21] On May 1, 2015, the U.S. Justice Department launched a website, titled United States v. BNP Paribas S.A., which invited submissions from all individuals worldwide, "regardless of nationality or citizenship," who claim to have "suffered harm linked to Sudan, Cuba, and Iran from 2004–2012."[22] The website specified that "the information collected will assist the Government in determining use of available forfeited funds."[23] This implied that the U.S. government might distribute some of the funds forfeited to it by BNP Paribas to persons with no nexus to the United States and no U.S. court judgment substantiating their claim. It would be more sensible for the funds to be used to compensate U.S. citizens. This could include (but not necessarily be limited to) U.S. victims holding U.S. court judgments as a result of acts of terrorism that were materially supported by the BNP Paribas money laundering.

In addition, it appears that the Justice Department has more statutory leeway to use its remission authority to compensate victims in a case such as BNP Paribas where the bank pleaded guilty.[24] There have over the last decade or so been billions of dollars in other payments made to the U.S. government by other banks as part of deferred or nonprosecution agreements settling charges against them for laundering money for Iran and other state sponsors of terrorism.[25] The U.S. reportedly has less flexibility under current law to use such funds to compensate victims of

[20] U.S. DEPARTMENT OF JUSTICE ASSET FORFEITURE POLICY MANUAL 168 (2012).
[21] Aruna Viswanatha and Nicole Hong, *Terrorism Victims Seek Part of BNP Penalty*, WALL STREET JOURNAL, June 14, 2015, http://www.wsj.com/articles/terrorism-victims-seek-part-of-bnp-penalty-1434323130?alg=y
[22] *Frequently Asked Questions*, United States v. BNP Paribas S.A., http://www.usvbnpp.com/frequently-asked-questions.aspx
[23] *Id.*
[24] Aruna Viswanatha and Nicole Hong, *Terrorism Victims Seek Part of BNP Penalty*, WALL STREET JOURNAL, June 14, 2015, http://www.wsj.com/articles/terrorism-victims-seek-part-of-bnp-penalty-1434323130?alg=y
[25] *Id.;* ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR (Oxford University Press, 2016)(Chapter 2).

acts of terrorism that were materially supported by the money laundering.[26] U.S. law should be changed to provide the same flexibility with both types of funds.

3. **The U.S. government should strongly and thoroughly consider how to more effectively cooperate with terror victims' families and their representatives.**

More systematic and sophisticated U.S. government cooperation with terrorism victim families could better serve both victim justice and other U.S. international security interests, including because victims' families sometimes have the ability to take impactful steps against U.S. adversaries that the U.S. government itself cannot. For example, in 2008, approximately $1.75 billion in Iranian government assets in a Citigroup account was frozen by a federal court in Manhattan on behalf of victim families of the Beirut Marine barracks bombing, who held a judgment against Iran in the *Peterson* case.[27] It was the biggest seizure of Iranian assets abroad since the 1979 Islamic revolution.[28] Information pointing to the Iranian funds' location in a specific Citigroup account was provided to the victim families by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC).[29]

At the time, Treasury did not itself have the legal authority to freeze such funds.[30] However, it knew that the Marine barracks victim families had the ability, under New York state law, to freeze the assets pursuant to the $2.65 billion *Peterson* judgment the families had won in federal court against Iran in 2007.[31] So OFAC gave the victim families the account number.[32] Last I checked, the $1.75 billion was in a qualified fund under the supervision of a court-appointed trustee, while awaiting the disposition of a petition for certiorari to the US Supreme Court by Bank Markazi, Iran's central bank. It has therefore been unavailable for Iran to use for purposes such as state-sponsored terrorism or advancing its nuclear or ballistic missile program. It will hopefully soon be used to compensate victims of the Marine barracks bombing. This cooperative effort was therefore a clear win for both victim justice and other U.S. international security interests vis a vis Iran.

The U.S. government should be looking for more such ways to work with victim families to advance the cause of justice for them and deter future terrorist attacks. For example, the Islamic State has brutally beheaded several U.S. citizens, including James Foley and Steven Sotloff. A civil judgment, pursuant to the Anti-Terrorism Act (ATA), against the Islamic State for these killings would enable the victims' families to go after the numerous Turkish and other foreign companies that do business with the Islamic State, for example by purchasing crude oil

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[26] Aruna Viswanatha and Nicole Hong, *Terrorism Victims Seek Part of BNP Penalty*, WALL STREET JOURNAL, June 14, 2015, http://www.wsj.com/articles/terrorism-victims-seek-part-of-bnp-penalty-1434323130?alg=y
[27] Jay Solomon, *U.S. Freezes $2 Billion in Iran Case*, Wall St. J., Dec. 12, 2009, http://online.wsj.com/article/SB126057864707988237.html .
[28] *Id.*
[29] *Id.*
[30] Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Lawyer, Oct. 28, 2013.
[31] *Id.*
[32] *Id.*

from it and laundering its money. Some of these companies which provide material support to the Islamic State likely have a presence in the United States, for example by entering the New York financial markets to purchase dollars. The ATA could be used to not only seek justice for the families of the Islamic State's U.S. victims, its treble damages provision could sap hundreds of millions, if not billions, of dollars from the Islamic State's coffers and from the financial institutions that launder the Islamic State's money.

As the U.S. government continues to search for ways to cut off the Islamic State's ability to raise, launder, and spend revenue, the U.S. government should strongly consider providing civil litigators the data they need to go after the Islamic State's customers and bankers. Establishing the lawfare strategy and office described in my following recommendation would be a good way to facilitate identification and implementation of such cooperation strategies.

4. **The U.S. government should develop a lawfare strategy and an office to coordinate its use of law as a weapon of war.** The office's purview should include establishing, where appropriate, public/private partnerships with terror victims' families and their representatives.

Law is becoming an increasingly powerful and prevalent weapon of war. As I describe in my forthcoming book Lawfare: Law as a Weapon of War, the reasons for this development include the increased number and reach of international laws and tribunals, the information technology revolution, and the advance of globalization, which has vastly increased governments' leverage over other countries and their companies by intensifying international economic interdependence.

The term "lawfare" was coined by Charles Dunlap, Jr., a major general in the U.S. Air Force Judge Advocate General's Corps, who defined it as the strategy of "using—or misusing—law as a substitute for traditional military means to achieve an operational objective."[33] Despite the term having been coined by a U.S. government official, the U.S. government has only sporadically engaged with the concept of lawfare.[34] It has no lawfare strategy or doctrine, and no office or interagency mechanism that systematically develops or coordinates U.S. offensive lawfare or U.S. defenses against lawfare.[35]

In contrast, the People's Republic of China (PRC) has adopted and vigorously implemented the similarly defined concept of "legal warfare" as a major component of its strategic doctrine.[36] In addition, law has become a preeminent weapon in the Israeli-Palestinian conflict, leading the Israeli government to create an office focused on waging and defending against lawfare.[37]

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[33] Charles J. Dunlap, Jr., *Lawfare Today . . . and Tomorrow*, *IN* INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 315 (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger eds., 2011).
[34] ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR (Oxford University Press, 2016)(Chapter 1).
[35] *Id.*
[36] *Id.* (Chapter 4).
[37] *Id.* (Chapters 5-8).

The U.S. government's lack of systematic engagement with lawfare is a tremendous missed opportunity. If the United States is going to wage maximally effective lawfare against a particular adversary, it needs to deploy a multipronged campaign—going after the adversary itself, its material supporters, and its financial service providers, using criminal and civil legal tools, and, where appropriate, coordinating with any application of kinetic weapons. The campaign should be coordinated both interagency and with civil litigators who may have evidence or claims that could be used to supplement and complement the government's campaign against the adversary. Neither the U.S. government as a whole nor any of the relevant federal agencies individually—including the Departments of Defense, Justice, State, and Treasury—have a point person for coordinating lawfare and collecting best practices. Nor do these agencies systematically engage in coordination on lawfare issues, either with each other or with civil litigators. Such coordination as does occur tends to be ad hoc and limited in scope.

Lawfare is not going to entirely or even largely replace traditional, kinetic warfare ("shooting warfare"). However, lawfare, deployed systematically and adeptly, could in various circumstances save U.S. and foreign lives, and U.S. taxpayer dollars, by enabling U.S. national security objectives to be advanced with less or no kinetic warfare.[38]

Lawfare is almost always less deadly than traditional warfare. Lawfare is also almost always less financially costly than traditional warfare. Lawfare is thus a weapon eminently suitable for the U.S. public's aversion to casualties and the current U.S. focus on reducing government spending.

Lawfare can sometimes also be more effective than kinetic warfare. For some foreign leaders, taking their money away can be more important than dropping a few bombs and killing a few of their citizens, about whom they may not care very much.[39]

In addition, if some portion of warfare can be shifted from kinetic combat to the legal arena, that should be to the United States' great advantage. While the United States does have more sophisticated lethal weapons than do its adversaries, its advantage in sophisticated legal weapons has the potential to be even greater. The United States is a far more law-oriented society, with a much higher percentage of its best minds going into the legal field and creatively using law to achieve their objectives than is, say, the PRC. Yet the PRC is currently waging lawfare much more diligently and systematically than is the United States.

Rather than complaining as much as it does about the creative strategies used by U.S. civil litigators to win and sometimes collect U.S. court judgments against state sponsors of terrorism such as Iran, the U.S. executive branch ought to more frequently emulate their creativity and partner with them where appropriate. Establishing a U.S. government lawfare strategy and office would be a good first start, as it would establish a strategy and entity designed

[38] *Id.*
[39] *Id.* (Chapter 2).

to identify and implement cooperation strategies.