

Testimony of
Prof. Allan Gerson

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I am very appreciative of the invitation to appear here today to contribute to the important goal that this Committee has set for itself: assessing the tools needed to fight the financing of terrorism. Surely, the standard by which these tools can be assessed must, in large measure, revolve the progress that has been made in securing for the families of the victims of 9/11 the rights guaranteed to them under recent US anti-terrorism legislation. It is through these initiatives that they seek to hold accountable those responsible for enabling the murder of their loved ones, beginning with the proposition that the root of the problem lies in the financing of terrorism. First, however, I would like to express gratitude to this Committee, on behalf of the over 3600 individual family members that I and my partner in this endeavor, Ron Motley, have the honor to represent. They understand that your continuing interest and involvement in the justice of their cause will enable them to play the important role carved out for them in the war against terrorism.

9/11 was the work of terrorists that preach global jihad. The mass rallies of the Nazis, fanning bigotry and hatred, have been replaced by their use of the internet and the click of a computer mouse. And yet I fear, Mr. Chairman, that we are still using antiquated and obsolete techniques to deal with today's threats.

The victims of 9/11 were predominantly civilians. Yet today their families have the capacity to strike back. But if, and only if, their hands are not tied. They must be allowed to invoke the full force of our laws. As Secretary of State Powell recently noted: "The coalition against terrorism must advance on all fronts - political, financial, legal and military - to root out terrorists wherever they live and plot." Indeed, President Bush, almost immediately following the September 11th attacks, proclaimed: "Our goal is to deny terrorists the money they need to carry out their plans." He went on to say: "Our weapons are military and diplomatic, financial and legal." Today, the families of the 9/11 victims are in the front ranks of those fighting the war on the financial and legal fronts. Their weapon is the legal process. Their principal target is terrorism's financial underbelly. It is no accident that the organized 9/11 families call themselves Families United to Bankrupt Terrorism. They are essentially acting, through their lawyers, as Harvard's Professor Alan Dershowitz has characterized it, as "private attorneys-general, stepping in where the government is constrained by economic and political considerations."

Our legal team has assembled highly experienced investigators to scour records in thirteen countries on behalf of the suit we have filed, Burnett, et al. v. Al Baraka Investment and Development Corp., et al in the US District Court for the District of Columbia. This suit names over 100 defendants in a complaint that spans 1,000 pages, with the third amended complaint to be filed this Friday. In addition, a more recently filed case in New York, Ashton, et al. v. al Qaeda, et al., names many of the same defendants on behalf of approximately an additional one

thousand 9/11 family members. The defendants in the Burnett suit are primarily Saudi banks, charities, institutions, wealthy contributors and individuals associated with the Government of Saudi Arabia. In this effort, we have the active assistance of the governments of Russia, Uzbekistan, Israel, and Bosnia, to name but a few. We have the active cooperation of the judiciary and the governments' prosecutorial arms in Spain and in Germany. Indeed, in Germany we are preparing, as I speak, to appear on behalf of the families as co-plaintiffs in a criminal prosecution against one of the alleged 9/11 plotters, a procedure permitted under German law. This will enable us to see evidence that is fresh, to call witnesses, and to strengthen our case. For example, one of the items of evidence obtained by our global investigatory efforts is a document showing fund transfers made by the Saudi American Bank in Washington's Watergate Hotel to the Middle East that we believe ultimately ended up in Hamas's pockets for the purpose of suicide bombings in Israel. We intend to demonstrate that this financing pattern served as a template for funding al Qaeda operations. We have also obtained judicial cooperation in tracking the al Qaeda money trail that, as reported by the New York Times on September 21 of this year, runs from Saudi Arabia through Spain.

For all of these reasons, I believe we are making good progress in using the tools that the Congress has already made available to us. Accordingly, I am not here to ask for new legislation. Rather, I come to thank you for what you have made possible, and to make one specific request. I respectfully urge you to do all in your power to make sure that those advances not

be frustrated by pernicious maneuverings by those who persist in viewing the 9/11 families' suit as unwarranted interference in foreign policy. Credible reports that our government might be considering stalling or otherwise impeding this suit were reported in the New York Times on October 25. As a result, a large delegation of family members promptly came by busloads from New York to stand vigil before the Capitol on November 1 to insist that our government stand with them, and not against them. Regretfully, I am not in a position to assure the families that the cause for their great anxiety and fear of betrayal has passed. In a full page open letter to the President that appeared in the Washington Post on November 1, they asked that President Bush "reavow any effort by our government to disarm us as we join you in the fight against terrorism." No response has been forthcoming.

Today, recourse to the courts by American citizens against the perpetrators of terrorism is a Constitutional right. It cannot be taken away or suspended without violating the due process and taking of property provisions of the Fifth Amendment. But, Senators, what is needed is more than grudging acceptance of this principle. What is needed is an affirmative statement that there will be no interference in the 9/11 families' efforts to seek redress. Beyond that, we would hope that, where practicable, there would be active cooperation in sharing of evidence.

Together we can act effectively to protect our citizens and our country. In the past, whenever we were faced with a serious challenge to our national security, new advances in public-private partnerships always arose to utilize the skills of all Americans. For example, as is surely pertinent to our

present inquiry, in the post war era as Americans turned their sights inward toward combating the scourge of racism, it was private actions for civil damages which bankrupted the Ku Klux Klan. I am proud to say that one of the attorneys that spearheaded that effort, Rich Hailey of Indianapolis, is affiliated with us in our effort on behalf of the 9-11 families.

Former US National Security Advisor Richard Allen was on target when he said that the 9/11 families' lawsuit against foreign interests should be supported by the United States government because it will provide important opportunities for learning about the workings of terrorism, and this will enhance the security of all Americans.

Congress's courageous initiatives in its anti-terrorism legislation thus operates not only for the benefit of individual citizens seeking compensation for past wrongs, but for all American citizens by helping to make them safer. If the reach of our enemy is global, then our response must surely be global. One thing is clear. International terrorists look for any opportunity to take advantage of the increasing porousness of international boundaries in order to find the best venue for their clandestine work, for places where it is easiest to launder money and hide assets. A counter-attack must necessarily use the same tools of globalization. It can begin with the criminal law process. In this regard, it is worth giving closer attention to a case instituted in the immediate aftermath of the International War Crimes Tribunal at Nuremberg: the US prosecution of Carl Rasche of the Dresdner Bank, in "The Banker's Case". He was convicted for giving financial assistance and financing the requirements of the Reich's deportation and ill-treatment of the civilian population of occupied countries, and the persecution of persons deemed racially or politically undesirable. The court there held that financial assistance, the signing of a check or otherwise effecting a financial transaction, can have the same devastating effect as the detonation of a bomb or the turning of the wheels of the gas chamber.

But it is not the criminal track alone that can lead us to the results that we seek. I have already mentioned the example of the bankrupting of the Ku Klux Klan. And it is worth noting that it was in that same spirit of recognizing the role of private citizens that the US Congress, in passing the 1991 and 1993 Anti-Terrorism Acts, and the 2001 American Patriots Act, sought to further in enabling private plaintiffs to address the evil of financing terrorism.

In this context, cooperation and the sharing of documents between courts, involvement of private plaintiffs all along the way, making sure that evidence does not turn stale, and allowing them to go into areas where for economic or other reasons governments are loathe to tread are all the essential elements of the new international public-private partnerships that must wage the fight against terrorism.

If the 9/11 families need the help of the US government in the prosecution of their law suit, it would also be true to say that the government needs their help. To be sure, dealing with foreign governments has traditionally been considered the exclusive prerogative of the State Department and the US government. Over the years, the 19th century concept of sovereign immunity, despite changing times, developed to the point that any foreign government would be immune from

accountability in our

courts to private citizens for even the most appalling behavior. Fortunately, that doctrine has been eroded by Congress's response to terrorist outrages against American citizens. But make no mistake: it was not the State Department that inspired these changes, but private citizens. It was the families of the victims of Pan Am 103 acting in unison with the families of the victims of the April 1995 Oklahoma bombing that deserve much credit for moving the US Congress to pass the 1996 Anti-Terrorism and Effective Death Penalty Act which permitted suits against governments designated by the State Department as sponsors of terrorism. That legislation was necessary in order for our courts to assert jurisdiction over Libya in connection with the bombing of Pan Am 103, an act which occurred outside the territorial jurisdiction of the United States. Had Libya's act of terrorism occurred within American borders, as did the outrage of 9/11, there is good reason to believe that an expansive reading of the 1976 Foreign Sovereign Immunities Act might have permitted a law suit against any government complicit in that event even without the 1996 legislation. This is because the '76 Act provides for an exception to immunity where tortious acts are committed on the soil of the United States.

That critical victory was followed after 9/11 by passage of the 2001 American Patriots Act which specifies the intent of Congress to accord broad latitude to all anti-terrorism legislation, including the 1991 and 1993 Anti-Terrorism Acts which provide for civil remedies against individuals perpetrating

acts of terrorism. It also holds open the prospect of RICO conspiracy actions. And, this legislative empowerment of those victimized by terrorism has coincided with far-reaching judicial decisions, most notably the unanimous decision of the Seventh Circuit Court of Appeals in the Boim case last summer which makes clear that the standard for determining liability in actions under the '93 Anti-Terrorism Act is not limited to actual, but includes constructive knowledge.

It is only proper that I also note at this point another ongoing effort by the 9/11 families as they seek to play a vital role in the war against terrorism to fulfill what they see as their mission -- preventing the horror visited upon them from being visited upon another group of innocent Americans. They fully support the establishment of an independent commission to examine that tragedy as a means of trying to avoid similar future tragedies. In this regard, the 9/11 families are following in the footsteps of the families of Pan Am 103 who tirelessly, and nearly single-handedly, fought to establish in 1990 an

Independent Commission on Aviation Security and Terrorism.

On May 15, 1990, that Commission issued a lucid and tough-minded 182 page report which, if heeded, might well have prevented 9/11. It made scores of recommendations about aviation security measures, but only some were actually incorporated into law or administrative recommendations. The Report's most strongly worded recommendation of all -- that terrorism cannot be defeated without the national will and moral courage to implement "a more vigorous US policy that not only pursues and punishes terrorists but also makes state sponsors of terrorism pay a price for their actions" -- went all but unheeded.

The 9/11 families want an independent commission with teeth, one which includes individual family members and whose recommendations will be respected. They understand that the work

of this Committee in enabling them to proceed in the courts as well as through such independent commissions are flip sides of the same commitment to achieving accountability and, through that, deterrence.