Reply to Questions for Record Submitted by Senator Jeff Sessions
Professor Edward Swaine

1. *If the United States chose to allow suits to go forward against SNCF as an exception to the Foreign Sovereign Immunities Act (FSIA), could the United States government then be sued in France or other countries? Please explain your answer.*

My written testimony addressed the question of whether (and under what conditions) a decision to permit suit against SNCF might be deemed to violate international law. However, assuming France took the view that the United States had unlawfully infringed on its sovereign immunity, it would probably have limited opportunities for suit.

Because I am not expert in civil law, I cannot say whether existing French law would permit France (or SNCF) to sue the U.S. government. France might, in any event, <u>change</u> its law to permit suit, just as the United States might enact this exception to the FSIA. Neither prospect seems particularly likely. France respects principles of sovereign immunity, and the mere fact that the United States had permitted lawsuits to proceed under these circumstances would not necessarily warrant a French countermeasure enabling recovery against the United States for its purely sovereign legislative acts. Nor am I aware of any likely basis for suit against the U.S. government in a third country.

Although it is not directly addressed by the question, there is a related possibility – that France might, in principle, attempt to initiate proceedings against the United States before the International Court of Justice (ICJ). Such a suit might seek to capitalize on the principles stated in that Court's recent judgment in *Jurisdictional Immunities of the State (Germany v. Italy)*. However, ICJ jurisdiction is limited. Because the United States has withdrawn from the ICJ's so-called compulsory jurisdiction, and because the United States is unlikely to consent to jurisdiction by entering into a special agreement with France, France would have to invoke an international agreement that vests the ICJ with jurisdiction over a relevant class of disputes – and to which both the United States and France are parties.

To be clear, whether the United States could be sued in France or elsewhere does not bear on whether S. 634 violates international law in the first place – and whether the United States' legal reputation is at stake – or whether there may be other adverse consequences.

2. *In your view, how might other countries react if Congress chose to create an exception to the FSIA in this case?*

For the reasons expressed in my written testimony, other countries may object to various aspects of S. 634: for example, the exception it would forge to domestic and international principles of sovereign immunity and the lack of any traditional nexus between the contemplated suits and the United States.

In the past, foreign countries have sometimes adopted retaliatory legislation in reaction to what they perceive as U.S. jurisdictional excesses – for example, by adopting "claw-back" legislation to enable foreign defendants to recover damages from successful U.S. plaintiffs. That kind of measure, however, seems highly inappropriate and unlikely in these circumstances.

A more likely reaction would be for France and any other concerned countries to engage the United States on a diplomatic level to express their objections. Moreover, while the drafting of S. 634, these hearings, and the continued interest expressed by individual members of Congress has probably encouraged further consideration of reparations for deportation victims, actually enacting legislation could have the opposite effect: once the option of litigation is established and suits are filed, the incentives for plaintiffs and defendants to cooperate with alternative mechanisms will be diminished, at least if France perceives that the risk of litigation can no longer be avoided.

As discussed in my written testimony, the most subtle, and potentially most serious, adverse reaction by other countries would be in the form of increased willingness to entertain comparable exceptions to the sovereign immunity of the United States – reasoning, for example, that some alleged participation by the U.S. government (or its agencies or instrumentalities) in serious wrongdoing might warrant a similarly tailored approach permitting a limited class of suits to proceed. The United States should be sensitive to the fact that its behavior may influence international legal practice, and consider whether the approach taken here is one that it would itself welcome – if administered by foreign governments and their courts.

3. As you know, in 1944, France began an extensive reparations program to compensate all French citizens or residents who had been deported. These programs remain available to all eligible victims, even those who have subsequently become U.S. citizens. Courts in both Europe and the U.S. have ruled that these programs are sufficient. Moreover, the State Department's long-held position is that reparations programs are preferred over litigation, especially in the case of Holocaust survivors. Given that these programs are in place, is an exception to the FSIA unnecessary in light of the risk to reciprocal protections given to the U.S. by other countries?

I have not had the opportunity to evaluate with sufficient care the extent of compensation available under existing French programs for all classes of deportees. Decisions by the Conseil d'État and the European Court of Human Rights have addressed this topic, but it is my understanding that their scope of inquiry was limited and that their factual premises have been challenged. The sufficiency of these programs was not resolved in the most relevant U.S. proceedings (in *Abrams v. SNCF*, referenced in the draft findings). Another case noted in my written testimony, *Freund v. SNCF*, instead addressed the adequacy of alternative mechanisms for spoliation claims, and it appears that the Statement of Interest submitted by the State Department in that case was limited to claims against the Caisse des Dépôts det Consignations (CDC). The scope of French programs may in any event evolve due to continuing efforts on behalf of deportees.

As a general proposition, however, well funded and competently administered reparations programs have distinct advantages over litigation. Such programs can reduce the expenses born by litigants and avoid problems of procedure and proof that can delay and frustrate recovery in civil proceedings. Moreover, the cooperative nature of such programs means that they do not pose the same degree of risk to the reciprocal character of foreign sovereign immunity – on which the U.S. government depends and which would be threatened by the adoption of legislation that violated international law.

In any event, as indicated in my written testimony, it should be noted that – even if existing French programs are inadequate – that does not constitute a basis in international law for limiting the otherwise applicable scope of foreign sovereign immunity, even where the underlying offenses are heinous in character.

4. *Congress has enacted only one explicit exception to the longstanding U.S. policy and practice of according immunity to foreign governments from lawsuits based on their public acts and that is for acts of terrorism. By contrast, S. 634 would authorize lawsuits against a close ally of the United States based on historical acts that the Executive branch has already determined are entitled to immunity. Moreover, the French Government as acknowledged these acts publicly and has established reparations for the victims. Is there reason to be concerned that S. 634 would create a dangerous precedent, damaging the FSIA and potentially our relationship with France?*

The overall impact S. 634 would have on U.S.-French relations is speculative. However, it is my opinion that the bill would present serious issues of legal policy. As reflected in my written testimony, the FSIA was developed so as to be consistent with international law. Arguable departures from those principles have been rare, and drafted so as to reduce both legal objection (for example, by limiting the expropriations exception to property or commercial activities relating directly to the United States, and limiting the nature of the claimants under the acts of terrorism exception) and diplomatic objection (for example, by relying on a procedure to designate foreign states subject to the terrorism exception, and otherwise avoiding country-specific statutory exceptions).

As indicated in my written testimony, the United States has a compelling interest in avoiding breaches of international law, because our government and citizens frequently depend upon its observance. The area of sovereign immunity is no exception, even in circumstances in which gross violations of human rights are concerned, so long as international legal principles continue to afford foreign sovereigns rights against suit in the courts of other nations.

Legislating in favor of human rights generally sets a positive precedent. And narrowly tailored exceptions to the immunity recognized by the FSIA are appealing because they seem to limit any negative precedent – that is, they address immediate and compelling claims while avoiding broader inroads with less certain consequences. Nonetheless, this <u>style</u> of legislating likely sets a bad precedent, both in terms of U.S. decision-making and for foreign countries evaluating the immunity of the U.S. government in the context of particular events. The downside may be particularly clear where, as here, a proposed exception focuses on the immunity of an agency or instrumentality of a country that is not marginalized in the international community, and which may remain open to diplomatic resolution.

5. *At the hearing, you mentioned a "host of domestic issues connected with [S. 634]" that you did not address in your testimony, including the difficulty of recovery. Please take*

this opportunity to elaborate on those issues. **[N.B.: I changed the bracketed reference from S. 1994 to S. 634, per an exchange with staff.]**

S. 634 attempts a simple change in the law: it eliminates any immunity otherwise established by 28 U.S.C. § 1604, and deems inapplicable any statute of limitations, for certain types of cases in which money damages are sought against covered railroads. The apparent purpose is to enable a class action against SNCF of the kind dismissed in *Abrams v. SNCF*.

Nevertheless – putting aside issues already mentioned in my written testimony, such as a potential retroactivity objection and the uncertain application to other European railroads – plaintiffs would still face several obstacles to recovery. I will briefly mention several, without purporting to offer an opinion on how they would be resolved, in order to illustrate potential complications in any ensuing litigation. I will ignore others, such as any potential challenges to class certification.

Despite S. 634, a court may consider jurisdictional objections. For example, personal jurisdiction questions are normally sidestepped under the FSIA, because 28 U.S.C. § 1330(b) deems personal jurisdiction to exist for all actions for which an exception under §§ 1605-1607 applies. I assume S. 634 would be codified in such a way as be included among the referenced sections. Nevertheless, it is notable that the proposed exception dispenses with the nexus requirements of other FSIA exceptions, giving rise to at least a remote possibility that a covered railroad might invoke constitutional due process rights limiting a court's jurisdiction over it (see, for example, the recent decision by the D. Circuit in *GSS Group Ltd. v. National Port Authority*). Whether such an argument is colorable would depend on the degree of the railroad's connection to the United States, which I have not reviewed.

Assuming jurisdiction, proceedings on the merits may not be straightforward, even assuming that the facts support defendants' liability. Discovery can be challenging in cases against foreign sovereigns. The proper legal basis for the claims may also be disputed. (The FSIA itself does not establish a cause of action, and S. 634 does not appear to do so either; rather, it removes immunity for certain cases in which "money damages are sought . . . for personal injury or death." In the *Freund* litigation against SNCF, plaintiffs alleged violations of customary international law, presumably in part to assist in their argument against sovereign immunity, but that may no longer be necessary.) And nothing in S. 634 purports to resolve various defenses SNCF may invoke, such as *forum non conveniens* or abstention based on judicial comity.

Finally, there remains the problem of recovering any judgment plaintiffs may be awarded. The FSIA limits the postjudgment attachment of sovereign property to a defined set of exceptions, none of which is obviously relevant to the present circumstances. S. 634 addresses immunity from liability, but does not purport to remove this immunity from attachment; doing so may not assist plaintiffs in any event, depending on whether SNCF (or other potential defendants) have assets in the United States, and removing that immunity would potentially constitute a separate breach of international legal obligations. The result, in all likelihood, is that the plaintiffs will be forced to seek the enforcement overseas of any judgment in their favor, which can be an arduous task. Whether litigation would be likely to yield tangible and timely financial benefits for the plaintiffs obviously merits close consideration.