Testimony of Ambassador Stuart E. Eizenstat*
Before the Senate Judiciary Committee
Holocaust-Era Insurance Claims
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Chairman Graham, Ranking Member Feinstein, I want to thank you, and the members of the Committee, for inviting me here today to testify on the very important issue of Holocaust-era insurance claims. Congress has frequently focused on a variety of Holocaust compensation and restitution matters. You have provided a strong voice of moral leadership on a wide variety of Holocaust-related issues, and I thank each of you for your determination to support Holocaust survivors and their heirs in efforts to obtain a measure of justice.

I appreciate the sentiment that has motivated this hearing and may lead you to propose legislation similar to S. 258, introduced last year. Providing belated justice for Holocaust survivors and for families of victims and preserving the memory of the Holocaust has been a central part of my public service in four U.S. administrations, and in my private life, leading to over $17 billion in compensation and recoveries. (In the Carter Administration, as the president's chief White House Domestic Policy Adviser, my memorandum to the President to create a Presidential Commission on the Holocaust chaired by Eli Wiesel, which led directly to the U.S. Holocaust Memorial Museum. And I have chaired the board of directors of the Defiant Requiem Foundation, which has mounted over 50 concert dramas, "Defiant Requiem: Verdi at Terezin", around the U.S. and the world to honor the memory of a Jewish prisoners who created a prisoner chorus to "sing to the Nazis what they could not say to the them."

In the Clinton Administration (1993-2001), while having four Senate confirmed positions, I was Special Representative of the President and Secretary of State Albright, and negotiated over $8 billion of compensation for more than 1.5 million slave and forced laborers, Nazi-looted art, hidden Swiss and French bank accounts, confiscated communal and real property, and unpaid insurance policies. Those agreements, and the subsequent payments to Holocaust victims and their families pursuant to them, were the result of the concentrated work of many people, including representatives of 11 agencies of the U.S. government, their counterparts in numerous foreign governments, including the State of Israel, leaders of many Jewish organizations, foreign companies, and a large number of skillful lawyers representing the interests of Holocaust survivors and heirs.

In the Obama Administration (2009-2017), as Special Adviser to Secretary of State Clinton and Secretary of State Kerry, I negotiated the 2009 Terezin Declaration and the 2010 Best Practices and Guidelines for the Restitution and/or Compensation of Real (Immovable) Property, each with over 40 countries. I also negotiated an $11 million agreement in 2011 with the Lithuanian government and a $60 million 2014 agreement with the French government for those deported on the French railway, their spouses and direct heirs. And I was appointed by Secretary of State Mike Pompeo as Expert Adviser to the State Department on Holocaust-Era Issues. To be clear, however, today I testify in my personal capacity. I am not here representing the Trump administration or the State Department.

In a non-governmental capacity, in addition, since 2009, as the Special Negotiator for the Conference on Jewish Material Claims Against Germany ("Claims Conference"), I have negotiated with the German Government for over $9 billion in pension, one time payments and homecare funding that has directly impacted the lives **of hundreds of thousands of survivors**. Just recently in May 2019, it was agreed with the German Government that the amount of German Government funding for homecare for 2020 would be € 524 million and there would be increases and expansions of the monthly pension program, creation of payments to spouses of deceased claimants, among other benefits. These are real tangible benefits that come from ongoing negotiations that allow Holocaust survivors worldwide to lead the final years of their lives with greater dignity.)

It is with this lifelong passion and experience that I say to you respectfully, that any proposed legislation similar to S. 258, which seeks to give claimants a right to sue in federal court on insurance policies, would have potentially catastrophic, negative effects at several levels:

--- It would leave the elderly insurance beneficiaries of Holocaust victims to costly, lengthy, and almost certainly unsuccessful litigation, with high standards of proof in courts and legal defenses, to the benefit of no one except lawyers.

---In unprecedented fashion, it would totally undermine the legally binding Unites States government agreement providing "legal peace" with our allies. This was promised to the German and Austrian governments and their private corporations, including some 70 insurance companies, as the basis upon which they joined with some one thousand other German companies to pay 10 billion DM ($5 billion) under a July 2000 agreement I negotiated on behalf of the U.S. government with the German government and private sector. Likewise, it was the basis for the hundreds of millions of dollars in compensation in a negotiation I concluded in January, 2001 with the Austrian government and private companies. The U.S. Supreme Court recognized the validity of the Executive Agreement with Germany and Judge Michael Mukasey, later Attorney General under President George W. Bush, recognized the Agreement in his decisions on Holocaust insurance cases.

---It would complicate our ability to negotiate additional agreements with Germany and other countries on behalf of Holocaust survivors or families of victims because the good word of the U.S. government could not be trusted.

-- It would fail to direct those Holocaust insurance claimants, free of charge, to the European insurers who continue to apply the cost-free, more expeditious procedures initially applied by the International Commission on Holocaust Era Insurance Claims (ICHEIC),with very low levels of proof, even making with payments where insurance companies were no longer in existence or could not even be named. And it would deter them from using the New York State Holocaust Claims Processing Office (HCPO), created by then New York Governor George Pataki and brilliantly led by Anna Rubin, to facilitate consideration of their claims. If there are potential claimants represented by any of your witnesses, I ask, as I have for over ten years, give us your names so that we can try to get them paid.

--- It would fail to recognize the opposition of virtually every major American Jewish organization and Holocaust survivor group, as shown by the attached letters and statements.

Over the years, I have testified before various Committees of the Congress and briefed Members over a dozen times on Holocaust issues, including in my capacity as the Special Representative of the President and the Secretary of State for Holocaust Issues during the Clinton Administration and the other positions I have held.

Members of the Committee, there is no doubt we all share a common goal to assist the survivors of the greatest horror inflicted by humanity on fellow man. We all want to seek justice. But under legislation you may be considering, this admirable goal would not lead to more justice to survivors. Indeed, allowing for litigation of these claims in US would NOT help survivors and to the contrary is likely even harm them. While cruelly raising false hopes for those who can least afford them, passage of the legislation also would negatively impact upon the US Government's role in international negotiations of all kinds. It represents a clear breach of the United States' prior international obligations, commitments, and agreements.

First, I will address the emergence of the International Commission on Holocaust Era Insurance Claims ("ICHEIC") and enhance the Committee's understanding of the United States Government's Holocaust compensation and restitution efforts during the period I served as the Administration's leader for these issues -- particularly regarding the Executive Agreement between the United States and Germany and the resulting German Foundation -- and how ICHEIC fit into these broader efforts to secure compensation and restitution for Holocaust victims and their heirs.

Second, I will suggest that legislation, similar to S.258, as circulated last year, threatens the integrity of the U.S. Government's long-standing policy of resolving Holocaust-era claims through negotiation, not litigation, and may endanger future agreements with other countries or entities.

Third, I will highlight several characteristics of the ICHEIC process and contrast them with what is found in a court of law. This contrast indicates to my mind that the bill will not add to the likelihood of additional recovery on Holocaust-era insurance policies

Fourth, I will demonstrate that there has been and continues to be a claims process based on relaxed ICHEIC standards for survivors and heirs to file claims for Holocaust era insurance policies and that this process is working effectively. Anna Rubin, Director of the NY State Holocaust Claims Processing Office will go into this issue in further detail.

Fifth, because of the shortness of the notice for this hearing and for health reasons no survivor is testifying today against any proposed legislation similar to S.258, But I know that there are many Holocaust survivors and survivor organizations opposing the legislation. I have been privileged to work with and continue to work with Holocaust survivor leaders, such as Roman Kent who is the co-Founder and Chairman of the American Gathering of Jewish Holocaust Survivors and their Descendants and who has been the leading Holocaust survivor in Holocaust negotiations over the past 25 years. I want to quote a short extract from his testimony to this committee in June 2011 at its hearing on "Holocaust Claims in the 21st century" when he stated his concerns for his fellow survivors…

> "S. 466 will raise unreasonable hopes, setting up false expectations for survivors only, in the end, to disappoint them. Litigation of the sort envisioned by the bill will be lengthy and costly, especially since the issue of attorneys' fees are not addressed by the proposed legislation. As a result, unless the bill is really intended as a class action tool to benefit certain attorneys, few claimants will be able to sue

individually"

His concern then, as now, is that this legislation, supported by lawyers who will benefit from filing cases, falsely raises the hopes of Holocaust survivors when in fact the survivors would have little chance of success in Court. Such legislation risks jeopardizing future agreements and settlements that I lead along with Roman Kent that could bring additional benefits to survivors. Thus it is not in the survivors' interests that such legislation would pass. I am attaching a recent letter from Mr Kent to my testimony together with letters from the Holocaust Restitution Committee and the World Federation of Jewish Child Survivors of the Holocaust and Descendants.

Our mission to achieve a measure of justice for Holocaust survivors and heirs is ,far from complete. There are many open issues and agreements yet to be negotiated in Central and Eastern Europe, ongoing discussions regarding art and on other issues with the German and Austrian Governments. The role of the US Government has been key in all these arenas. As can be seen from the letter attached to this testimony, the major Jewish organizations in the United States hold the position that legislation similar to S.258 could undermine the ability to reach future agreements while providing few tangible benefits to survivors. They note that despite its admirable goals, they have serious concerns that legislation such as S.258 "is not only unwarranted, but that its enactment could be detrimental to the interests of survivors, delaying or even jeopardizing tangible, ongoing efforts to provide support for them". The letter, which I attach, was signed last year by the Anti-Defamation League, the American Jewish Committee, the American Gathering of Jewish Holocaust Survivors and their Descendants, the Conference on Jewish Material Claims Against Germany, B'nai B'rith International, National Coalition Support Eurasian Jewry, World Jewish Congress- American Section and the World Jewish Restitution Organization, when S. 258 was pending.

Congress has held eight (8) hearings on these issues in the past two decades – coming before different committees in the House and the Senate and thus under the scrutiny of dozens of members of Congress over that period. Congress has thoughtfully considered the issues and arrived at the conclusion that when balancing the different considerations - the importance of the fulfilling United States international legal commitments set forth in binding Agreements and maintaining its position as a honorable party in future negotiations **against** the unlikely chance of legal success for survivors, the existence of an alternate process to receive payments, and jeopardizing future benefits for survivors, it time and time again clearly resulted in a decision NOT to pass such legislation. I hope that with all the other issues confronting you, this committee will take up the challenge of delving deeply into these complex issues to ensure the best result for Holocaust survivors.

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German government. His negotiations on behalf of the U.S. government and with the Claims Conference have led to $17 billion in recoveries for Holocaust survivors and families of victims from Swiss and French banks, German and Austrian slave and forced labor companies, restitution and compensation for Nazi-looted art, restitution and compensation of communal and private property, insurance policies, persons deported on the French railway, as well as the 1998 Washington Principles on Nazi-Confiscated Art, the 2009 Terezin Declaration, and the 2010 Best Practices and Guidelines for the restitution and compensation of Immovable (Real) Property Confiscated by the Nazis and their Allies between 1933-1945

Background

Since the end of the Second World War, restitution for Nazi crimes has been an important policy objective of the United States Government. Unfortunately, the ability of the United States Government to seek restitution and compensation for many individuals was compromised during the Cold War. Efforts to seek funds directly from European companies were particularly hindered in this regard. Following the end of the Cold War, however, the United States Government's policy was to seek justice and to do so with urgency. We wanted to ensure that survivors and their families received justice, but it was equally important that they get some measure of justice quickly. The fifty-year duration of the Cold War meant that time was running short.

The twin goals of justice and urgency gave life to what became the fundamental policy of the United States with regard to Holocaust-era claims. We made the decision that the interests of survivors would be best advanced by seeking compensation and restitution through mechanisms based on negotiation and administrative processes, and not on litigation or any other adversarial process. The timing issue, of course, was not the only reason litigation was an impracticable option, although it was an important one. Defenses which defendant companies and governments could use in lawsuits including post-War settlements, transaction costs including attorneys' fees, statutes of limitation and rules of evidence, as well as the burden of proof that would apply to survivors' claims in U.S. courts, made it highly unlikely that litigation offered a useful path to obtain restitution and compensation. Indeed, several federal judges dismissed Holocaust-related claims for slave labor payments.

Emergence of the ICHEIC Process

The ICHEIC process emerged initially not from our efforts inside the federal government, but rather from the impetus provided by the insurances regulators of a number of states. The initiators of the ICHEIC process were Neil Levin, at that time the New York Superintendent of Insurance, and Glen Pomeroy, the vice chairman of the National Association of Insurance Commissioners and North Dakota's Commissioner of Insurance. The insurance regulators had seen a growing number of claims relating to unpaid Holocaust-era insurance policies and heard and met with Holocaust survivors, who told their stories of purchasing insurance policies to provide for their families' futures, of deaths of family members during the Holocaust, of their own survival, and of their unsuccessful attempts to receive payment under their insurance policies.

In the spring of 1998, the insurance commissioners and Holocaust survivor organizations invited the Clinton Administration to support an international commission to resolve

unpaid Holocaust-era claims and asked us to use diplomatic efforts to bring the affected European governments and companies into the process. We agreed to support this effort, which became ICHEIC. We also agreed to become an ICHEIC Observer, although the United States was never a member. My able deputy, J.D. Bindenagel, served as the Observer and kept me abreast of ICHEIC's activities, and continued to do so in the George W. Bush Administration.

Our support for the ICHEIC process was premised on the Government's interest in obtaining as quickly as possible some measure of justice for Holocaust victims and their families, including many U.S. citizens. The ICHEIC process also offered a way for us to resolve outstanding claims in a way that enhanced our diplomatic and economic relations with our European allies as well as with the State of Israel.

At the time, I was at the State Department. I was approached by the representatives of European insurance companies that had faced criticism and lawsuits in the United States for non-payment of Holocaust-era claims. It was clear to me that while insurance in our system is an activity that is regulated by the states, the resolution of these 60-year-old claims had to be merged with our forthcoming broader negotiations with Germany on Holocaust-era claims, as well as with other future negotiations. The merger was essential because our negotiations and those of the state insurance regulators were both seeking funds from the same universe of companies in Germany, and eventually also Austria. Moreover, under the class action settlement with the Swiss Banks which I helped facilitate (and which U.S. District Judge Edward Korman completed), all Swiss companies, including insurance companies, received certain protections from further lawsuits relating to Holocaust-era claims. The companies, understandably, did not want to pay twice for the same wrongs.

We also felt that we had to ensure the inclusion of the broadest possible number of companies and countries because, as a practical matter, the state insurance regulators had influence over only those European companies with significant operations in the United States. Indeed, the insurance companies that signed the ICHEIC Memorandum of Understanding were essentially the only European companies in that category, and thus were the only European insurance companies subject to U.S. state regulation. They were also, for the most part, the only insurance companies that survivors and heirs could sue in U.S. courts. Yet we knew that European insurance companies with operations in the United States did not constitute the complete universe of companies that had issued policies to Holocaust victims. Ultimately, many European insurers that did not conduct business in the United States and, therefore, would have been beyond the reach of U.S. courts, participated in the ICHEIC process.

So, as I met with the heads of insurance companies or other insurance company representatives, I put them in touch with Glen Pomeroy and Neil Levin, and at the same time searched for a mechanism to link them to our broader efforts on behalf of Holocaust survivors and heirs. In August 1998, the Memorandum of Understanding between the European insurers, state regulators, and survivor representatives, including the State of Israel, was signed with our support, and the ICHEIC process was launched.

As you know, ICHEIC was chaired by former Secretary of State, Lawrence Eagleburger

who has testified on these issue. He provided his decades of diplomatic leadership and negotiating skills to the ICHEIC process and I am sure that we all would have benefited from his wisdom and insight today. He was trusted by all parties, US Insurance Commissioners, European insurance companies, Holocaust survivors, the Israeli government, and Jewish organizations to ensure that the ICHEIC process achieved its goals. I am appending his last testimony to Congress to my testimony today.

The U.S. Government took a number of steps to support the ICHEIC process beyond assisting in diplomatic negotiations:

- The State Department organized a seminar in Prague to help spur efforts to create a fact-based history of the very complex issues relating to insurance policy assets seized by the Nazi regime and to help translate into action existing research into these issues so as to settle quickly the insurance claims of Holocaust survivors.

- The U.S. Government publicly supported ICHEIC at a 1998 meeting of the National Association of Insurance Commissioners in New York City.

- The State Department organized the so-called "Washington Conference" on Holocaust-era assets, which was held in November and December 1998 and at which I voiced the U.S. Government's support for the ICHEIC process and encouraged European insurers to participate in it. The proceedings of the Conference were published and remain available online.

The participants at the Washington Conference urged the resolution of still-pending insurance issues, but they also acknowledged past German Government efforts to compensate the victims of Nazi persecution. Those efforts began in the early 1950s. West German Chancellor Konrad Adenauer expressed, in September 1951, the need for Germany to provide Holocaust victims with "moral and material indemnity." In October 1951 and in an effort to avoid direct negotiations with West Germany (East Germany having refused any responsibility), the State of Israel, led by Prime Minister David Ben-Gurion helped create the Conference on Jewish Material Claims Against Germany (the "Claims Conference") along with 23 Jewish organizations that were Claims Conference members. These actions led to the two 1952 Luxembourg Agreements with West Germany on one side and the State of Israel and the Claims Conference, respectively, on the other. Under these and later agreements which together became known as the German "Federal Indemnification Laws," Germany has paid some 100 billion marks (equal to more 60 billion euros or 100 billion in today's dollars) to Holocaust survivors and heirs around the world.

On behalf of the U.S. Government, I strongly encouraged all insurance companies that had issued policies during the Holocaust era to join ICHEIC and participate fully in the process. That policy was reflected in testimony I gave before the House Banking Committee on September 14, 1999, in which I stated that "[w]e continue to believe that [ICHEIC] is the best vehicle for resolving Holocaust-era insurance claims …." It was reiterated numerous times, including in my letter of November 28, 2000, to former Secretary of State Eagleburger, who served as Chairman of ICHEIC, in which I stated that it was the foreign policy of the United States that ICHEIC "should be recognized as

the exclusive remedy for resolving all insurance claims that relate to the Nazi era." That policy has never changed.

I met with the Prime Minister of the Netherlands to encourage him to get the Dutch insurance companies to join ICHEIC. Indeed, the State Department worked with ICHEIC and representatives of the Dutch Government, insurance industry, and survivor organizations to incorporate the Dutch companies into ICHEIC. And through Executive Agreements that I negotiated with Austria and Germany, the United States Government ultimately brought the entire German and Austrian insurance industries into the process as well.

It is important for the Committee to understand that the ICHEIC process emerged voluntarily. It was not forced on the insurance companies. New York Insurance Superintendent Levin once described the theme of the effort to establish ICHEIC as "voluntary action based on a moral foundation." Neil Levin tragically died in the September 11th attack on the World Trade Center, yet all of the participants in ICHEIC -- including the state insurance regulators, the European insurers, and survivor's representatives -- have labored on to complete the work that he and his colleagues inspired.

It is also important for the Committee to appreciate that support for the ICHEIC process was bipartisan. After the Clinton Administration, Deputy Secretary of State Richard Armitage, in the George W. Bush Administration, strongly supported ICHEIC. So did career foreign service officer J.D. Bindenagel, Special Envoy for Holocaust Issues in the State Department, who had been my strong right arm on many of my negotiations and as the official Observer to ICHEIC

U.S. Government's Broader Restitution and Compensation Efforts

ICHEIC and the insurance claims it processed were only one part of the U.S. Government's broader Holocaust restitution and compensation efforts. As noted above, the United States was limited in its ability directly to pursue restitution and compensation during the Cold War, although Germany paid substantial sums beginning in the early 1950s. I first became involved in these issues when I was asked, in the mid-1990s while serving as U.S. Ambassador to the European Union, to encourage the newly-independent states of Eastern Europe to restore to their Jewish communities communal property (including Synagogues, cemeteries, and community centers) that had been taken during World War II. Soon, however, I became the Administration's point person for a much broader effort.

The single largest piece of the broader effort was the Executive Agreement between the United States and Germany as a part of which the German insurance companies participated in the ICHEIC process. This came about because in the fall of 1998 the German Government and German industry turned to me for help in facilitating the resolution of class action lawsuits brought against German companies. Germany proposed the creation of a foundation to make dignified payments to slave laborers and to resolve property and insurance issues. We agreed to work with them in that process. After 18 months of very difficult negotiations, on July 17, 2000, the United States and

the reunified Germany signed an executive agreement which committed Germany to operate a foundation under the principles to which the parties in the negotiations had agreed, and at the same time, committed the United States to take certain steps to assist German companies in achieving "legal peace" in the United States.

As an initial matter, the United States has a long history of negotiating "lump sum" or similar settlements of its nationals' claims through executive agreements, a practice which dates back to 1799. Typically, executive agreements settle the claims of individuals against a foreign state. In the case of Holocaust claims, individuals had claims against foreign corporations as well as against foreign states. As the Supreme Court noted in its *Garamendi* decision, however, this "distinction does not matter." It does not affect the United States Government's authority to settle claims through executive agreement. Additionally, in many situations, such executive agreements have provided that individual claims be submitted to a commission, which would adjudicate and ultimately pay the claims of individual claimants. So the ICHEIC process was not revolutionary in this respect either.

In typical settlement negotiations with foreign countries, the United States Government is the sole party negotiating on behalf of, and seeking to protect the interests of, individual American claimants. In the case of our Holocaust-related negotiations, however, the interests of the survivors and heirs were represented by a number of different groups, each of which had every reason to seek the best settlement possible. First, they were represented by a number of the United States' premier class action lawyers. Second, the State of Israel actively participated, in the person of Bobby Brown, in all negotiations. In addition, Moshe Sanbar a Holocaust survivor and former Governor of the Bank of Israel was very active in ICHEIC negotiations and was particularly involved in the issues relating to valuation of insurance policies.

Third, Jewish groups, such as the Claims Conference and the World Jewish Restitution Organization ("WJRO") insisted on favorable terms. The WJRO is an umbrella organization of 10 other Jewish group created in 1992 by the State of Israel and the World Jewish Congress to represent the interests of world Jewry in regaining Jewish property after the fall of communism. Representatives of the State of Israel, WJRO and Claims Conference participated in the subcommittees of ICHEIC including the Audit Committee. The Audit committee was particularly important as it reviewed how the companies searched their records for groups of relevant files and also reviewed the processes that the companies utilized when a company received individual claims.

As shown, the interests of survivors and heirs were broadly and vigorously represented throughout the negotiations, and in the end, all parties accepted the Foundation "Remembrance, Responsibility and the Future" I negotiated with the German government and private sector as a worthy result. The U.S. Government has filed Statements of Interest recommending that it was in the foreign policy interest of the United States that court cases against German companies for wrongs committed during the Nazi era be dismissed on any valid legal ground, and the U.S. Government remains committed to do so in future cases that are covered by the Foundation agreement. The United States, however, has not extinguished the claims of its nationals or of anyone else. It was and remains the policy of the United States government that Holocaust claims

should not be resolved by litigation.

The most difficult issues in our German negotiations were the scope of the beneficiaries to be covered -- not just Jewish slave laborers but also non-Jewish forced laborers, for example; the total amount to be paid-in by Germany; the allocation of those funds to the various classes of claimants; and the provision of "legal peace" for the German companies and government.

The Foundation which was created as a result of our negotiations was capitalized at 10 billion marks with the German Government providing 5 billion marks, and German industry providing another 5 billion marks, plus 100 million marks in interest. A board of trustees provided oversight of the Foundation's operations, and the Foundation was managed by a three-member board of directors. Of the 10 billion marks, 8.1 billion was allocated to cover slave and forced labor claims, while another 1 billion marks was to cover property claims not fully captured by earlier German compensation and restitution programs. Of the one billion marks, 550 million marks were allocated to insurance claims. The German Foundation also created a Future Fund of 700 million marks. (The remaining 200 million marks were for legal and administrative costs.)

The 26 members on the board of trustees included representatives of the German Government, the U.S. Government, the State of Israel, German companies, and also Jewish organizations and plaintiffs' attorneys. The Foundation has been subject to legal oversight by the German Government and is audited by two of its agencies. If one considers the U.S.-Germany Executive Agreement of July 17, 2000, one will find that it provides a framework for the treatment of claims made against German insurance companies but leaves the details of implementation to the responsible parties.

The role of the German insurance companies in the negotiation of the Executive Agreement was a critical one. In fact, without their participation, there could have been no broader Executive Agreement between Germany and the United States. There were two issues. First, was the money. It was impossible for Germany to provide the full 10 billion marks which we had agreed upon without the participation of the German insurance companies. Second, was the issue of legal peace. German insurer Allianz, a key member of the German private sector negotiating team, and the German companies together, refused to settle unless German insurance companies also received "legal peace." This was particularly complicated because ICHEIC was also engaged with German insurance companies. I was negotiating with the German insurance industry, the plaintiffs' attorneys, and the Jewish groups, on the one hand, and with Secretary Eagleburger, on the other. My negotiations with Secretary Eagleburger, chairman of ICHEIC, were difficult since he wanted the monies allocated from our German settlement to ICHEIC.

Ultimately, we reached a solution whereby 550 million marks of the global 10 billion mark settlement amount would be "passed through" to ICHEIC. In return, the United States Government agreed to submit a Statement of Interest in any appropriate litigation involving any German company, including German insurance companies, stating that it is in the foreign policy interests of the United States for the court to dismiss on any valid legal ground as found by the court cases against them in return for the 10 billion mark

payment. This was to afford the companies the legal peace they desired.

The U.S.-Germany Executive Agreement provided that insurance claims made against German insurance companies were to be processed by the companies and the German Insurance Association on the basis of claims-handling procedures that were to be adopted in an agreement between the Foundation, ICHEIC, and the German Insurance Association. The Government of the United States and the Federal Republic of Germany were not part of those tripartite negotiations, but we made every effort to facilitate and encourage all sides to come together and resolve their differences.

By the time I left government in January 2001, these negotiations had not yet been brought to a conclusion. It took until October 2002 to conclude the so-called "Trilateral Agreement" on claims-handling procedures. It took until July 2003 to conclude an agreement with three other non-German ICHEIC members (AXA, Winterthur, and Zurich), and it took until December 2003 to conclude an agreement I negotiated with the Austrian General Settlement Fund. In that agreement, in addition to hundreds of millions of dollars for slave and forced labor at the hands of Austrian companies, Austria agreed to pay Holocaust survivors $150 million for confiscated apartment and small business leases and the contents of these apartments and business, and contributed $210 million to the General Settlement Fund to address remaining Nazi-era property issues. On behalf of the U.S. government, we undertook similar commitments with respect to the Austrian Fund as we had with the German Foundation, with the same commitment by the U.S. government to assure Austrian companies "legal peace" from future suits. Under this agreement, Austria agreed that its General Settlement Fund would provide $25 million to cover claims against those Austrian insurance companies that were not already covered through ICHEIC or the German Foundation, and that claims would be processed using ICHEIC claims handling procedures, including valuation, low-levels of proof, and relevant decisions by the chairperson.

It must be said that ICHEIC got off to a painfully slow and expensive start due to the complexity of the issues and the distrust of the parties. Eliminating that distrust took years, but in the end, ICHEIC was able to achieve its mandate of providing some measure of justice for Holocaust survivors and their heirs as quickly as possible. ICHEIC ultimately was successful. It paid $306 million to 48,000 Holocaust victims and their heirs under relaxed legal standards -- far lower than would satisfy a court. It also paid $169 million for humanitarian programs and humanitarian claims. A surplus in the claims fund of $27 million for specific social welfare programs for Holocaust survivors went from ICHEIC to be administered by the Claims Conference.

ICHEIC paid claims regardless of whether the company which issued the claimant's policy was actively participating in the ICHEIC process. This is important, because it meant that individuals who owned policies issued by companies that were liquidated, nationalized, or otherwise no longer existed, could still submit a claim to ICHEIC and be paid the full value of the claim. Approximately $31 million was paid out on such so-called "8A2" claims, in addition to the hundreds of millions fo dollars paid to claimants where a specific policy could be found. The normal relaxed ICHEIC standards applied equally to these claims. None of these payments would have been possible in litigation in

U.S. courts, with high evidentiary standards and technical defenses.

Much has been made of the amount paid by ICHEIC – approximately $500 million compared to the supposed "value" of total Holocaust era insurance policies. In 1999, ICHEIC appointed Glenn Pomeroy, then North Dakota Insurance Commissioner and former President of the NAIC and Phillippe Ferras (then Executive Vice President of AXA France) as joint chairmen of a task force to report on the estimated number and value of insurance policies held by Holocaust victims. The task force was staffed by outside experts as well as ICHEIC members, and included economists Frank Lichtenberg from Columbia University Graduate Business School and Helen Junz, a member of the Presidential Advisory Commission on Holocaust Assets in the United States, who assisted the Volcker Committee with a project on estimating the size and structure of the wealth of the Jewish population in Nazi-affected countries before World War II, as well as actuaries with the Office of the California State Insurance regulator and AXA-Paris. The Pomeroy-Ferras report, available at www.icheic.org, provided data that allowed the Commission to assess the scope and size of the European pre-Holocaust insurance market relevant to Holocaust victims and their heirs.

Certain data – the size of the insurance market in a certain country and the Jewish population of that country is not controversial. The question of the Jewish propensity to insure – generates more discussion. It is known that Jews insured at a higher rate than the general population but it is unclear at what number – in any event this fact is not determinative. The factors that can change the estimate of the value of unpaid policies by the greatest degree are (1) percentage of policies unpaid (2) how to convert the values of the currencies in 1938 currencies into US dollars ($) (3) how to determine the present day valuation of these US Dollars. How these questions and assumptions are answered can result in radically different estimates as to the value of unpaid policies today.

While the amount paid by the companies to ICHEIC is lower than the amount estimated by some, both the Congressional Research Service and the NY HCPO agree that while certain based data is clear, the assumptions and methodology used in working with this data can greatly impact the final result on the value of unpaid policies.

In its report "Insurance Industry and the Economies of Central and Eastern Europe 1918-1945 published in October 2011, the HCPO stated:

> "Although numerous figures both for the number of unpaid policies and for their value today have been posited, it should be noted that methods that have been used to calculate these figures are highly dependent on (1) the underlying assumptions made by the person doing the calculations and (2) the base value (nominal insured amounts versus direct premium income) used (i.e. if one wished to demonstrate that the value of unpaid policies is very high, then one would choose the method of calculating present-day value that yields the highest amount, whereas if one wished to show that the value is low, the method of valuation would be chosen accordingly)" .

The Congressional Research Service itself stated:

> "In order to evaluate how effectively it fulfilled its mission, however, others have attempted to calculate the present day value of the universe of outstanding policies and compared this to the amount paid out through the ICHEIC process. The process of calculating current value implies many areas where estimates and assumptions must be made and it is possible to produce a wide range of estimates using assumptions that can be well defended. This is particularly true because ICHEIC produced a range of estimates rather than a single estimate…"

In 2011, the HCPO report pointed out that by far the largest and most developed insurance market was in Germany, but victims of Nazi persecution made up only 0.5% of the European insurance market. Moreover, some part of the 100 billion DM paid by Germany under their post-War German compensation legislation (BEG) to Holocaust survivors went for insurance payments. In addition, by far the largest Jewish population in Europe was in Poland and it had one of the smallest insurance markets – both in terms of market share and per capita insurance. In point of fact, there is no way to know the prewar value of insurance policies owned by Nazi victims with any degree of certainty.

Director of the HCPO Anna Rubin states in her written testimony to this Committee:

> "*The calculation [of the value of the prewar insurance market] yielded a December 2006 value of the prewar market at just over $13 billion. Please note that this represents the value of the entire insurance market, and not the value of the market that may have been owned by victims of Nazi persecution.*
>
> *Victims of Nazi persecution made up a small percentage of the prewar population of the largest European insurance market (Germany, 0.5%); moreover, the country with the largest percentage of Nazi victims (Poland) had a relatively small and underdeveloped insurance market. It is therefore unlikely that billions of dollars' worth of insurance policies belonging to victims of Nazi persecution remain unpaid, particularly after the extensive compensation programs of the 1950s and 1960s as well as modern-day processes such as ICHEIC, the Austrian General Settlement Fund and other entities discussed below.* "

In the final analysis, ICHEIC successfully compensated individuals for their Holocaust - era insurance policies. Much has been said about the substantial administrative costs ICHEIC incurred, which amounted to approximately 17.4% of the funds it paid out. But it is important to understand what is included in this 17.4% figure. It includes all costs incurred by ICHEIC in publicizing its programs; in the difficult task of researching all claims at no cost to the claimants; in creating and staffing U.S. and European offices to work with local claimants; and in maintaining a call center that potential claimants could contact to receive more information about and assistance with the ICHEIC process.

Proposed new legislation could Jeopardize U.S. Government Policy on Holocaust Restitution and Compensation

The United States Government's policy on Holocaust restitution and compensation matters was and is that claims should be resolved through negotiation and cooperation, using administrative processes without payment of attorneys' fees, and not through a slow, costly, uncertain adversarial process like litigation. The policy is based on a belief that it was necessary to work with our European allies and other interested parties to secure restitution and compensation as quickly as possible. The policy also recognizes that litigation presents what would be, in the vast majority of cases, prohibitive barriers to recovery -- including statutes of limitation, rules of evidence, and burdens of proof -- and significant transaction costs in the form of high attorneys' fees. The policy is based also on consideration of the United States' broader foreign policy interests, in particular that we work closely with, and not against, our European allies and the State of Israel.

The approach that was taken by S.258 is squarely at odds with this United States Government policy. The bill provides for an adversarial, litigation process. It imposes the probability of litigation on companies that have cooperated fully with the United States Government and in the ICHEIC process and that have paid tens of millions of dollars in an effort to satisfy their obligations. It further imposes the probability of litigation on companies that have been deemed by the United States Government to be entitled to "legal peace," thereby undermining the word and credibility of the U.S. Government itself.

I am concerned with two groups of companies that could be subjected to litigation under the bill. First, are the German insurance companies. These companies participated in the ICHEIC process pursuant to the Executive Agreement between the United States and Germany, an Executive Agreement which enjoyed strong support by key Members of Congress. In return for their participation, which was monitored by the German government and audited by two of its agencies, the United States Government agreed that all German companies including German insurers should enjoy legal peace. The bill, as currently drafted, would vitiate that commitment by the United States Government and would be an example of gross bad faith after payment of 10 billion marks in settlements.

The second group of companies are those that participated fully in the ICHEIC process without the benefit of an Executive Agreement calling for a Statement of Interest in the event of litigation. While there was no technical legal peace extended by the U.S. Government with respect to these companies, they nonetheless participated in good faith in a process that the United States Government had decided was the "exclusive remedy" for resolving all Holocaust-era insurance claims. I testified before Congress on this very policy and it was broadly supported on a bipartisan basis. There is no justification for now subjecting them to some other remedy. This is a conclusion shared by the United States Supreme Court, in its *Garamendi* decision dealing with a State of California statute that conflicted with our agreement, and later by Judge, Michael Mukasey, who later became Attorney General under President Bush, in his *In re Assicurazioni Generali* decision dealing precisely with this issue.

The consequences of upsetting United States foreign policy interests will likely be wide-

ranging. First, the bill essentially and fundamentally threatens our existing Executive Agreements with Germany and Austria and would undermine confidence in our Executive Agreement with France. Second, survivors' groups, such as the Claims Conference, continually seek to increase payments under our existing arrangements. It will impair the ability of those groups to successfully negotiate such enlargements in the future if Congress passes the bill.

Third, the United States Government continues to seek agreements with other governments and industries that have not yet dealt fully with Holocaust restitution and compensation. Its ability to negotiate likewise would be impaired.

In December 2014, I negotiated a $60 million agreement between France and the United States have under which Holocaust victims who were transported to Germany by the French national railway will receive reparations.(see https://20092017.state.gov/p/eur/rls/rm/2014/dec/234917.htm) It is exactly these type of agreements that would be placed in jeopardy if the status of the US Government as an honorable broker that keeps its side of the bargain is not maintained.

Countries and companies will be unwilling to negotiate with survivors' groups or the United States Government if it appears to them -- not unreasonably -- that the United States is incapable of maintaining its end of a bargain.

Legislation Will Not Increase the Likelihood of Recovery on Holocaust-Era Insurance Claims, and Will Subject Them to Lengthy, Costly, Uncertain Litigation with High Levels of Proof and Technical Defenses They Would Have Difficulty Overcoming

The ICHEIC process included extremely favorable rules for claims processing. HCPO's research indicates that over 85% of the insurance companies doing business in Europe before World War II were covered by the ICHEIC process. Rather than being required to prove his or her claim by a "preponderance of the evidence," a Claimant before ICHEIC was required only to prove that his or her claim was "plausible." Even in the absence of evidence establishing plausibility, thousands of Claimants received humanitarian payments which required an even lesser showing. Claims were paid for defunct companies or those that had been nationalized during the post-war Communist era.

Participants in the ICHEIC process likewise were not bound by any rules of evidence. The insurance companies agreed to these relaxed standards of proof, far more lenient than any court of law would require.

Finally, claims were resolved through the ICHEIC process at no cost to Claimants -- unlike costly discovery in lawsuits. This included considerable research ICHEIC performed to help Claimant's develop their claims.

The U.S. Courts would not be so friendly a venue for claims. Litigants would be faced with, jurisdictional arguments, rules of evidence, and burdens of proof. They would be

faced with considerable costs, including attorneys' fees, which might only be recovered at the end of the process if he or she wins (and wins on appeal). Such a cause of action would likely raise the hopes of survivors without offering them a real chance at additional recovery. But most importantly, litigation would take time – which survivors on the whole do not have.

I would urge that any attorneys or others with potential insurance claims give them to HCPO for resolution. This is a request I made a decade ago.

A Better Way Forward

At the conclusion of the ICHEIC process, the participating European insurance companies provided undertakings that they would continue to process claims using the valuation guidelines and relaxed standards of the ICHEIC process. A copy of those commitment letters were provided by Diane Koken, Vice Chair of ICHEIC to the House Financial Services Committee for the record in April 2008.

According to information from the GDV (available on their website https://www.gdv.de/en/issues/our-news/compensation-of-insurance-policies-of-holocaust-victims-16160), since 20 March 2007, enquiries from claimants have led to the identification of 317 Holocaust era insurance policies and 130 resulted in payments for a total of $3.2 million. According to Generali, it has made payments of 499 claims for a total of $12 million. Thus it is clear that there is an existing claims payment process and the Holocaust Claims Processing Office (HCPO) in New York continues to assist claimants worldwide in this process

This Committee might usefully decide that one way forward should be to have those companies submit periodic reports to an appropriate office of the United States Government on their claims processing. This reporting should include the number of new Holocaust-era claims submitted, the number granted, the reasons for any refusal, and the amount offered in compensation. The report could be submitted to the State Department's Office of Holocaust Issues, or some other appropriate office, and it should also be shared with the National Association of Insurance Commissioners and New York State's Holocaust Claims Processing Office ("HCPO"), to assist in their efforts to aid individuals with Holocaust claims. The HCPO, which will assist any individual -- not just New Yorkers -- in making Holocaust-related claims, is working in concert with the National Association of Insurance Commissioners to provide this continuing service. HCPO has itself obtained $34 million in insurance payments from European insurers.

Congress also should hold periodic oversight hearings to assure that claims submitted are being handled properly and in conformity with ICHEIC standards. These requirements would strengthen U.S. policy of resolving Holocaust claims through non-adversarial processes and could be complied with without forcing European insurance companies to violate any European privacy laws, which otherwise may prevent them from participating in a wholesale publication of the names attached to all Holocaust-era insurance policies.

Further, it is currently possible to search the list of approximately 500,000 names of potential Holocaust era insurance policyholder names at the Yad Vashem website (on https://www.yadvashem.org/pheip/ICHEC_Search.ASP) . There should be notices in

the United States and Europe bringing to the attention of the general public the existence of the searchable list on the Yad Vashem site and of the companies' willingness to process future claims under ICHEIC standards, and of the availability of the HCPO in assisting with claims.

Conclusion

In conclusion, I would simply like to say that I appreciate and share the emotions which motivate the desire on the part of Congress to do something to help Holocaust survivors and heirs. However, as one who has spent many years working diligently on Holocaust compensation and restitution issues, I urge them to consider the potentially catastrophic effect that new legislation that undermines our existing obligations, would likely have on existing and future efforts to secure some measure of justice for victims of the Holocaust and would likely do so without giving survivors any additional real chance of recovery. At the same time, I would support legislating a reporting requirement to ensure that European insurers pay claims in the future under ICHEIC standards and do so with continuing Congressional supervision. I would support notification of the existence of the searchable ICHEIC list of names and renewed efforts to inform the public of the availability of claims processing by the ICHEIC companies and assistance by the HCPO.

Finally, Congress took a significant step in shining a light on outstanding Holocaust-Era Issues by passing the Justice for Uncompensated Survivors Today (JUST) Act, which was signed into law by President Trump on May 9, 2018. The JUST Act requires the State Department to report to Congress on the progress of each country in complying with their commitments in dealing with Holocaust era assets under the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues, which I negotiated with over forty countries. Congress may wish to review the State Department's report and engage on unresolved issues that can directly benefit Holocaust survivors and their families.

Thank you.