Testimony of Stuart E. Eizenstat[*]
Before the House Financial Services Committee
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Mr. Chairman, Mr. Bachus, I want to thank you, and the members of the Committee, for inviting me here today to testify regarding H.R. 1746, the Holocaust Insurance Accountability Act. I thank the Committee too for its continued focus on Holocaust compensation and restitution matters. For many years, you have provided a strong voice of moral leadership on a wide variety of Holocaust-related issues. I thank you for that leadership.

I have testified before this Committee numerous times, including in my capacity as the Special Representative of the President and the Secretary of State for Holocaust Issues during the Clinton Administration. In that capacity I negotiated agreements with the German, Swiss, Austrian, French, and other European governments that have resulted in the payment of more than $8 billion in compensation to more than 1.5 million Holocaust survivors, their heirs, and the heirs of those who did not survive. Those agreements, and the subsequent payments to Holocaust victims and their families pursuant thereto, 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, leaders of many Jewish organizations, foreign companies, and a large number of skillful lawyers representing the interests of Holocaust survivors and heirs.

Through my testimony today I hope to enhance the Committee's understanding of how the International Commission on Holocaust Era Insurance Claims ("ICHEIC") fit into the United States Government's broader efforts to secure compensation and restitution for Holocaust victims. First, I will describe how the ICHEIC process emerged. Second, I will provide the Committee with background on the United States Government's broader compensation and restitution efforts during the period I served as the Administration's leader for these issues, particularly with respect to the Executive Agreement between the United States and Germany and the resulting German Foundation. Third, I will suggest that the Bill, as currently drafted, threatens the integrity of the U.S. Government's long-standing policy of resolving Holocaust-era claims through negotiation, not litigation. And finally 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 may not add appreciably to the likelihood of additional recovery on Holocaust-era insurance policies, is actually more likely to hurt the beneficiaries of any unpaid insurance policies rather than help them, and undercuts the successful U.S. Government policy of finding non-litigation ways to compensate Holocaust victims and their families through loose, flexible rules of evidence without resort to costly, lengthy, and uncertain lawsuits.

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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 unlikely that litigation offers a useful path to obtain restitution and compensation.

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. They and other insurance regulators had seen a growing number of claims relating to unpaid Holocaust-era insurance policies. In response, they 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.

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 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 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. In fact, 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.

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 with payments amounting to some 100 billion marks, or over 60 billion euros, or more than 100 billion in today's dollars. Much of this amount was distributed through the so-called BEG, the German Federal Compensation Laws. These compensation programs also included some payments for some confiscated insurance policies.

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 this 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 the foreign policy of the United States Government was 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.

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 inspired.

German Foundation

The German insurance companies also participated in the ICHEIC process by virtue of the Executive Agreement executed by the United States and Germany. 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.

Victims' interests were broadly and vigorously represented throughout the negotiations, and in the end, all parties accepted the Foundation "Remembrance, Responsibility and the Future" as a worthy result. The U.S. Government has filed Statements of Interest recommending dismissal on any valid legal ground in court cases brought against German companies for wrongs committed during the Nazi era and it 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.

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; 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 billion marks was to cover property claims not fully captured by earlier German compensation and restitution programs. Of the one billion marks, 550 million were for 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 victims' 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 an important 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 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. My negotiations with Secretary Eagleburger, chairman of ICHEIC, were difficult.

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 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 with the Austrian General Settlement Fund.

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 and ICHEIC. 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 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 Conference on Jewish Material Claims Against Germany.

HR 1746 Jeopardizes 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 was 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 came also from a 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 Bill 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 certain companies that have been deemed by the United States Government to be entitled to "legal peace."

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 ICHIEC 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 now-Attorney General, then Judge, Michael Mukasey determination in his *In re Assicurazioni Generali* decision dealing precisely with this issue. Other cases have resulted in similar holdings.

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 and the United States Government continually seek to increase payments under our existing arrangements. It is exceedingly unlikely that the Executive Branch will be able successfully to negotiate such enlargements in the future if Congress passes the Bill. Countries and companies will be unwilling to negotiate with the United States Government if it appears to them -- not unreasonably -- that the United States is incapable of maintaining its end of a bargain.

HR 1746 Will Not Increase the Likelihood of Recovery on Holocaust-Era Insurance Claims

The ICHEIC process included extremely favorable rules for claims processing. 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.

Participants in the ICHEIC process likewise were not bound by any rules of evidence. The insurance companies agreed that "anything goes" on the evidentiary front.

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. Litigants would be faced with statutes of limitation, 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). But most importantly, litigation would take time. Time that survivors on the whole do not have.

Reporting Requirement for Future Claims

Since the ICHEIC claims process was completed in late 2006, each insurance company that participated has agreed to continue to process claims that could have been submitted during the ICHEIC process. They have agreed to do so using favorable ICHEIC-like standards of evidence and burden of proof and to do so without cost to Claimants.

I understand fully the desire to require publication of all Holocaust-era insurance policies as an aid to potential claimants. However, I am concerned that the Holocaust Insurance Registry proposed in the Bill would place the European insurers in the untenable position of being forced to violate European privacy laws in order to comply with U.S. law. To avoid this situation but to ensure future processing of claims under ICHEIC-like standards, I would support a requirement that these companies submit periodic reports on their post-ICHEIC claims processing to the Congress or to an appropriate office of the

Department of State like the Office of Holocaust Issues. Such a report -- which should include the number of new Holocaust-era claims submitted, the number granted, the reasons for any refusal, and the amount offered in compensation -- would vindicate the public's interest in ensuring that the insurance companies were living up to their commitment to continue to process claims under ICHEIC-like standards. Congress also should hold periodic oversight hearings to assure that claims submitted are being handled properly and in conformity with ICHEIC-like standards. This is all the more important because ICHEIC had done research at its expense when unnamed claims -- that is, claims without a specific insurer named -- were submitted to the German Insurance Association ("GDV"). ICHEIC is now disbanded and the GDV supporting research mechanism has been dissolved. Thus, the GDV has indicated that its members will consider "named claims" under relaxed ICHEIC standards. These requirements could be complied with without forcing 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.

Conclusion

In conclusion, I would simply like to say that I appreciate and share the emotions which motivate the Bill. However, as one who has spent many years working hard on Holocaust compensation and restitution issues, I urge the Committee to err on the side of discretion and to consider the potentially catastrophic consequences of the Bill to existing and future efforts. At the same time, I would support legislating a reporting requirement to assure that European insurers pay claims in the future under ICHEIC-like rules and do so with continuing Congressional supervision.

Thank you.