FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

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| In the Matter of the Claim of<br><br>5 U.S.C. §552(b)(6)<br><br>Against the Great Socialist People's Libyan Arab Jamahiriya | Claim No. LIB-I-037<br><br>Decision No. LIB-I-031 |

Counsel for Claimant: Richard D. Heideman, Esq.
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Oral Hearings held on July 28, 2011, and September 14, 2012.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) at Fiumicino Airport in Rome, Italy on December 27, 1985. By Proposed Decision entered February 18, 2010, the Commission denied the claim on the ground that claimant had not met her burden of proving that she had set forth, in the Pending Litigation, a claim for injury other than emotional distress alone. In so doing, the Commission found that she had failed to establish that her claim was within the category of claims referred to the Commission under the December 11, 2008 *Letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("December Referral"). Accordingly,

the Commission concluded that it did not have jurisdiction to adjudicate the merits of the claim.

On March 5, 2010, the claimant filed a Notice of Intent to File Objection, asserting various legal errors in the Commission's decision. Approximately seven weeks later, on April 22, 2010, the claimant filed her Objection to Proposed Decision No. LIB-I-031, in which she detailed her arguments and provided additional evidence in support of her claim. This evidence included, *inter alia*: a copy of an Order, dated April 2, 2010, issued by the United States District Court for the District of Columbia, granting the plaintiff's Motion for Leave to Amend the Complaints, *Nunc Pro Tunc*, in the Above Referenced Matters Limited to the Allegations of Juliet Sweis Only[1] ("*Nunc Pro Tunc* Order"), and ordering the relation back of the amended complaints to the date of the original filing of the claim; copies of the amended complaints (the "April 2010 Complaints"); and additional medical records.

One year later, on April 22, 2011, claimant requested an oral hearing on her objection. Subsequently, by letter dated June 6, 2011, claimant requested that the Commission bifurcate further proceedings in the claim, confining the oral hearing to the question of jurisdiction and issuing a separate Proposed Decision on the merits concerning claimant's physical injury claim. The Commission agreed to claimant's request and scheduled a July 28, 2011 oral hearing solely on the question of jurisdiction. On July 7, 2011, claimant submitted an objection brief containing further evidence in support of her claim, including the sworn declaration of Professor David J. Bederman, addressing the jurisdictional aspects of the claim, as well as additional medical records.

[1] The "Above Referenced Matters" refers to the Pending Litigation cases that are the subject of the present claim, namely, *Estate of John Buonocore III v. Great Socialist People's Libyan Arab Jamahiriya*, 06-cv-727 (D.D.C.), and *Simpson v. Great Socialist People's Libyan Arab Jamahiriya*, 08-cv-529 (D.D.C.).

The hearing was held, as scheduled, on July 28 and included argument from claimant's counsel, as well as from Professor Bederman.

By Order dated December 21, 2011, the Commission set January 25, 2012 as the date for a hearing on the merits portion of claimant's physical injury claim. As of that date, there had been no Final Decision regarding the Commission's jurisdiction over the claim. By letter dated January 12, 2012, claimant requested, *inter alia*, that "the hearing date of January 25, 2012 be removed from the calendar; that no new hearing date yet be assigned[,]" and that claimant be given additional time to submit further evidence with respect to the merits of her claim. The Commission granted claimant's request and set a deadline of March 1 for the submission of further documentation.

On February 29, 2012, claimant submitted additional evidence with respect to the merits of her claim, including, *inter alia*: recent skull x-ray and brain CT-scan images, together with a radiology report from Mohammed al-Khatib, M.D.; a February 2012 medical report from Carl Warren Adams, M.D.; affidavits from 5 U.S.C. §552(b)(6) (claimant's siblings) discussing claimant's treatment following the incident; and an affidavit from claimant discussing her treatment and alleged permanent scarring. Subsequently, the Commission requested, and claimant provided, digital and original print versions of the above-referenced x-ray and CT-scan images.

The Commission issued a Supplemental Proposed Decision, on May 17, 2012, addressing only the merits of claimant's physical injury claim, denying the claim on the ground that claimant had failed to satisfy the Commission's physical injury standard. In particular, the Commission cited the inconclusive nature of the medical records with respect to claimant's alleged shrapnel injuries and the claimant's failure to establish that

her pituitary tumor, diagnosed in 2007, was caused by alleged head trauma sustained during the 1985 incident.

On July 10, 2012, claimant filed a notice of objection to the Commission's Supplemental Proposed Decision and requested an oral hearing. On August 23, 2012, claimant filed an objection brief, together with additional exhibits in support of her claim, including: a revised version of Dr. al-Khatib's February 2012 radiology report, inserting additional language as to his findings; recent expert medical opinions from a neuroradiologist and a neurological surgeon concerning claimant's alleged shrapnel injuries; a recently prepared medical report from Robert Cooper, M.D., an endocrinologist, addressing claimant's pituitary tumor and its alleged relation to the Rome Airport incident; an additional affidavit from claimant; and a sworn statement from a doctor in Rome discussing his conversations with two of the physicians whose signatures appear on claimant's contemporaneous medical records.

Claimant filed a supplemental opinion from Dr. Cooper on September 12, 2012. The Commission held an oral hearing on the merits of the claim on September 14, 2012; the hearing consisted of argument by claimant's counsel, and claimant offered live testimony addressing her experience during the Rome Airport incident and her alleged physical injuries.

DISCUSSION

The Commission's jurisdiction in claims under the ICSA is defined by the terms of the State Department's referral. *See* 22 U.S.C. § 1623(a)(1)(c) ("The Commission shall have jurisdiction . . . with respect to any claim . . . of any national of the United States . . . included in a category of claims against a foreign government which is referred

to the Commission by the Secretary of State."). Here, it is the December Referral that sets the terms of the Commission's jurisdiction.

*I. March 2008 Complaints in the Pending Litigations*

Claimant first argues that, contrary to the Commission's determination, the March 2008 Complaints in the *Buonocore* and *Simpson* cases satisfy the jurisdictional requirement, set forth in the December Referral, that the claim in the Pending Litigation have been set forth as a claim for injury other than emotional distress alone. The basis for this argument is Federal Rule of Civil Procedure ("FRCP") Rule 8, which requires, *inter alia*, that pleadings set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. Claimant argues that, under this "notice pleading" standard, the original complaints, on their face, "would have been deemed by the federal trial court as sufficient . . . to proceed to trial on Claimant's claim for physical injury." She maintains that FRCP Rule 8 contemplates that the details of an alleged injury will become apparent during the course of the proceedings and that a party is only required to provide "reasonable notice" of the allegations made against the defendant. As claimant argued during the first oral hearing, she was not required to plead with particularity whether she suffered physical or non-physical injuries at the time the complaint was filed.

This broad reading of the complaints, under FRCP Rule 8 or otherwise, cannot bring this claim within the Commission's jurisdiction. If claimant's interpretation of the original complaints were given effect, the December Referral's language excluding claims based only on emotional distress would be rendered entirely meaningless. Indeed, under this reading, claimants who made *only* emotional distress claims in the Pending

Litigation would fall within the scope of the December Referral, notwithstanding language in the referral that explicitly *excludes* such claims. This is an untenable result and runs directly counter to the jurisdictional grant found in the December Referral.

Therefore, in order to determine whether claimant meets the pleading requirement contained in the December Referral, the Commission must rely exclusively on the counts actually pled in the Pending Litigation. Here, the counts actually pled by claimant are contained in the First Amended Complaint in *Buonocore* and the Complaint in *Simpson*, both of which were filed in March 2008 (the "March 2008 Complaints"). Each complaint contains nine counts. Count I of each complaint is simply titled "28 U.S.C. § 1605A(c)" and applies to "[a]ll [p]laintiffs." That count does include a paragraph alleging that the defendants engaged in "assaulting, terrorizing and holding . . . captive" certain named individuals, but claimant is not among them. Moreover, claimant's sister, father, and brother are among the individuals listed in that paragraph, which suggests a very conscious omission of claimant's name from that list. The count goes on to allege that the defendants caused "emotional distress, including solatium," to members of the families of the listed individuals. Thus, while Count I alleged personal injury, possibly including physical injury, as to three members of claimant's family, it only alleged emotional distress in relation to claimant—and it did so only derivatively.

Counts II and III of each complaint allege battery and assault, respectively, under state common law (*Buonocore* Complaint) and "28 U.S.C. § 1605A(c) and State Law" (*Simpson* Complaint). In both instances, the allegations are made only as to specifically identified plaintiffs. Again, while claimant's sister, father, and brother are among those named, claimant is not—and so again, the omission of claimant's name can be viewed as

intentional. Count IV alleges intentional infliction of emotional distress, including loss of solatium, on behalf of all plaintiffs under the FSIA and state common law. Counts V and VI allege wrongful death and survival damages, respectively. These two counts make no allegations concerning either claimant or any member of claimant's family, since they involve claims related to those who were killed during the terrorist attack. Counts VII, VIII, and IX set forth actions for civil conspiracy, aiding and abetting, and punitive damages, respectively. These counts apply to all plaintiffs; however, as with the battery and assault counts (Counts II and III), they allege injuries only to specifically named individuals, and the group includes claimant's sister, father, and brother, but not claimant herself.

Examining each of the counts contained in the complaints in *Buonocore* and *Simpson*, therefore, it is clear that the only claim made by or on behalf of the claimant in the original complaints was for emotional injury. Indeed, claimant's counsel acknowledged this fact during the first oral hearing.[2] Counsel's explanation was that claimant's family did not provide him with information about claimant's injury and that he would have learned about it during the adversarial process. In short, as claimant's counsel has conceded, the March 2008 Complaints, on their face, fail to satisfy the jurisdictional requirement of the December Referral, which requires the claimant to have set forth a claim for injury "other than emotional distress alone" in the Pending Litigation.

[2] Asked directly during the oral hearing to confirm that physical injury was not pled in the original complaint, counsel replied, "That is correct." Counsel added: "We're not arguing that the Commission erred when it said that physical injury was not pled in the original complaint. It was not pled in the original complaint."

*II. FRCP 15 and the Possibility of a Subsequent Amendment to the March 2008 Complaints*

Claimant also contends that the fact that FRCP Rule 15 permits amendments of pleadings effectively means that the relevant inquiry ought to be simply whether she *could have* pled a physical injury. She states that, had the case proceeded to trial, she "would have presented evidence of her physical injury and then been permitted to make any amendments to both complaints, had the Court deemed it necessary, to conform to the proof presented, i.e. that she suffered physical injuries . . . ." As such, she argues, the "claim should rise or fall *on the actual facts and evidence of her injury*, not on whether the claim may or may not meet a pleading standard . . . ."

This argument fails for the same reasons as claimant's arguments based on FRCP Rule 8. Claimant effectively argues that the March 2008 Complaints satisfy the pleading requirements in the December Referral because she *could have* amended her pleadings during the course of the litigation, and because such amendment would have related back to the date of the original filing.[3] But this argument ignores the unambiguous language in the December Referral requiring the explicit pleading of an injury other than emotional distress. This approach, moreover, would require the Commission to accept as fact that which has not been established. The Commission's jurisdiction cannot be based on what claimant *might have done*, but did not do, prior to the December Referral. Thus, FRCP Rule 15 does not support a finding of jurisdiction in this claim.

In addition, to the extent claimant argues that the FRCP "have the force and effect

[3] Under Rule 15(c), "an amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; (B) *the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading*; or (C) [under certain circumstances when the amendment changes the party or the naming of a party] . . . ." Fed. R. Civ. P. 15(c)(1) (emphasis added).

of federal statutes[,]" the Commission notes that those rules apply only in the United States district courts, and not in proceedings before the Commission. *See* Fed. R. Civ. P. 1; 28 U.S.C. § 2072 (2006). In addition, as noted above, a separate federal statute, the ICSA, governs the Commission's exercise of jurisdiction and sets forth the law to be applied in deciding claims. *See* 22 U.S.C. § 1623. The ICSA makes no mention of any other federal law and certainly none to rules of procedure. Thus, the mere reference to the Pending Litigation in the December Referral cannot imply that the FRCP, in and of themselves, can shape and determine the Commission's jurisdiction. Rather, the December Referral made reference to "the Pending Litigation" solely to facilitate the intended distribution of funds from the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("CSA"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. *See* December Referral at 1. FRCP Rule 15 and the hypothetical possibility of a subsequent amendment of claimant's March 2008 Complaints do not give this Commission jurisdiction when the clear language of the December Referral says otherwise.

*III. The Amended Complaints and the Nunc Pro Tunc Order*

Claimant argues, in the alternative, that she alleged a physical injury in the April 2010 Complaints, i.e., the amended complaints she submitted to the District Court in 2010—the Second Amended Complaint in *Buonocore* and the Amended Complaint in *Simpson*. On the district court's docket, these complaints were actually filed on April 2, 2010, after the CSA and Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (August 2008), the State Department's December Referral (December 2008), the District Court's dismissal of claimant's suit against Libya (also December 2008), and just

after the Commission's Proposed Decision on jurisdiction in February 2010. Despite this fact, claimant argues that because the court granted her motion to amend the complaints "*Nunc Pro Tunc*, relating back to the date of the original filing of her claim," it is as though she filed them prior to the CSA. Claimant buttresses this argument by noting that FRCP Rule 15 provides that such amendments typically relate back to the date of the original pleading.[4]

The claimant argues that the *Nunc Pro Tunc* Order compels the Commission to recognize the April 2010 Complaints as the operative documents for purposes of satisfying the December Referral jurisdictional requirement that she have pled an injury other than emotional distress alone. According to claimant, the court's order "[gave] the amendments the effect of relating back to the original filing dates of those Complaints." Moreover, counsel asserted during the oral hearing that "the Commission has a non-discretionary duty to defer to the trial judge who issued the *Nunc Pro Tunc* Order . . . ." Claimant's counsel further argued that once such an order is issued, "other judicial bodies," including the Commission, "are obligated to give full faith and credit to [the court's decision]." Thus, according to claimant, because the district court issued an order declaring that the April 2010 Complaints relate back to the filing date of the original complaints, she now satisfies the jurisdictional requirement that she have asserted a claim for injury other than emotional distress alone; therefore, the Commission should proceed to adjudicate her claim on the merits.

Moreover, claimant argues that the Commission has done something comparable in the past. In the June 6, 2011 letter to the Commission, counsel wrote,

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[4] *See supra* note 3.

> [t]he Commission has previously looked to the practice of federal and state courts to determine whether certain claims that had been previously filed in the US and state court systems were valid under the Commission's jurisdictional requirements. . . . Thus, the Commission imposed a jurisdictional requirement . . . that depended on the existence of a ruling from a US or state court.

In particular, claimant's counsel cited the Soviet Claims Program authorized under Title III of the ICSA. Professor Bederman made similar arguments in his declaration, asserting that the Commission "should give substantial deference to the District Court's *nunc pro tunc* order." He noted that the Commission has also done so with regard to the rulings of foreign tribunals "where such has a bearing on jurisdictional matters before the FCSC[,]" and has given similar effect to the rulings of domestic U.S. courts, particularly in the Soviet Claims Program. According to Professor Bederman, this previous practice suggests the Commission should give effect to the *Nunc Pro Tunc* Order in this claim.

To understand this argument requires a look at the underlying purpose of a *nunc pro tunc* order. A *nunc pro tunc* order or judgment is one "[h]aving retroactive legal effect through a court's inherent power[.]" *Black's Law Dictionary* 1174 (9th ed. 2009). A *nunc pro tunc* judgment, for example, "is one given effect as of a date in the past." *Weil v. Markowitz*, 829 F.2d 166, 174 (D.C. Cir. 1987). Its use, however, is not without limits. "An order may be entered *nunc pro tunc* 'to make the record speak the truth but it cannot supply an order which in fact was not previously made.'" *Matos ex rel. Rivera v. Sec'y of Dep't of Health & Human Servs.*, 35 F.3d 1549, 1553 (Fed. Cir. 1994) (quoting *Crosby v. Mills*, 413 F.2d 1273, 1277 (10th Cir. 1969)). The Eighth Circuit has explained that the "function of a nunc pro tunc order is to correct clerical or ministerial errors, including typographical errors, or to reduce an oral or written opinion to judgment; *the function is not to make substantive changes affecting a party's rights.*" *United States v.*

*Suarez-Perez*, 484 F.3d 537, 541 (8th Cir. 2007) (emphasis added). That court also stated that such an order "'is no warrant for the entry of an order to record that which was omitted to be done.'" *Id.* (quoting *W.F. Sebel Co. v. Hessee*, 214 F.2d 459, 462 (10th Cir. 1954)). Similarly, the Seventh Circuit has stated that "the only proper office of a *nunc pro tunc* order is to correct a mistake in the records; *it cannot be used to rewrite history.*" *Central Laborers' Pension, Welfare & Annuity Funds v. Griffee*, 198 F.3d 642, 644 (7th Cir. 1999) (emphasis added).

Some courts have adopted a more expansive view of *nunc pro tunc* orders, but even those courts limit their use. As the D.C. Circuit put it,

> [orders *nunc pro tunc*] may be entered to achieve equity even though doing so supplies an action that did not occur on the earlier date . . . . But even courts taking the broader view have only granted such orders under extraordinary circumstances where they will not prejudice any party or frustrate the purposes of the [relevant statutes]."

*Drabkin v. Midland-Ross Corp.* (*In re Auto-Train Corp.*), 810 F.2d 270, 275 (D.C. Cir. 1987) (citing *In re Triangle Chemicals, Inc.*, 697 F.2d 1280, 1288-89 (5th Cir. 1983)). Moreover, "[*n*]*unc pro tunc* relief has been granted only in a limited number of circumstances, where its entry is necessary to avoid, and does not create, an injustice at the hands of the court itself." *Weil* v. *Markowitz*, 898 F.2d 198, 201 (D.C. Cir. 1990).

This underlying purpose of *nunc pro tunc* orders makes clear why the claimant cannot use the *Nunc Pro Tunc* Order in *Buonocore* and *Simpson* to give this Commission jurisdiction. In her motion to amend the complaints, claimant stated to the District Court that her intent was to "clarify her claim . . . in order to permit her entitlement to an administrative award arising out of her physical injuries." However, as counsel for the claimant admitted during the oral hearing, claimant did not plead physical injury in the

original complaints. Claimant's amendment was thus intended to alter, not clarify. Further, claimant's omission did not arise from any clerical error of the court or a mistake in the records. Rather, as the claimant acknowledged in her motion, she sought to amend her complaint (and to amend it *nunc pro tunc*) solely to bring her claim within the Commission's jurisdiction.

In short, claimant sought to *change a fact* in the court's record, a fact that would determine whether she had the right to invoke this Commission's jurisdiction. She seeks to use the *Nunc Pro* Tunc Order "to rewrite history" and "to make substantive changes affecting [her] rights," precisely what the Seventh and Eighth Circuits have stated are impermissible uses of such an order. *See Suarez-Perez*, 484 F. 3d at 541; *Griffee*, 198 F.3d at 644. Because the December Referral used the claims in the Pending Litigation as *jurisdictional facts*, established at the time of the referral, the claimant cannot use the *Nunc Pro Tunc* Order to change those facts. Simply put, the December Referral precludes the Commission from relying on the *Nunc Pro Tunc* Order, regardless of any impact it might have in the *Buonocore* and *Simpson* proceedings in federal court.

As to claimant's related argument that "the Commission has a non-discretionary duty to defer to the trial judge," counsel has cited no legal authority to support this proposition as a general matter, let alone in circumstances akin to those at issue here. As noted above, counsel asserted during the first oral hearing that "other judicial bodies . . . are obligated to give full faith and credit to [the court's] decision." He argued that this would apply to the Commission. However, the only authority cited for this proposition was 28 U.S.C. § 1738 (2006), which states that "every court within the United States" must give the same full faith and credit to state "judicial proceedings . . . as they have by

law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (2006).

This provision has no bearing on claimant's situation. First, it only requires *courts* to give full faith and credit. Claimant cites no authority for interpreting the provision to apply to Executive Branch entities such as the Commission, and the Commission's independent research has likewise uncovered none.[5] Second, and more important, 28 U.S.C. § 1738 provides for full faith and credit only for *final judgments*, not court orders—such as a *nunc pro tunc* order—issued in the course of a lawsuit. *See, e.g., MacArthur v. San Juan County*, 497 F.3d 1057, 1065 (10th Cir. 2007) ("[O]nly *final* judgments are subject to enforcement pursuant to full faith and credit principles[.]") (emphasis in original), *cert. denied*, 552 U.S. 1181 (2008). For purposes of this Commission's jurisdiction, 28 U.S.C. § 1738 is simply irrelevant.

In sum, for the above-stated reasons, the *Nunc Pro Tunc* Order does not compel the Commission to treat claimant's April 2010 Complaints as though they were in fact filed more than two years earlier.

Apart from the contention that the Commission *must* treat the *Nunc Pro Tunc* Order as conclusive proof that claimant has jurisdiction, claimant asserts that the Commission *should* do so. Claimant cites the Commission's practice under the Soviet Claims Program, authorized under Title III of the ICSA, arguing that the Commission imposed in that program "a jurisdictional requirement . . . that depended on the existence

[5] Moreover, the provision provides for full faith and credit only for *state* court proceedings, *see Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506-07 (2001) (noting that by its terms 28 U.S.C. § 1738 "govern[s] the effects to be given only to state-court judgments . . . ."), and claimant argues that we should give full faith and credit to a *federal* court order. It is federal common law, not 28 U.S.C. § 1738, that determines the claim-preclusive effect (the equivalent of "full faith and credit") of federal courts judgments on questions of federal law. *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

of a ruling from a US or state court." Claimant further argues that "the Commission looked to the holdings and practice of various courts" to determine whether valid liens existed on the property at issue in claims before it. In his declaration, Professor Bederman also cited the Soviet Program as support for the proposition that the Commission should "give effect to the rulings of U.S. domestic courts concerning jurisdictional determinations within [the Commission's] competence."

The Commission's practice under the Soviet Claims Program is of little precedential value in the Libya Claims Program because it was governed by statutory provisions that specifically directed the Commission to treat court judgments as binding. Title III of the ICSA stated: "Any judgment entered in any court of the United States or of a State of the United States shall be binding upon the Commission in its determination, under paragraph (1) of subsection (a) of this section, of any issue which was determined by the court in which the judgment was entered." 22 U.S.C. § 1641d(b) (2006). The reference to "paragraph (1) of subsection (a)" concerned whether a "judgment was entered in, or a warrant of attachment issued from, any court of the United States . . . in favor of a national of the United States, with which judgment or warrant of attachment a lien was obtained . . . upon any property" that had been subject to the Litvinov Assignment.[6] *Id.* § 1641d(a)(1). The issue the Commission had to face in the Soviet Claims Program was not whether to treat a U.S. court decision as binding—that much was required by the statute—but instead simply whether claimant had in fact obtained "in [his] favor" a "judgment . . . or a warrant of attachment." *See, e.g. Claim of ESTATE OF*

[6] Under the Litvinov Assignment of 1933, the Government of the Union of Soviet Socialist Republics (USSR) assigned to the United States "amounts admitted or found to be due it as the successor of prior governments of Russia, or otherwise, preparatory to a final settlement of the claims outstanding between the two Governments and the claims of their nationals[.]" 22 U.S.C. § 1641 (2006); *see also U.S. Dep't of State, Foreign Relations of the United States: The Soviet Union 1933-1939*, at 35-36 (1952).

*M. SERGEY FRIEDE*, Claim No. SOV-40,000; Decision No. SOV-1 (1956). Obviously, to determine whether a court has entered a judgment or issued a warrant requires looking to what the court had done.

By contrast, the Libya Claims Program falls under Title I of the ICSA, which contains no language requiring the Commission to give binding effect to judicial determinations. For this reason alone, the Commission's practice under the Soviet Claims Program is inapposite. As discussed in detail above, accepting the claimant's argument about the *Nunc Pro Tunc* Order is inconsistent with the plain language of the December Referral, and it is the December Referral that provides the Commission with jurisdiction in the Libya Claims Program. Moreover, the claimant's argument renders the jurisdictional element a nullity: any claimant whose pleadings in litigation failed to satisfy the jurisdictional requirements of a State Department referral to the Commission could simply seek an order *nunc pro tunc* to cure the defect. Clearly, such a result would render it difficult, if not impossible, for the United States to negotiate claims agreements or design a program based on a set of facts in existence at a particular point in time (i.e., in this case, the date the CSA was concluded). Thus, the Commission's practice under the Soviet Claims Program offers no useful guidance on this issue.

Finally, Professor Bederman also cites claims programs in which "the Commission has granted substantial deference to the rulings of *foreign* tribunals, where such has a bearing on jurisdictional matters before the FCSC" (emphasis added). Specifically, he cites Commission practice in the First Yugoslav and the First Czechoslovakian Claims Programs. In the first of these programs, Professor Bederman cites cases in which the Commission accepted various decrees and judicial proceedings in

Yugoslavia as evidence of facts necessary to adjudicate the claim. *See, e.g.*, *Claim of LUCIE C. ROSENBERG*, Docket No. Y-1090, Decision No. Y-1307 (1954); *Claim of JOSEPHINE PRSLE*, Docket No. Y-513, Decision No. Y-1518 (1954). In the Czechoslovakian program, he cites a decision in which the Commission recognized the retroactive effect of a nationalization decree of the Government of Czechoslovakia. The result was a denial of the claim for failure to satisfy the requirement of continuous nationality: although the claimant had acquired U.S. nationality before the decree was actually published, she had done so after the decree's retroactive date and so was deemed not to be a U.S. national at the time of the expropriation. *See Claim of GERTRUDE A. SCHWARZ*, Claim No. CZ-1848, Decision No. CZ-3425 (1962).

While in both of the above-cited programs the rulings or decrees at issue supplied jurisdictional facts that were recognized by the Commission, those rulings or decrees did not frustrate the terms of the applicable agreement or otherwise undermine the program. By contrast, if the Commission were to recognize the amended April 2010 Complaints as the operative complaints for purposes of the December Referral, it would not only compromise the structure of the present claims program, but also set a harmful precedent for future claims programs. Moreover, like the Soviet Claims Program, the First Yugoslav and First Czechoslovakian programs specifically required the jurisdictional facts to be established by the decrees and/or judicial proceedings that the Commission relied on. Those foreign decisions were the proof that, for example, a nationalization actually occurred. Without looking into the decree and/or judicial proceeding, the Commission simply could not even determine the relevant facts (e.g. whether particular property had been nationalized, and if so, when). Here, in contrast, the December

Referral directs the Commission to look to whether or not "the claim is [as of the date of the December Referral] *set forth* as a claim for injury other than emotional distress alone" (emphasis added). The December Referral requires the Commission to look at how the claim was "set forth," not at whether and/or how a court or other governmental decision maker has acted.[7]

Finally, the Commission's acceptance of the retroactive application of a nationalization decree in the *SCHWARZ* claim from the First Czechoslovakian Claims Program did not involve the use of the decree to *change* a fact, but instead the use of the decree "merely [to] confirm[] an already accomplished fact." *Foreign Claims Settlement Commission of the United States: Decisions and Annotations* 419 (1968). This distinction between using a court order to *change* a fact (as claimant seeks to do here) and using a court order to help understand what the actual facts are becomes clear from a look at other cases from the First Czechoslovakian Claims Program. In several Czechoslovakian claims, including *SCHWARZ*, the Commission held that certain April 28, 1948 nationalization laws were deemed to have taken effect on January 1, 1948 (about 4 months earlier), but the reason was that "the enterprises in question were under the management and control of national administrators on January 1, 1948 and the change over, after nationalization, was *the affirmation of an already accomplished fact.*" *Claim of JOHN H. LUSDYK*, Claim No. CZ-3219, Dec. No. CZ-2517, at 5 (1961) (emphasis added).

[7] In this program, the Commission does look to the court's order when determining whether the Pending Litigation has been dismissed. On this issue, the Commission accepts the court order as evidence of a jurisdictional fact because the State Department referrals specifically provide that a particular jurisdictional fact—whether the Pending Litigation has been dismissed—depends on a court's determination.

In *Claim of JOHN H. LUSDYK*, *supra*, in stark contrast, the Commission refused to give retroactive effect to a different nationalization decree because the property remained in the claimant's possession until the actual issuance of the decree. *See also Claim of ERIC LENHART*, Claim Nos. CZ-2122 and CZ-4111, Dec. No. CZ-3479 (1962) (retroactive date of January 1, 1948 not applicable where evidence showed claimant continued to possess property until nearly a year later, when actual nationalization occurred). Key is that the Commission did *not* defer to the decree when the retroactive order conflicted with the actual facts. This is of course exactly the situation in the present claim.

In sum, for these reasons, the December Referral precludes the Commission from exercising jurisdiction, and the *Nunc Pro Tunc* Order does not require the Commission to adopt the April 2010 Complaints as the operative documents in the Pending Litigation referenced in the December Referral.

*IV. Physical Injury*

The details concerning claimant's allegations of physical injury are set forth in the Commission's Supplemental Proposed Decision. Claimant states that she and her family were inside the Rome Airport terminal when terrorists opened fire with machine guns and grenades, at which point claimant fell to the ground and struck her head on the floor. She further alleges that grenade shrapnel struck her in the back left side of her head, causing her substantial bleeding and pain. Claimant asserts that she was taken to San Agostino Hospital in Rome and received emergency care, including the suturing of her head wound. She was taken to another hospital in Rome the next day and was discharged four days later. Claimant avers that she has been left with permanent scarring from the

grenade wound to her head, and that shrapnel fragments remain embedded in this area. She further alleges that this injury caused her to develop a pituitary tumor that has resulted in numerous related ailments.

The Commission recognizes claimant's efforts to provide sufficient evidence, particularly medical evidence, for a finding regarding the merits of her claim. However, in light of the Commission's conclusion as to jurisdiction, the Commission does not make any findings as to this aspect of her claim.

## CONCLUSION

From all indications, the Rome Airport attack appears to have had a profound impact on claimant's life, leaving her with emotional scars and horrific memories of what occurred that day. Her sworn statements and live testimony describe an unimaginable scene in which she witnessed the death and injury of several people, including members of her own family. In these proceedings, however, the Commission may not award compensation unless a claimant satisfies the jurisdictional requirements set forth in the December Referral. One of these requirements is that the claim must have been "set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation." Despite claimant's evidence about her alleged physical injuries, she did not make any allegations of physical injury in the Pending Litigation, as required by the December Referral, and she is thus ineligible for an adjudication of her claim on the merits.

Accordingly, the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, December 12, 2012
and entered as the Final Decision
of the Commission.

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

Anuj C. Desai, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

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| In the Matter of the Claim of<br><br>5 U.S.C. §552(b)(6)<br><br>Against the Great Socialist People's Libyan Arab Jamahiriya | Claim No. LIB-I-037<br><br>Decision No. LIB-I-031 |

Counsel for Claimant: Richard D. Heideman, Esq.
Heideman Nudelman & Kalik, P.C.

SUPPLEMENTAL PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) at Fiumicino Airport in Rome, Italy on December 27, 1985.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

> receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On December 11, 2008, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication a category of claims of U.S. nationals against Libya. *Letter from the*

*Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("December Referral"). The category of claims referred consists of

> claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya's agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

*Id.* at ¶ 3. Attachment 1 to the December Referral lists the suits comprising the Pending Litigation.

The December Referral followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the Secretary of State certified, pursuant to the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure "fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya . . . ." On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement

Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of the Libya Claims Program pursuant to the ICSA and the December Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On February 18, 2010, the Commission denied this claim on the basis that the claimant had failed to demonstrate that her claim was within the category of claims referred to the Commission. Specifically, the Commission found that claimant had not set forth, in the Pending Litigation, a claim for injury other than emotional distress alone. The claimant objected to the Proposed Decision on March 5, 2010, and filed an objection brief with additional evidence on April 22, 2010. One year later, on April 22, 2011, claimant requested an oral hearing on the objection.

By letter dated June 6, 2011, claimant's counsel requested that the Commission limit the oral hearing to the jurisdictional question that formed the basis of its Proposed Decision. The Commission granted claimant's request. The oral hearing was held on July 28, 2011; the Commission has not yet issued a Final Decision on this aspect of the claim.

In the meantime, the claimant has continued to supplement the record of the claim with additional evidence concerning the alleged injury itself. This Supplemental Proposed Decision addresses this evidence and the accompanying argument on the merits of claimant's injury claim.

The claimant, 5 U.S.C. §552(b)(6) states that on December 27, 1985, she was present at the Fiumicino Airport in Rome, Italy with her parents, brothers, and sister at the time of the terrorist attack. Claimant states that she suffered grenade shrapnel wounds to her head during the attack, which left fragments in her head. She alleges that she required four days of hospitalization in Rome, and that her injuries have left permanent scarring to her head. In addition, claimant alleges that her shrapnel injuries subsequently caused her to develop a pituitary tumor, resulting in a host of related medical ailments.

## DISCUSSION

### *Standard for Physical Injury*

As stated in the December Referral, to qualify for compensation, a claimant asserting a claim for physical injury must meet the standard for physical injury adopted by the Commission for purposes of this referral. In order to develop the appropriate standard for compensability, the Commission considered both its own jurisprudence and pertinent sources in international and domestic law. The Commission concluded in *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001, at 8-9 (2009), that in order for a claim for physical injury to be considered compensable, a claimant:

> (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident related to the Pending Litigation; and
>
> (2) must have received medical treatment for the physical injury within a reasonable time; and
>
> (3) must verify the injury by medical records.

*Physical Injury*

According to her Statement of Claim and accompanying documentation, claimant, who was six years old at the time of the attack, was sitting in the food court area near the TWA and El Al Airlines ticket counters when terrorists opened fire with machine guns and tossed hand grenades at waiting passengers. Claimant states that, when the attack began, she "was thrown to the ground, and [she] hit [her] head on the ground." In addition, she alleges that she was "seriously wounded by hand grenade shrapnel in the back left side of [her] head[,]" and that "she was bleeding." Specifically, claimant states that shrapnel had "entered and lodged in the left, parietal, occipital region of her head, causing cuts, bruising and burning." One of claimant's brothers, who was also present, recalls in his affidavit that "[t]he bleeding was substantial, and there was blood streaming down her face and neck and onto her shirt." Another brother (who was also present) states in his affidavit that claimant "had a deep gash in the back of her head, from which most of the blood was flowing . . . ."

In her initial objection brief, claimant stated that, following the attack, she "was taken by ambulance to the San Agostino Hospital, where she was admitted into the Department of Surgery and received emergency medical care." According to claimant, she received treatment that included "receiv[ing] sutures in the largest wound on [her] head that was caused by hand grenade shrapnel." One of her brothers, who was also hospitalized, states that after approximately twenty-four hours, they were both transferred to another hospital in Rome, and that they were both discharged four days later on December 31, 1985.

Claimant alleges that, as a result of her injuries, she has been left with permanent scarring, which "has always been sensitive to touch and temperature," and that "[a]t times, it feels like it is burning." In addition, she states that shrapnel fragments remain embedded in the "left parietal area" of her head to this day, a fact she asserts is confirmed by copies of recent radiological evaluations that have been provided in support of this claim. Further, claimant alleges that her shrapnel injuries resulted in the development of a pituitary tumor—first diagnosed in 2007—that is characterized by symptoms that include "elevated prolactin[1] levels," "serious weight and water retention issues," painful headaches, poor vision, lethargy, and insomnia.

In support of her claim, claimant has provided, *inter alia*, medical records, including contemporaneous medical records; a narrative description of the incident recounting her experience during the attack and describing her alleged physical injuries; a translated copy of a sentencing order, dated February 12, 1988, from the criminal trial in Italy of one of the terrorists, indicating that claimant was one of the victims of the attack; a translated excerpt of a contemporaneous newspaper article, also identifying claimant as one of the wounded and noting that she had been taken to San Agostino Hospital; and affidavits from claimant and each of her two brothers.

The contemporaneous medical records provided with this claim confirm that, following the attack, claimant was admitted to the Surgery Department at San Agostino Hospital in Rome, having suffered "Penetrating puncture wounds caused by metallic shrapnel in the parietal occipital region (soft parts)[,]" and was given a "5 days prognosis." Upon her transfer to CTO Hospital the following day, claimant was similarly

[1] Prolactin is a "hormone that causes a woman's breasts to make milk during and after pregnancy." *General Information About Pituitary Tumors*, Nat'l Cancer Inst., http://www.cancer.gov/cancertopics/pdq/treatment/pituitary/Patient/page1 (last updated Mar. 16, 2012).

diagnosed with "Bruised puncture wounds to the parietal occipital region with retention of metallic shrapnel." The record from that hospital describes claimant's "General Conditions" as "Good," and her "Internal organs and apparatuses" as "Unharmed." While noting the "open and bruised puncture wound," an examination nonetheless noted that she "appears to be well oriented in time and space . . . ." A neurological examination was also performed, which noted that there was "[n]o neurological damage." The only treatment described is a notation from December 29, consisting of the word "Medication" under the heading "Daily Clinical Journal." Claimant was discharged on December 31.

Claimant has not submitted any medical records from the period from 1985 to 2007. However, more recent medical records contain evidence of possible shrapnel injury. For example, a physical examination by Adel Haddad, M.D.,[2] in April 2010 in Amman, Jordan, revealed that claimant had "wounds [which] appear as soft scarring (approximately 2 cm x 2 cm) in the parietal occipital region of her head, all of which is consistent with a hand grenade shrapnel wounds [sic]." Dr. Haddad also noted that "[t]he scarring is palpable to touch, and visible to the unaided eye, though partly obscured by hair making it difficult to photograph . . . ." The report of a separate examination the same month by M.A. Arnaout, M.D., an endocrinologist also in Amman, similarly concluded that claimant "has permanent scarring . . . consistent with physical injury from hand grenade shrapnel as reported." The claimant has not, however, submitted any photographs to verify the existence or extent of her alleged scarring.

Claimant has submitted radiological images from February 2012—one a skull x-ray, the other a brain CT-scan—which also confirm the presence of small foreign bodies on the top left side of her head. The reports accompanying these images indicate that

[2] In one of her briefs, claimant refers to Dr. Haddad as a plastic surgeon.

there are "[m]ultiple small shrapnels seen in the left parietal region[,]" but that "[n]o definite bony fracture could be seen[,]" and "[n]o mass lesion . . . is seen in the brain substance."

Notwithstanding the evidence contained in the radiological images and accompanying reports, and the statements of Drs. Haddad and Arnaout, the precise nature and severity of claimant's alleged shrapnel injuries remain unclear. Although the x-ray images indicate the presence of several small foreign bodies in the location where the contemporaneous records indicate claimant retained shrapnel fragments in her head, the size of the fragments, and more importantly, the severity of the resulting injury are not set forth in any detail. There is no evidence that, at the time of the incident (nor, for that matter, at any time since then), doctors attempted to remove any of the shrapnel which had allegedly become embedded in claimant's head. The only evidence of any shrapnel removal is contained in the affidavits of claimant's brothers, which both state that their mother had explained to them at the time of the attack (when the brothers were eight and twelve years old, respectively) that claimant had undergone surgery "to remove the metal from her head."

The evidence tends to confirm that claimant suffered an injury of unspecified severity to her head as a result of the incident; however, it is unclear from the records presented whether the shrapnel injuries, as evidenced by the medical documentation provided, were anything more than a superficial injury. As noted above, the contemporaneous medical records contain no specific evidence of treatment of any kind, apart from the administration of "medication." Further, the radiological images appear to indicate that the foreign objects are very near to the surface of the skin, and as the records

suggest, caused no damage to the skull or any significant damage to the surrounding tissue. It is unclear why medical personnel did not remove these fragments, either at the time of the incident or in the years since. On this point, a letter from Carl Warren Adams, M.D., a thoracic surgeon who examined the radiological images in February 2012, concluded that "due to the location of the embedded multiple shrapnel fragments they cannot be removed without an additional surgical procedure, risk of anesthesia, neurological injury, medical risk, additional pain and suffering, and additional scarring to [claimant]." However, Dr. Adams does not provide any reasons or factors to support this conclusory statement; indeed, it is almost tautological and does not assist the Commission in understanding the nature and extent of the injury. Finally, although the records are clear that claimant was hospitalized for four days in Rome, it is unclear whether the purpose of this hospitalization was for treatment for her own physical injuries, for medical observation, or simply because she was six years old and other members of her family had also been hospitalized as a result of the incident.

As noted above, a finding of physical injury for purposes of the December Referral requires that the claimant have suffered a physical injury that is both discernible and more significant than a superficial injury. Even where a claimant provides evidence that he or she suffered a physical injury, the superficiality threshold must be met in order for a claim to be compensable under the December Referral. Where a claimant suffered only minor skin injuries, and underwent no significant medical procedures, a claimant is unlikely to satisfy the Commission's standard for physical injury claims. *See Claim of*

5 U.S.C. §552(b)(6) Claim No. LIB-I-006, Decision No. LIB-I-013 (2011) (Final Decision).

In this claim, the medical documentation suggests at most that claimant retained small pieces of shrapnel—the exact size is unknown—on the top left side of her head. At the same time, the medical evidence fails to indicate whether these fragments caused any damage to the skull or resulted in any significant injury. As noted above, there is no documentation of any medical treatment for the alleged injuries.

Under these circumstances, and in the absence of evidence establishing that the fragments in claimant's head caused any significant injury or required any treatment beyond cleaning and observation, the Commission is unable to determine that claimant's shrapnel injury was a significant, non-superficial physical injury for purposes of the Commission's standard for such claims under the December Referral.

As noted, claimant also asserts that her alleged shrapnel injuries resulted in the development of a pituitary tumor. Indeed, the medical evidence indicates that the claimant does suffer from such a tumor. The results of radiological examinations from September and December 2007 submitted with the claim indicate that claimant has a "microadenoma"[3] on the right side of her pituitary gland, measuring approximately 5.5 mm in diameter, a fact also confirmed by Dr. Arnaout's 2010 letter.

While the evidence submitted establishes that claimant has a pituitary tumor as described above, the claimant has failed to establish that the tumor was caused by the 1985 attack. Dr. Arnaout, the endocrinologist in Amman, notes that "a head trauma may induce a pituitary growth or adenoma," and that her "trauma may have a role in the

[3] A pituitary tumor is called a "microadenoma" when the "tumor is smaller than 1 centimeter." *Stages of Pituitary Tumors*, Nat'l Cancer Inst., http://www.cancer.gov/cancertopics/pdq/treatment/pituitary/Patient/page2 (last updated Mar. 16, 2012). An "adenoma" is a "benign, noncancerous tumor arising from the epithelium (cell layer lining the inner surface) of any gland . . . ." Am. Med. Ass'n, *Encyclopedia of Medicine* 68 (Charles B. Clayman ed., 1989).

formation of the pituitary adenoma that 5 U.S.C. §552(b)(6) is having." Dr. Arnaout does not, however, opine with any medical certainty that the tumor is the result of her alleged injuries. Indeed, his suggestion of this possibility rests on his assumption that claimant suffered "trauma" during the incident, a conclusion he derives based on the contemporaneous records and claimant's scarring. Yet, as noted above, those records are unclear as to the severity of claimant's injury and whether it caused any discernible injury beyond the surface of the skin.

Claimant has also submitted the separate report of Dr. Adams from June 2011, in which Dr. Adams concludes "to a reasonable degree of medical certainty that the traumatic head injuries (shrapnel injury and concussive injury) sustained by [claimant] in the December 1985 Rome Airport attack resulted in her development of a pituitary tumor (adenoma) . . . ." In support of this conclusion, Dr. Adams explains that the "medical and trauma surgical literature is now replete, based upon the last 10 years experience of the increasing clinical presentations of a population of patients . . . sustaining concussive and nonconcussive head trauma . . . with the subsequent development of not only neuroendocrine tumors but primary brain tumors." He also states that "in this case, and supported by the medical records, the chronic overstimulation of the neuroendocrine axis due to posttraumatic stress syndrome caused the adenoma . . . ."

Dr. Adams' statements regarding the cause of the pituitary tumor are the only medical evidence in the record asserting that the tumor was, in fact, caused by the 1985 attack. His conclusion, however, appears to be based solely on general statements regarding the prevalence of tumors among a population of persons suffering head injuries, rather than on a specific observation of claimant's alleged physical injuries and

their effect on claimant's condition. Although he states that the "chronic overstimulation of the neuroendocrine axis due to [PTSD] caused the adenoma[,]" it is entirely unclear whether Dr. Adams draws this conclusion based on his individualized observation of claimant's physical condition, and specifically, the relationship between the tumor and claimant's alleged head trauma, or whether his conclusion is based solely on his reading of some medical literature indicating that persons with head injuries may develop neuroendocrine tumors. Apart from these concerns, the Commission also notes that Dr. Adams is, in fact, not an endocrinologist. Rather, he is a cardiovascular and thoracic surgeon, and does not appear to be board-certified in endocrinology or radiology. Under these circumstances, the Commission cannot conclude that claimant's development of a pituitary tumor was the result of the 1985 terrorist incident.

Given the inconclusive nature of the medical records with respect to claimant's alleged shrapnel injuries and the claimant's failure to establish that her pituitary tumor was caused by head trauma sustained during the 1985 Rome Airport attack, the Commission cannot conclude that the claimant suffered "a discernible physical injury, more significant than a superficial injury." On this point, it should be noted that in proceedings before the Commission, the burden of submitting sufficient evidence lies with the claimant. Section 509.5(b) of the Commission's regulations provides:

> The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. § 509.5(b) (2011).

In this case, based on the entirety of the evidence presented, the Commission finds that the claimant has not met her burden of proof to provide evidence sufficient to establish that she "suffered a discernible physical injury, more significant than a superficial injury," and that the injury be "verif[ied] . . . by medical records," as required under the Commission's physical injury standard.

In light of the foregoing, the Commission is constrained to conclude that, with respect to the merits of this claim, the claimant, 5 U.S.C. §552(b)(6) does not qualify for compensation under the December Referral. Accordingly, her claim must be and is hereby denied.

Dated at Washington, DC, May 17, 2012
and entered as the Proposed Decision
of the Commission.

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

Anuj C. Desai, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2011).

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

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| In the Matter of the Claim of<br><br>Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6)<br><br>Against the Great Socialist People's Libyan Arab Jamahiriya | Claim No. LIB-I-037<br><br>Decision No. LIB-I-031 |

Counsel for Claimant: Richard D. Heideman, Esq.
Heideman Nudelman & Kalik, P.C.

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) at Fiumicino Airport in Rome, Italy on December 27, 1985.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

> receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On December 11, 2008, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication a category of claims of United States nationals against Libya. *Letter from*

*the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("December Referral Letter"). The category of claims referred consists of

> claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya's agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

*Id.* at ¶ 3. Attachment 1 to the December Referral Letter lists the suits comprising the Pending Litigation.

The December Referral Letter followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the Secretary of State certified, pursuant to the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure "fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya . . . ." On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any pending suit within the terms of the Claims

Settlement Agreement, and directing the Secretary of State to establish procedures governing claims by United States nationals falling within the terms of the Claims Settlement Agreement.

On March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of the Libya Claims Program pursuant to the ICSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On July 17, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the claim, including evidence of: claimant's United States nationality; her inclusion as a named party in the complaints filed in *Estate of John Buonocore III v. Great Socialist People's Libyan Arab Jamahiriya*, 06-cv-727 (D.D.C.), and *Simpson v. Great Socialist People's Libyan Arab Jamahiriya*, 08-cv-529 (D.D.C.), part of the Pending Litigation referred to in Attachment 1 of the December Referral Letter; the dismissal of the Pending Litigation against Libya; and her physical injuries.

The claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6), states that on December 27, 1985, she was present at the Fiumicino Airport in Rome, Italy with her parents, brothers, and sister at the time of the terrorist attack. Claimant states that she suffered shrapnel wounds to her head and body from exploding hand grenades. She further states that her physical injuries required four days of hospitalization in two different hospitals in Rome, and that she sustained permanent scars from some of her wounds. The claimant has provided evidence of her United States nationality, both on the date of the incident and at the time of the

Settlement Agreement. Additionally, claimant has provided medical records noting "small bruised wounds" with "retention of metallic splinters" upon admission to the hospital, newspaper clippings, records from a criminal trial in Rome against one of the terrorists in the attack, and other documents in support of her claim.

## DISCUSSION

### Jurisdiction

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the December Referral Letter is limited to claims of individuals who: (1) are United States nationals; (2) are named parties in a Pending Litigation case against Libya which has been dismissed; and (3) set forth a claim for injury other than emotional distress alone in the Pending Litigation. December Referral Letter, *supra*, ¶¶ 2-3.

### *Nationality*

In the *Claim of* . Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that that in order for a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. Based on the evidence submitted with this claim, the Commission determines that the claimant was a United States national at the time of the injury on which her claim is based and that the claim has been continuously held by a United States national until the effective date of the Claims Settlement Agreement.

*Pending Litigation and its Dismissal*

To fall within the category of claims referred to the Commission, the claimant must also be a named party in the Pending Litigation listed in Attachment 1 to the December Referral Letter and must provide evidence that the Pending Litigation against Libya has been dismissed. December Referral Letter, *supra*, ¶ 3. The claimant has provided a copy of the Order of Dismissal in Cases No. 06-cv-727 and 08-cv-529, filed in the United States District Court for the District of Columbia, which name her as a party, and which shows that these cases were ordered dismissed on December 24, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

*Claim for Injury Other than Emotional Distress*

The December Referral Letter further limits claims eligible for compensation to those in which the claimant set forth "a claim for injury other than emotional distress alone" in the Pending Litigation. Although the claimant did not provide copies of pleadings in support of this element of her claim, copies of pleadings obtained by the Commission reflect that the claimant did not set forth a claim for anything other than emotional distress, including solatium damages, in the above-cited Pending Litigation.

By letter dated October 27, 2009, the Commission communicated to claimant's counsel that the complaints in the Pending Litigation appeared to set forth a claim on behalf of the claimant only for intentional infliction of emotional distress, and requested that counsel clarify this matter for the Commission. Counsel responded by letter, dated December 1, 2009, noting that he had received the October 27 communication and would respond "in due course." To date, however, claimant's counsel has not provided any

additional clarification concerning this issue.

Section 509.5(b) of the Commission's regulations provides:

> The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. § 509.5(b) (2008).

For the reasons stated above, and in the absence of additional information, the Commission finds that the claimant has not met the burden of proof in this claim in that she did not set forth in the Pending Litigation a claim for injury other than emotional distress alone. As such, she has failed to establish that her claim is within the category of claims referred to the Commission by the State Department's Legal Adviser under the December Referral Letter and the Claims Settlement Agreement. The Commission is accordingly constrained to conclude that it does not have jurisdiction to adjudicate the merits of this claim. Therefore, this claim must be and it is hereby denied.

The Commission finds it unnecessary to make determinations with respect to other elements of this claim.

Dated at Washington, DC, and
entered as the Proposed Decision
of the Commission.

FEB 18 2010

Mauricio J. Tamargo, Chairman

Rafael E. Martinez, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2008).