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COMMENTS: Per your request -- final of Justice's testimony on "Ricky Ray"

TO: Jennifer Klein, DPC

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Final

Department of Justice

STATEMENT OF

EVA M. PLAZA
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

CONCERNING

H.R. 1023 -- THE RICKY RAY HEMOPHILIA RELIEF FUND ACT

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION AND CLAIMS
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

PRESENTED ON

SEPTEMBER 19, 1996

I am here today, in response to the Committee's invitation, as it considers H.R. 1023, a bill to "provide procedures for claims for compassionate payments with regard to individuals with blood-clotting disorders, such as hemophilia, who contracted human immunodeficiency virus due to contaminated blood products."

First and foremost, let me point out that the Administration is painfully aware and sympathetic to the tragedy faced by persons with hemophilia who have contracted the HIV virus through blood and blood products. We share the concerns expressed in the bill concerning the effects of this tragedy upon individuals with hemophilia and their families.

I want to stress the Administration's willingness to work with the Congress to develop an appropriate means to assist those who have been infected with HIV, including through the use of blood and blood products.

The Department of Justice's Perspective

The Attorney General and the Department of Justice are charged with protecting the interests of the United States in judicial forums and proceedings. See, 28 U.S.C. § 516-519. In particular, the Attorney General and the Department of Justice are responsible for the administration of the Federal Tort Claims Act (FTCA) both in the context of litigation and during the process of consideration of claims administratively. See, 28 U.S.C. §§ 2672, 2677. As a consequence of these responsibilities, the Department of Justice's Torts Branch has had to defend many different species

of litigation seeking damages for virtually every conceivable form of injury.

The Federal Tort Claims Act (FTCA) has been a vehicle for damage litigation filed on behalf of persons (or their estates) who claimed that federal agency personnel caused them to contract the HIV virus. For instance, a suit was filed on behalf of a hemophiliac who claimed to be infected from blood products provided to him by the military when he was a military dependent. John Smith v. United States (D. HI, Civil No. 87-0891). In another example, a family claiming to have contracted AIDS as a result of negligence in providing an adult with contaminated blood when he underwent transfusions at an Army hospital sued the United States. This lawsuit also was resolved in favor of the United States. C.R.S. by D.B.S. v. United States, 11 F.3d 791 (8th Cir. 1993). In addition, the Congress does have the power to enact legislation to provide for payments to individuals outside the framework of the FTCA and has done so in a small number of instances. Thus, in a variety of contexts, the United States is, or has been, party to suits in which individuals who claim to have contracted AIDS or have tested positive for the HIV virus assert that the government should answer in damages under the FTCA for their injuries.

Based on our experience with litigation in this area, I have several comments that I believe the Subcommittee will find helpful in its consideration of H.R. 1023.

Manufacturers of anti-hemophilic factor concentrates utilize blood components to create blood-clotting factors. During the

period encompassed by the bill (1980 through 1987), anti-hemophilic factor concentrates were used by hemophiliacs to prevent and control bleeding. During the same period of time, the exact chronology being disputed, the scientific community became aware of AIDS and HIV, the virus that ultimately was identified as the causative agent of AIDS. The major sources of transmission of this deadly virus were found to be bodily fluids, including blood, and methods were assessed for reducing the risk of transmission.

Government agencies, including the National Institutes of Health, the Food and Drug Administration and the Centers for Disease Control and Prevention, all components of the Department of Health and Human Services, were involved in the identification of the virus and in discussion of public health measures to reduce transmission. Whether the government components' response was suitable is a matter that is the subject of heated debate and intense emotion. The government components' response has been the subject of review. The recent Institute of Medicine Report is a comprehensive examination of the components' activities and assessment of what lessons can be learned from their experiences. HHS has embraced the goals reflected in the Report's recommendations and created a task force to assess all of the recommendations in light of current practices. This is a forward-looking manner of dealing with past activities.

Section 2 of the bill sets forth findings that state, for example, that the federal government failed to fulfill its responsibility to regulate the blood-products industry properly.

This finding is not supported by the record. The Department is concerned that this and other findings in the bill could be used, or abused, in litigation to expand the litigation and raise new areas for conflict.

As we read the bill, it appears that a large number of persons would be eligible for compensation. According to a report by the Committee on Government Reform and Oversight:

> In the early 1980's, 10,000 people with hemophilia, fully 50% of all U.S. hemophiliacs at the time, as well as 12,000 other transfusion recipients, were infected with HIV through blood products prior to 1985, when a screening test was implemented that could detect HIV antibodies in donated blood. Many also unknowingly infected their spouses and children before learning of their own infections.

Protecting the Nation's Blood Supply From Infectious Agents: The Need for New Standards to Meet New Threats, House Committee on Government Reform and Oversight (House Report No. 104-746, 1996) at 4. Section 3(e) authorizes the appropriation of $1 billion to pay claims to infected persons or their estates. As a fiscal matter, one billion dollars is substantial. At the same time, it might be inadequate to pay all claims based on the large number of potentially infected persons or their successors in interests as claimants. Moreover, there is at least a question as to whether the infected individual would be assisted by a payment to his or her estate. In that sense, the bill would require a governmental payment on behalf of the United States that cannot be viewed as compensatory. These and other issues relating to the payment of claims will need to be addressed.

The provision in Section 5(e) that "acceptance" of a payment award be in full satisfaction of any claim against the United States is ambiguous. If the bill is intended to create an exclusive remedy, thereby barring claims and suits under the Federal Tort Claims Act, it should specifically state that the remedy the bill would provide is the exclusive remedy against the United States and its employees (discussed below) for any claims falling within its terms, regardless of whether a tort claim or any other type of claim, proceeding, or suit is presented or initiated.

As drafted, the bill would not bar litigation against any entity or person other than the United States or expressly bar those persons from seeking indemnity or contribution from the United States. The "full settlement" provision, as currently drafted, would bar claims against the United States, but not against any other person or entity. If Congress intends the bill to be a full bar against further litigation, it should extend the bar to claims against any employee of the United States acting within the scope of his employment. The United States should be protected from third-party claims, to avoid indirect evasion of the statutory bar.

H.R. 1023 provides for judicial review exclusively in a district court of the United States on the basis of the administrative record. (Section 5(1).) It is not clear whether the general venue provision, 28 U.S.C. § 1391, is to apply to the judicial review proceedings. Also, it is unclear whether the Court could or should order a remand to the Attorney General where the

record is deemed inadequate. Further, while it is presumed that Court of Appeals and Supreme Court review may be had following a district court decision pursuant to this subsection, in the same manner, and to the same extent as other district courts' decisions are subject to appellate review, provisions for appellate review should be included to remove any doubt on this score.

Finally, it would be desirable to specify a period of time (a statute of limitations) within which any judicial review proceeding must be commenced.

* * *

I hope these comments will be helpful in assisting the Subcommittee in its consideration of H.R. 1023. I look forward to talking to you about these and other suggestions the Department has on this legislation as we work together in developing a bipartisan program to assist people with hemophilia who were infected by HIV.

I will be pleased to answer your questions. Thank you.