

**FOREIGN CLAIMS SETTLEMENT COMMISSION  
OF THE UNITED STATES  
UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	
;	}	Claim No. IRQ-I-021
	}	
	}	Decision No. IRQ-I-020
	}	
Against the Republic of Iraq	}	

Counsel for Claimant:	Daniel Wolf, Esq. Law Offices of Daniel Wolf
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**FINAL DECISION**

Claimant objects to the Commission’s Proposed Decision denying Mr. 5 U.S.C. §552(b)(6) claim against the Republic of Iraq (“Iraq”). In that decision, the Commission concluded that 5 U.S.C. §552(b)(6) had failed to meet his burden of proving that

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<sup>1</sup> The original Claimant, 5 U.S.C. §552(b)(6), was a hostage in Kuwait and Iraq in 1990 and the victim who suffered the injuries giving rise to this Claim. According to Claimant’s counsel, 5 U.S.C. §552(b)(6) died in August 2014. Counsel then requested that the Commission substitute 5 U.S.C. §552(b)(6) estate as the claimant. In support of this request, counsel provided letters of administration dated November 14, 2015, issued by the Second Judicial Court of the State of Nevada in and for the County of Washee, appointing Naomi W. 5 U.S.C. §552(b)(6) widow, as administratrix of her late husband’s estate. 5 U.S.C. §552(b)(6) has also submitted a sworn statement, dated January 16, 2015, authorizing Daniel Wolf to continue the prosecution of this claim on behalf of the estate. Therefore, the Commission finds that the ESTATE OF 5 U.S.C. §552(b)(6), DECEASED; 5 U.S.C. §552(b)(6), PERSONAL REPRESENTATIVE has the legal right to pursue the objection filed in this claim and is now the proper claimant before this Commission. See ESTATE OF 5 U.S.C. §552(b)(6), EXECUTOR, Claim No. IRQ-I-003, Decision No. IRQ-I-006, at 1 n.1 (Final Decision) (2015). Since 5 U.S.C. §552(b)(6) did not die until after submitting his claim to the Commission, the beneficiaries of his estate do not need to satisfy the U.S. nationality requirement. See Claim No. LIB-II-180, Decision No. LIB-II-079, at 5 (2011). Only the decedent needs to satisfy that requirement, and he does. See Proposed Decision at 5. In this decision, we refer interchangeably to both the estate’s representative and the original claimant as “Claimant,” except where distinctions are relevant.

he had suffered an aggravated physical assault or any other discrete act comparable in brutality or cruelty at the hands of Iraqi officials during his captivity in Kuwait and Iraq. He was thus unable to show that Iraq had knowingly inflicted upon him a “serious personal injury,” as required by the State Department’s referral letter authorizing the Commission to hear claims in this program.<sup>2</sup> On objection, Claimant has submitted additional evidence and argument in support of its claim. With this newly submitted evidence, Claimant has now met its burden to show that Iraqi officials subjected Mr. <sup>5 U.S.C. §552(b)(6)</sup> to an aggravated physical assault. Because Claimant has thus shown that Iraq knowingly inflicted upon Mr. <sup>5 U.S.C. §552(b)(6)</sup> a “serious personal injury,” and because Claimant meets all other requirements of eligibility, we reverse the denial of the claim and conclude that Claimant is entitled to an award of \$500,000.00 in compensation.

#### BACKGROUND

<sup>5 U.S.C. §552(b)(6)</sup> brought a claim against Iraq based on injuries he suffered while being held hostage in Kuwait and Iraq between August and December 1990. He sought compensation, in addition to that already paid to him by the United States Department of State for his experience as a hostage, based primarily on a claim that “he was severely beaten by Iraqi soldiers[,]” and that, as a result, he suffered serious physical and emotional injuries. In support of his claim, Claimant submitted, *inter alia*, two of his own sworn statements describing his ordeal and his alleged personal injuries (one dated March 2004 from his federal court litigation and the other prepared specifically for this Commission in December 2013); sworn statements from his wife and two daughters describing his condition upon his return to the United States and his recounting to them

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<sup>2</sup> See Letter dated November 14, 2012, from the Honorable Harold Hongju Koh, Legal Adviser, Department of State, to the Honorable Timothy J. Feighery, Chairman, Foreign Claims Settlement Commission (“2012 Referral” or “Referral”).

of what had occurred in Iraq (all three of which were prepared in 2013); medical records; news articles published shortly after Claimant's release; and a photograph allegedly depicting Claimant with other released hostages shortly before their departure from Iraq. In a Proposed Decision entered on July 24, 2014, the Commission denied the claim on the record then before it, finding that Claimant had not provided evidence sufficient to establish that he suffered injuries from an aggravated physical assault, or any other discrete act comparable in brutality or cruelty, during his captivity in Iraq. *See* Claim No. IRQ-I-021, Decision No. IRQ-I-020 (2014) ("Proposed Decision").

On August 8, 2014, counsel for the Claimant filed a notice of objection and requested an oral hearing. In his letter, counsel indicated that <sup>5 U.S.C. §552(b)(6)</sup> had recently died, and that the objection would be pursued by <sup>5 U.S.C. §552(b)(6)</sup> estate as successor in interest to the claim. On January 26, 2015, the Claimant submitted a brief containing further evidence and argument in support of its objection. The Commission held a hearing on the objection on February 12, 2015. At the hearing, <sup>5 U.S.C. §552(b)(6)</sup> widow and one of his daughters provided sworn testimony, and Claimant's counsel provided further legal argument in support of the claim.

#### DISCUSSION

To decide this claim, the Commission must determine whether Claimant's evidence, which now includes the newly submitted evidence, satisfies its burden to prove the factual allegations of its claim—namely, whether <sup>5 U.S.C. §552(b)(6)</sup> was subjected to an aggravated physical assault. Stated differently, the question on objection is whether the additional evidence sufficiently adds to the record such that Claimant has carried its burden of proving its claim. We conclude that it does. In particular, we conclude that

Claimant has provided enough evidence to establish that <sup>5 U.S.C. §552(b)(6)</sup> suffered a re-ruptured ventral<sup>3</sup> hernia from having been beaten by Iraqi soldiers and that this assault was thus sufficiently brutal to constitute an “aggravated physical assault,” as that phrase is used in the 2012 Referral.

### *I. Proposed Decision*

In its Proposed Decision, the Commission concluded, based on the evidence before it at that time, that <sup>5 U.S.C. §552(b)(6)</sup> had not met his burden of proving that he had suffered an aggravated physical assault. In particular, the Commission noted that the allegations of assault rested almost entirely on <sup>5 U.S.C. §552(b)(6)</sup> own statements and those of his wife and daughters, who themselves only learned of the incident through him. Although <sup>5 U.S.C. §552(b)(6)</sup> had submitted some medical records in support of his claim, the Commission concluded that, for each of the various physical injuries alleged, there was either no medical evidence to establish that the injury occurred or no medical evidence that the injury was caused by an assault. On the record then before it, the Commission thus concluded that <sup>5 U.S.C. §552(b)(6)</sup> had not satisfied his burden of proving that he was the victim of an aggravated physical assault during his captivity in Kuwait and Iraq.

### *II. New Evidence*

On objection, Claimant provided three additional sworn statements from individuals unrelated to <sup>5 U.S.C. §552(b)(6)</sup>, each of whom attested that <sup>5 U.S.C. §552(b)(6)</sup> told them of the alleged assault shortly after his return from Iraq. Two of the declarations included direct observations of some of <sup>5 U.S.C. §552(b)(6)</sup> alleged physical injuries. The

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<sup>3</sup> “Ventral” is another word for “abdominal” and means of or having to do with the abdomen. See *Stedman’s Medical Dictionary* 2114 (28th ed. 2006) (“Ventral” means “[p]ertaining to the belly or to any venter.”).

Claimant also submitted additional medical records from the Department of Veterans Affairs (VA), starting from 2010, which Claimant contends contain evidence of Mr. <sup>5 U.S.C. §552(b)(6)</sup> alleged physical injuries as well as of the cause of those injuries. Finally, as noted above, <sup>5 U.S.C. §552(b)(6)</sup> widow and one of his daughters testified at the oral hearing, providing further detail about Claimant's allegations and affording the Commission the opportunity to conduct cross-examination and test the veracity of statements previously made by the witnesses only in writing. As explained below, with this new evidence, the Commission finds that Claimant has met its burden to prove that Iraqi soldiers beat <sup>5 U.S.C. §552(b)(6)</sup> so brutally that he, at the very least, re-ruptured a ventral hernia. Because the additional evidence provided by Claimant, including the live testimony and the additional medical records, is essential to our decision to reverse the denial in the Proposed Decision, we begin with a review of that evidence. We then apply the standard for aggravated physical assault claims in this program to the facts derived from the testimony and other evidence.

*Live Testimony:* At the hearing, <sup>5 U.S.C. §552(b)(6)</sup> widow, <sup>5 U.S.C. §552(b)(6)</sup>, testified that she and her husband were in their flat in Kuwait at the time of the invasion on August 2, 1990. They remained there for approximately three weeks until somebody called to warn them that "the soldiers were coming to pick up Americans." Ms. <sup>5 U.S.C. §552(b)(6)</sup> stated that they then moved around to different locations, staying longest at a safe house with another American and his girlfriend. In mid-September, Saddam Hussein decided to release women and children, and upon her husband's urging, <sup>5 U.S.C. §552(b)(6)</sup> flew back home to the United States, leaving her husband behind in Kuwait.

5 U.S.C. §552(b)(6) testified that she spoke with her husband once over the phone while he was in captivity. She stated that that they only spoke for a “couple seconds,” and that he did not mention any injuries, but that “he sounded terrible.” The next time she saw him was at the airport in December when he returned to the United States after his release. 5 U.S.C. §552(b)(6) testified that she “didn’t even recognize him. When he left[,] . . . his hair was just turning slightly grey. . . . When he got off the airplane, his hair was pure white.” She further testified that he “was all bent over and he’d lost so much weight[,]” that “[i]t was hard for him to walk[,]” and that “it was really hard for him to breathe.” 5 U.S.C. §552(b)(6) further testified that 5 U.S.C. §552(b)(6) “had a scar above his eye that was pretty much healed because he’d been in detention for several months. But it was prominent so that you could see he’d been hit there.”

Shortly after meeting her husband at the airport, 5 U.S.C. §552(b)(6) and her daughter took 5 U.S.C. §552(b)(6) to their younger daughter’s apartment, when he “broke down and explained why he looked [the way] he looked and what had happened to him.” She explained that 5 U.S.C. §552(b)(6) said he had been mistaken for a CIA agent and was taken to a Kuwaiti police station, where he claimed that “he had been hit in the head with a rifle butt, and that had knocked him down,” and that he was kicked and beaten. Ms.

5 U.S.C. §552(b)(6) stated that “the worst thing was his breathing. . . . He was just wheezing . . . .”

5 U.S.C. §552(b)(6) testified that between one to three weeks after her husband’s return, they took him to the VA hospital because he had pneumonia as well as a “hernia [that] was just sticking out of his stomach in this big bulge, and it was all black and blue, and [it] looked like it might have some kind of infection.” She stated that the doctor repaired the hernia by placing “a mesh sling of some kind” over it, but that “it had to be

fixed several times because it was such a mess.” <sup>5 U.S.C. §552(b)(6)</sup> also described how, during the first visit, the doctors discussed with her the condition of her husband’s diaphragm—<sup>5 U.S.C. §552(b)(6)</sup> had alleged in his claim a dislocation of his diaphragm as a result of the beating—and indicated that he had a “disintegrating tailbone.”

During the hearing, the Commission asked <sup>5 U.S.C. §552(b)(6)</sup> how she knew what had caused the hernia. She explained that, before the hostage-taking incident, her husband had suffered a ruptured hernia that was repaired, but that it was re-ruptured in Iraq, although as to the exact cause, she replied, “I don’t know.” Counsel asked her if <sup>5 U.S.C. §552(b)(6)</sup> ever explained to her how it happened, and responded, “Not in any detail.”

Counsel asked <sup>5 U.S.C. §552(b)(6)</sup> about other injuries that <sup>5 U.S.C. §552(b)(6)</sup> had alleged in the original claim. With regard to his alleged broken pinkie finger, counsel asked if anything had been done to treat this; <sup>5 U.S.C. §552(b)(6)</sup> said no, and that it just “healed itself[,]” but had “healed crooked.” Regarding her husband’s injured diaphragm, Ms. <sup>5 U.S.C. §552(b)(6)</sup> testified that they had it x-rayed “right away, because it affected his breathing so bad.” <sup>5 U.S.C. §552(b)(6)</sup> stated that her husband told her that the problem with his diaphragm began “right after the beating.” She maintained that the doctors did not know how to fix it, although they tried for many years. She added that this condition prevented her husband from engaging in activities that he used to enjoy, such as marathon-running and bicycling, and that he was unable to walk for long distances. She stated that the problem persisted until his death.

With regard to the alleged dental damage said to have resulted from the beating, <sup>5 U.S.C. §552(b)(6)</sup> noted that her husband had a “permanent bridge on his front teeth that

[was] hooked on to his real teeth[,]” and that Iraqi soldiers knocked his (real) teeth loose, so when he returned, “they just kept disintegrating.” She stated that starting about one or two years after her husband’s return to the United States, his teeth could no longer support the bridge. As a result, “the denture fell out and the teeth fell out.” Ms. <sup>5 U.S.C. §552(b)(6)</sup> testified that they were dissuaded from seeking treatment due to the prohibitive cost for dental implants, which she testified would have been necessary because there were not enough teeth left to put in another bridge. She also stated that, after <sup>5 U.S.C. §552(b)(6)</sup> bridge fell out and his teeth “deteriorated,” he never smiled anymore. . . . He always kept his mouth closed.”

<sup>5 U.S.C. §552(b)(6)</sup> testified that, following her husband’s return from captivity, he “very seldom” worked and “couldn’t start over because everything was gone.” She stated that he “picked up a few writing assignments and lectures . . . at colleges . . . . That’s how we managed . . . .” However, she also testified that “his mind was getting really weak. He couldn’t concentrate. He couldn’t think enough to get full employment again . . . .” <sup>5 U.S.C. §552(b)(6)</sup> also noticed that her husband became very anxious and was startled by loud noises, and that “his personality just completely changed.”

Asked why <sup>5 U.S.C. §552(b)(6)</sup> did not mention the beating in his many press interviews following his captivity, <sup>5 U.S.C. §552(b)(6)</sup> testified that her husband’s Greek heritage meant that he did not discuss incidents involving his body with other people, particularly people he did not know, and only shared the story of the beating with his family and closest friends. She stated that “he didn’t want that to be number one in these interviews. He wanted to get across . . . what happened to everybody, not to him. . . .”



Claimant also presented the live testimony of <sup>5 U.S.C. §552(b)(6)</sup>, one of Mr. <sup>5 U.S.C. §552(b)(6)</sup> daughters. Although she was never in Kuwait with her parents, she was aware of their circumstances and was with her mother when they went to pick Mr. <sup>5 U.S.C. §552(b)(6)</sup> up at the airport after his release from captivity in December 1990. Camille testified that when she first saw her father at the airport, he looked “old and bent over.” She stated that she grabbed his hand and saw what she believed to be his broken finger. She further testified that “you could hear his labored breathing[]” and “wheezing.” She also noticed his bent posture and that he had developed “white hair [and a] white beard.” She described it as “a shocking[] age progression.”

Camille testified that she was with her parents and sister the night <sup>5 U.S.C. §552(b)(6)</sup> “broke down and told [them] about the beating” in her sister’s apartment. She stated that <sup>5 U.S.C. §552(b)(6)</sup> told them it had “happened at the police station, that he was struck with a rifle butt in the head, which dropped him to his back, and then he was kicked several times about the torso.”

Camille recalled that <sup>5 U.S.C. §552(b)(6)</sup> told her sometime in 1990 that his breathing problems were the result either of “a rifle butt or the kicking.” The Commission asked her to clarify whether <sup>5 U.S.C. §552(b)(6)</sup> had personally made the connection between his diaphragm injury and his breathing problem; Camille responded yes, adding that he “didn’t do any of [the activities] that he did before[,]” such as marathon-running, biking, and going for long walks. She also noted that doctors were never able to treat this condition successfully, stating that until his death they “were still trying to figure out what to do about the diaphragm so he could have better breathing capability.”

With regard to the hernia, Camille testified that <sup>5 U.S.C. §552(b)(6)</sup> “stomach was just hanging out[,]” and that it was “distended, deformed, black and blue, [in a] huge knot.” She testified that <sup>5 U.S.C. §552(b)(6)</sup> sought treatment at the VA within a couple months of his return and underwent surgery for this condition, and that “[t]hey put a mesh in, but because it was so bad they had to redo it two other times.” The Commission asked whether <sup>5 U.S.C. §552(b)(6)</sup> had ever told her how the injury happened; she responded that the night he returned to the U.S., he said he “believed that it re-ruptured . . . because of the beating.”

Concerning the alleged injuries to <sup>5 U.S.C. §552(b)(6)</sup> teeth, Camille testified that when he returned from Iraq, <sup>5 U.S.C. §552(b)(6)</sup> “had a huge bruise that was healing on his cheek and he said he took a rifle butt to the face . . . near his teeth which loosened the bridge . . . .” She stated that “with the loosening over time [it] became infected.” She noticed that at some point the bridge had fallen out entirely and that <sup>5 U.S.C. §552(b)(6)</sup> “didn’t have any teeth.”

Finally, Camille testified that following her father’s return home, he exhibited changes in his mental state—in particular, that he “was very, very fractured in his thought process . . . .” She also testified that he had “memory issues” and that he had become “kind of pessimistic,” whereas he had been very positive before the incident.

*Medical Records:* As noted above, Claimant has also submitted additional medical records from the VA, records that discuss <sup>5 U.S.C. §552(b)(6)</sup> condition and treatment between 2006 and his death in 2014. In one lengthy examination note dated March 1, 2010—six months before the U.S. and Iraq signed the Claims Settlement Agreement—<sup>5 U.S.C. §552(b)(6)</sup> noted that he had undergone a “1990 ventral hernia repair

[that] was ruptured in Iraq.” It also notes that <sup>5 U.S.C. §552(b)(6)</sup> underwent another “[v]entral hernia repair with mesh[.]” on February 1, 1999. Upon examination, it was observed that <sup>5 U.S.C. §552(b)(6)</sup> had a “[v]entral hernia repair scar [that was] well healed and non tender[.]” The note also makes reference to a 2006 chest x-ray, noting that there was “marked eventration<sup>[4]</sup> of the right hemic diaphragm . . . .”

The March 2010 examination note also contains <sup>5 U.S.C. §552(b)(6)</sup> recounting of what happened to him in 1990. He reported at the time that he had been “taken hostage and held prisoner for six months just before the Gulf War[.]” and that he “was roughed up pretty good in the beginning.” He claimed that he “was kicked and his ventral hernia repair was ruptured[.]” and that “[he] walked around with [his] stomach hanging out until he was released.” He also indicated that he had been diagnosed with post-traumatic stress disorder (PTSD) and had “stopped working in 1990 as he could not find a job.”

Other, more recent notes provide further evidence of the injury to Mr. <sup>5 U.S.C. §552(b)(6)</sup> diaphragm. One, dated April 17, 2012, notes a “chronic right elevated hemidiaphragm.” Another, from October 5, 2013, indicates that <sup>5 U.S.C. §552(b)(6)</sup> reported that the diaphragm condition was the “result of beatings while [a] POW in Kuwait.” Mr. <sup>5 U.S.C. §552(b)(6)</sup> appeared to confirm this connection with his time in Kuwait again during a visit to the emergency room on March 25, 2014, when he reported that, during the invasion of Kuwait, he “sustain[ed] an injury which rendered his right hemidiaphragm unable to function properly . . . .” The note from this visit goes on to describe the condition of the elevated right hemidiaphragm in considerable detail, although it does not explicitly attribute the injury to any sort of trauma.

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<sup>4</sup> “Eventration of the diaphragm” is defined as the “extreme elevation of a half or part of the diaphragm, which is usually atrophic and abnormally thin.” *Stedman’s Medical Dictionary, supra*, at 679.

*Additional Witness Statements:* As also noted above, Claimant has submitted three additional sworn statements from separate individuals—none of whom are family members or who appear to have a special relationship with the <sup>5 U.S.C. §552(b)(6)</sup> family—confirming various aspects of the Claimant’s allegations. One of these, an affidavit dated January 20, 2015, is from Louis F. Test, an attorney contacted by <sup>5 U.S.C. §552(b)(6)</sup> in June 1991 about possible legal action against Iraq. Mr. Test briefly recounts what Mr. <sup>5 U.S.C. §552(b)(6)</sup> told him at that time, including, *inter alia*, that he “was severely beaten by his captors to such extent it caused a rupture to a preexisting hernia previously repaired by operation and forced his diaphragm up into his chest area.”

The other two sworn statements, also from January 2015, are declarations that recount recollections of <sup>5 U.S.C. §552(b)(6)</sup> injuries shortly after his return from Iraq in 1990. In one of these declarations, Gregory Evangelatos, a former colleague of Mr. <sup>5 U.S.C. §552(b)(6)</sup> recalls how he saw <sup>5 U.S.C. §552(b)(6)</sup> about three weeks after his return; he states that <sup>5 U.S.C. §552(b)(6)</sup> had lost 20-30 pounds, that “[h]is teeth had been damaged and [that] he had a scar over his eye.” He also states that <sup>5 U.S.C. §552(b)(6)</sup> “appeared to have difficulty breathing . . . .” In addition, he states that <sup>5 U.S.C. §552(b)(6)</sup> told him that he was “physically assaulted and badly beaten by Iraqi soldiers, but he did not provide further details.” In the other declaration, Marge Sherman, a former neighbor of the <sup>5 U.S.C. §552(b)(6)</sup> family, states that she saw <sup>5 U.S.C. §552(b)(6)</sup> in December 1991—one year after his release. She states that <sup>5 U.S.C. §552(b)(6)</sup> told her he had been beaten by Iraqi soldiers, but without any further detail. Ms. Sherman states that <sup>5 U.S.C. §552(b)(6)</sup> “breathing was laborious and his little finger had been broken and was bent out of shape.” He also allegedly told her that “he had to have surgery to repair a hernia, resulting from numerous blows to the

stomach”; she further stated that “[h]is teeth were also damaged badly, changing his once glorious smile.”

### *III. Aggravated Physical Assault Analysis*

With this new evidence, Claimant has met its burden of proving sufficient material facts to sustain its claim. As the Commission has previously held, to prove an “aggravated physical assault” as defined in the 2012 Referral, a claimant must show that the physical assault is “so brutal that it either is intended to or actually does result in death, permanent disfigurement or significant damage to some body part or organ.” Claim No. IRQ-I-012, Decision No. IRQ-I-028, at 8 (2015) (Final Decision) (quoting Claim No. IRQ-I-012, Decision No. IRQ-I-028, at 17 (Proposed Decision)). In this case, in light of the newly submitted evidence, the Commission is satisfied that Claimant has proven that <sup>5 U.S.C. §552(b)(6)</sup> suffered such an assault and thus suffered a “serious personal injury” as defined in the 2012 Referral.

*Physical Assault:* First, with Claimant’s new testimonial evidence—both oral and written—Claimant has met its burden to prove that Claimant was physically assaulted. In its Proposed Decision, the Commission noted that all of the allegations about the physical assault had been made either by <sup>5 U.S.C. §552(b)(6)</sup> in his own declaration or by family members who themselves were recounting details he shared with them. Because the “narrative of the assault in each of these declarations [came] from a single source[,] Claimant himself[,]” and because “all of the declarants [were] members of Claimant’s immediate family[,]” the Commission concluded that it “must look to other evidence to support a finding of serious personal injury arising from the alleged physical assault.”

On objection, Claimant has provided evidence that enhances the credibility of the previously submitted declarations, including, as noted earlier, three additional sworn statements from non-family members attesting to 5 U.S.C. §552(b)(6) condition upon his return from Iraq. All three of them attest that 5 U.S.C. §552(b)(6) stated within one year of his return that he had been severely beaten by Iraqi soldiers while in captivity in Kuwait. Two of them make reference to 5 U.S.C. §552(b)(6) labored breathing, and two of them state that he told them about the ruptured hernia, which he said he reinjured as the result of “numerous blows to the stomach.” Given that none of these three witnesses appears to be “a party interested in the outcome of the proceedings or [that] has a special relationship with the claimant,” Proposed Decision, *supra*, at 13 (citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 312, 317 (Cambridge University Press 2006) (1953)), the Commission finds that these sworn statements further support Claimant’s allegations.

In addition, the Commission notes that two of the individuals who submitted sworn declarations in the original filing—5 U.S.C. §552(b)(6) widow and his daughter Camille—presented live testimony at the oral hearing, where the Commission was able to conduct cross-examination and ask additional questions. Both witnesses were consistent and credible. Both stated that when 5 U.S.C. §552(b)(6) returned home, he told them of being severely beaten by Iraqi soldiers. They further testified that he had difficulty breathing, had a ruptured hernia, and that they took him to the VA medical center within a few weeks of his return. Both also mentioned that the doctors identified the problem with his diaphragm at that time. Although neither was able to provide conclusive testimony about the precise cause of 5 U.S.C. §552(b)(6) injuries—apart from 5 U.S.C. §552(b)(6) own statements to them—their testimony supports the claim that 5 U.S.C. §552(b)(6) was

physically assaulted by Iraqi soldiers while in Kuwait and enhances the credibility of the statements they made previously in their written submissions. *See* Proposed Decision, *supra*, at 13 (“Sworn statements will carry much greater weight when there has been an opportunity for cross-examination.” (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 137 (Sept. 2, 1998))).

In light of the newly submitted sworn statements and the live testimony of Ms. <sup>5 U.S.C. §552(b)(6)</sup> and her daughter Camille, the Commission is persuaded that <sup>5 U.S.C. §552(b)(6)</sup> was physically assaulted by Iraqi officers while in Kuwait. This evidence alone, however, provides insufficient detail to determine the extent of <sup>5 U.S.C. §552(b)(6)</sup> specific injuries, evidence that is needed to determine whether his injuries were caused by an “aggravated physical assault” under the Commission’s standard for the 2012 Referral. The Commission must therefore turn to the additional medical records to make this determination.

*Medical Evidence That Physical Assault Was Aggravated:* The Proposed Decision noted that for each of the injuries said to have resulted from the beating, “there [was] either no medical evidence to establish that the injury occurred or, if there [was], no medical evidence that it was caused by an assault.” Proposed Decision, *supra*, at 14-15. This deficiency in the medical evidence at the time was crucial to our decision to deny the claim. Now, however, we have medical records that directly tie one of Mr. <sup>5 U.S.C. §552(b)(6)</sup> injuries, the re-ruptured hernia, to the assaults. We thus now find that the totality of the evidence establishes that <sup>5 U.S.C. §552(b)(6)</sup> suffered an aggravated physical assault.

(1) *Re-ruptured Ventral Hernia:* The Proposed Decision noted that there was no medical evidence of a re-ruptured ventral hernia, much less any evidence that would tie it specifically to a 1990 physical assault. Claimant's new evidence, however, directly responds to this gap in the record. In particular, the medical record from March 2010 (which, we re-emphasize, predates the Claims Settlement Agreement by six months) indicates that <sup>5 U.S.C. §552(b)(6)</sup> told the doctor that he had suffered a ruptured ventral hernia repair in 1990 in Iraq that required treatment with a mesh. The doctor herself noted a scar from the repair surgery. Given the medical evidence of this condition, and the fact that, prior to the Claims Settlement Agreement, <sup>5 U.S.C. §552(b)(6)</sup> specifically connected the injury to the beating he sustained in Iraq, the Commission is persuaded that Claimant suffered a re-ruptured ventral hernia as a result of being beaten by Iraqi soldiers while he was held hostage in Kuwait.

(2) *Elevated Diaphragm:* The Commission noted in the Proposed Decision that while the medical records (including from before the 2012 Referral) clearly recorded the elevated diaphragm, they contained no information on causation. The newly submitted records provide further support for the existence of this condition and also contain some evidence of causation: The October 2013 medical note indicates that <sup>5 U.S.C. §552(b)(6)</sup> stated that he injured his right hemidiaphragm as the result of beatings while in Kuwait. He made similar statements again during his medical appointment in March 2014. While these medical records do clearly connect the injured diaphragm to the 1990 assault, they appear to be based entirely on <sup>5 U.S.C. §552(b)(6)</sup> own statements to his doctors, statements that were made several months *after* <sup>5 U.S.C. §552(b)(6)</sup> filed his claim with the Commission.



While such evidence supports the causal connection, we do not view it as *medical* evidence to establish that connection.

There is other evidence that might indicate a connection, but none of it suffices to meet Claimant's burden to establish the causal connection. For one, the earliest of Mr. <sup>5 U.S.C. §552(b)(6)</sup> medical records, the January 1993 radiology report, contains references to the elevated diaphragm. In addition, there is testimonial evidence suggesting a connection: both <sup>5 U.S.C. §552(b)(6)</sup> and her daughter Camille, in their live testimony, indicated numerous times that <sup>5 U.S.C. §552(b)(6)</sup> was having trouble breathing when he returned from Iraq, that he attributed the labored breathing to the diaphragm he allegedly injured from the beating he sustained, and that doctors diagnosed the injured diaphragm within a few weeks after his return. And, as mentioned above, the two non-family member declarants indicated in their sworn statements that <sup>5 U.S.C. §552(b)(6)</sup> appeared to have difficulty breathing when they met him after the incident.

While it does not seem implausible to think difficulty in breathing might be a symptom of an elevated diaphragm, Claimant has not provided any *medical* evidence supporting that connection. Moreover, there is no medical evidence from the alleged diagnosis a few weeks after <sup>5 U.S.C. §552(b)(6)</sup> return to the United States. Finally, as we noted in the Proposed Decision, nothing in the 1993 radiology report indicates any connection with trauma of any kind, let alone <sup>5 U.S.C. §552(b)(6)</sup> time in Kuwait. *See* Proposed Decision, *supra*, at 15. While this is a close question, we conclude that Claimant has not met its burden to prove a causal connection between the assault and Claimant's diaphragm problems.

(3) *Other Injuries:* As discussed above, <sup>5 U.S.C. §552(b)(6)</sup> asserted other physical injuries as well—namely, damaged teeth, an injured tailbone, a broken left pinkie finger, and a scar over his eye. While these injuries were addressed to varying degrees in the live testimony and in the newly submitted declarations, none of the medical records submitted on objection mention any of these injuries, with the exception of his tailbone: in the March 2010 medical report, <sup>5 U.S.C. §552(b)(6)</sup> reported “low back pain,” and noted that “during combat in Korea in 1951 his jeep was hit by a round of mortar[, and he] was thrown out [of] the jeep landing on his tailbone. . . . He report[s] occasional back pain since that time.” Given the complete absence of any medical records discussing these alleged injuries—the one exception being the tailbone injury, which appears to have been caused by an unrelated combat incident nearly four decades before <sup>5 U.S.C. §552(b)(6)</sup> time in Kuwait—the Commission does not have sufficient evidence to make a finding on the nature and severity of these particular injuries, much less what caused them.

\* \* \* \*

Nevertheless, since Claimant has proven that <sup>5 U.S.C. §552(b)(6)</sup> suffered a re-ruptured ventral hernia as the result of a beating by Iraqi soldiers, the Commission is satisfied that the Claimant has proven that <sup>5 U.S.C. §552(b)(6)</sup> was the victim of an “aggravated physical assault” while being held hostage in Kuwait: he suffered physical injuries at the hands of Iraqi soldiers whose attack was “so brutal that it . . . result[ed] in . . . significant damage to some body part or organ”—namely, to <sup>5 U.S.C. §552(b)(6)</sup> abdomen, resulting in the re-rupturing of a ventral hernia.<sup>5</sup> See Claim No. IRQ-I-012,

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<sup>5</sup> Because Claimant has proven a connection between the re-ruptured ventral hernia and the physical assault in Iraq, Claimant’s failure to meet its burden to prove the existence and/or the cause of the displaced diaphragm and other alleged injuries does not undermine our conclusion that <sup>5 U.S.C. §552(b)(6)</sup> suffered an aggravated physical assault and that Claimant is thus entitled to an award of compensation.

*supra*, at 8 (to satisfy the Commission’s definition of an “aggravated physical assault,” the physical assault “must be so brutal that it either is intended to or actually does result in death, permanent disfigurement or significant damage to some body part or organ”). Claimant has therefore demonstrated that <sup>5 U.S.C. §552(b)(6)</sup> suffered a “serious personal injury” that was “knowingly inflicted” by Iraq. Moreover, given the nature of the specific acts committed by Iraq giving rise to <sup>5 U.S.C. §552(b)(6)</sup> injury, the severity of his serious personal injury constitutes a “special circumstance warranting additional compensation.” See Claim No. IRQ-I-003, Decision No. IRQ-I-006 (Proposed Decision), at 11.

#### COMPENSATION

The Commission has previously held in this program that in determining the appropriate level of compensation under the 2012 Referral, the Commission will consider, in addition to the State Department’s recommendation, such factors as the severity of the initial injury or injuries; the number and type of injuries suffered; whether the victim was hospitalized as a result of his or her injuries, and if so, how long (including all relevant periods of hospitalization in the years since the incident); the number and type of any subsequent surgical procedures; the degree of permanent impairment, taking into account any disability ratings, if available; the impact of the injury or injuries on the victim’s daily activities; the nature and extent of any disfigurement to the victim’s outward appearance; whether the victim witnessed the intentional infliction of serious harm on his or her spouse, child or parent, or close friends or colleagues; and the seriousness of the degree of misconduct on the part of Iraq. *See* Claim No. IRQ-I-001, Decision No. IRQ-I-005, at 22 (2014) (Proposed Decision).

Claimant argues that, if the Commission finds its claim to be compensable, it should award Claimant \$1 million, or at least \$750,000,<sup>6</sup> in light of awards made to other claimants in this program. Claimant points in particular to Claim No. IRQ-I-003, *supra*, a claim in which the claimant was subjected to three instances of coercive interrogation and was awarded \$500,000.<sup>7</sup> Claimant argues that, because <sup>5 U.S.C. §552(b)(6)</sup> suffered both psychological and physical injuries, whereas the claimant in Claim No. IRQ-I-003 suffered only psychological harm, <sup>5 U.S.C. §552(b)(6)</sup> estate should receive a higher award. Claimant also points to Claim No. IRQ-I-025, IRQ-I-011 (2014) (Proposed Decision), a claim in which the claimant suffered an aggravated physical assault and a coercive interrogation by Iraqi security forces, and was initially also awarded \$500,000.<sup>8</sup> The Claimant argues that this award constitutes an appropriate “bottom comparator,” but that Claimant should receive a higher award here because <sup>5 U.S.C. §552(b)(6)</sup> injuries were more severe and longer-lasting.

We are not persuaded by Claimant’s arguments. In determining compensation, our task is to determine where on the continuum from zero to \$1.5 million Claimant’s injuries fall, based on the severity of those injuries relative to all other successful claimants in this program, using the factors we have previously articulated, and taking into account the fact that we are making awards in this program in broad categories. Claim No. IRQ-I-026, Decision No. IRQ-I-025, at 7 (2015) (Final Decision). In two other claims in which a claimant suffered an assault on one occasion the Commission has

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<sup>6</sup>At the oral hearing, Claimant increased its request to \$1.25 million.

<sup>7</sup>The claimant in that claim objected to the level of compensation by challenging the Commission’s methodology; however, the Commission reaffirmed its approach in the Final Decision and again held that the claimant was entitled to \$500,000. *See* Claim No. IRQ-I-003, IRQ-I-006 (2014) (Final Decision).

<sup>8</sup> On objection, the Commission awarded the IRQ-I-025 claimant \$1 million, though the Commission did not issue its Final Decision in that claim until after the oral hearing in <sup>5 U.S.C. §552(b)(6)</sup> claim. Claim No. IRQ-I-025, Decision No. IRQ-I-011 (2015) (Final Decision).

awarded \$500,000. *See* Claim No. IRQ-I-010, Decision No. IRQ-I-022 (2015) (Final Decision); Claim No. IRQ-I-003, *supra*. The Commission has awarded more than that only where a victim was subjected to multiple brutal physical and psychological assaults, *see, e.g.*, Claim No. IRQ-I-001, Decision No. IRQ-I-005 (2015), or, if a single assault, the assault was of a uniquely harrowing type, *see, e.g.*, Claim No. IRQ-I-026, Decision No. IRQ-I-025 (2015); Claim No. IRQ-I-023, Decision No. IRQ-I-021 (2015); Claim No. IRQ-I-014, Decision No. IRQ-I-027 (2015).

Claimant's arguments are premised on the notion that we should determine compensation based on a fine-grained comparative assessment of each individual claimant's particular injuries. Such an analysis, however, would be entirely unworkable, and it is this concern that led us to make awards in this program in broad categories. *See* Claim No. IRQ-I-009, Decision No. IRQ-I-004 (2015) (Final Decision). Indeed, with respect to Claimant's comparison with claimant in IRQ-I-003, we have specifically rejected Claimant's argument that psychological and physical injuries necessitate a greater award than psychological injury alone. *See* Claim No. IRQ-I-026, *supra*, at 12-13; Claim No. IRQ-I-023, Decision No. IRQ-I-021, at 21-22 (Final Decision) (2015). Moreover, not all of the relevant factors favor Claimant receiving a higher award than the IRQ-I-003 claimant. One of the factors the Commission considers is the number of injuries suffered, *see* Claim No. IRQ-I-001 (Proposed Decision), *supra*, at 22, and the claimant in Claim No. IRQ-I-003 was subjected to *three separate* instances of coercive interrogation, whereas <sup>5</sup> U.S.C. §552(b)(6) only suffered a single instance of aggravated physical assault.

We also reject Claimant's attempt to analogize this claim to Claim No. IRQ-I-025. There, the claimant suffered a uniquely harrowing experience, one that included both significant physical assaults and a coercive interrogation. More importantly, the physical assaults were integrated into a long and brutal interrogation which was, in both degree and kind, far worse than that inflicted on <sup>5 U.S.C. §552(b)(6)</sup> . When the Commission awarded the IRQ-I-025 claimant \$1 million, it did so in large part because he had suffered "six hours of brutal interrogations and aggravated physical assaults that led to both long-term mental injuries and physical injuries, including a fractured nose and permanent scars above one eye and on his scalp." Claim No. IRQ-I-025, Decision No. IRQ-I-011, at 11 (2015) (Final Decision).

Claimant here does not allege nearly as lengthy or brutal a period of questioning and/or physical assault, and there is no evidence that the totality of <sup>5 U.S.C. §552(b)(6)</sup> long-term injuries were significantly greater than those of the claimant in IRQ-I-025. While both claims involve physical assaults, the far more brutal nature of the Iraqi actions in Claim No. IRQ-I-025 and the length of that claimant's ordeal warrant a higher award than that to which <sup>5 U.S.C. §552(b)(6)</sup> estate is entitled here.

In sum, in light of all other claims in this program, we conclude that Claimant is entitled to an award of \$500,000.00, and that this amount (which is in addition to the amount <sup>5 U.S.C. §552(b)(6)</sup> already received from the Department of State for having been held hostage) constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

The Commission enters the following award, which will be certified to the Secretary of the Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-27.

AWARD

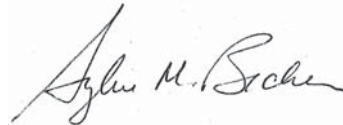
Claimant is entitled to an award in the amount of Five Hundred Thousand Dollars (\$500,000.00).

Dated at Washington, DC, October 30, 2015  
and entered as the Final Decision  
of the Commission.



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Anuj C. Desai, Commissioner



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Sylvia M. Becker, Commissioner

**FOREIGN CLAIMS SETTLEMENT COMMISSION  
OF THE UNITED STATES  
UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	Claim No. IRQ-I-021
	}	
	}	Decision No. IRQ-I-020
Against the Republic of Iraq	}	

Counsel for Claimant:

Daniel Wolf, Esq.  
Law Offices of Daniel Wolf

PROPOSED DECISION

Claimant brings this claim against the Republic of Iraq (“Iraq”) based on injuries he suffered while being held hostage in Kuwait and Iraq between August and December 1990. The United States Department of State has already provided him compensation for his experience as a hostage. He now seeks additional compensation based on his allegation that “he was severely beaten by Iraqi soldiers[,]” and that, as a result, he suffered serious physical and emotional injuries, some of which persist to this day. Although we are sympathetic to all that Claimant endured as a result of his hostage experience, the evidence he has submitted is insufficient to establish that Iraqi soldiers did in fact severely beat him. On the present record, he is thus not entitled to additional compensation beyond that which the State Department has already provided him. Therefore, the claim is denied.



## BACKGROUND AND BASIS OF CLAIM

Claimant alleges that he was working in Kuwait when Iraq attacked the country in August 1990. He claims that he was detained for four months, first for six weeks in Kuwait while hiding in various residences, and then for the rest of the time in Iraq, primarily in what Claimant describes as a small, dirty “worker hut” in a “biological and chemical weapons complex” near Samarra. He claims that, when he was initially seized by Iraqi forces, he was beaten in the face and in the abdomen, resulting in numerous physical and emotional injuries. Claimant’s experiences and injuries are detailed in the Merits section below.

Claimant sued Iraq in federal court in 2001 for, among other things, hostage-taking. That case was pending when, in September 2010, the United States and Iraq concluded an *en bloc* (lump-sum) settlement agreement. *See Claims Settlement Agreement Between the Government of the United States of America and the Government of the Republic of Iraq*, Sept. 2, 2010, T.I.A.S. No. 11-522 (“Claims Settlement Agreement” or “Agreement”). The Agreement, which came into force in May 2011, covered a number of personal injury claims of U.S. nationals arising from acts of the former Iraqi regime occurring prior to October 7, 2004. Exercising its authority to distribute money from the settlement funds, the State Department provided compensation to numerous individuals whose claims were covered by the Agreement, including some, like Claimant, whom Iraq had taken hostage or unlawfully detained following Iraq’s 1990 invasion of Kuwait. According to the State Department, this compensation “encompassed physical, mental, and emotional injuries generally associated with” being

held hostage or subject to unlawful detention.<sup>1</sup> Claimant states that the amount of the payment he received was based on a formula, consistently applied to all of the hostages, of \$150,000 plus \$5,000 per day of detention (\$765,000 total).

The State Department's Legal Adviser subsequently requested that the Commission commence a claims program for some of the hostages that it had already compensated. More specifically, the State Department authorized the Commission to award additional compensation to hostages who suffered a "serious personal injury," when that injury was "knowingly inflicted ... by Iraq" and the severity of that injury is a "special circumstance warranting additional compensation." The State Department made its request in a letter dated November 14, 2012 pursuant to its discretionary statutory authority. *See* 22 U.S.C. § 1623(a)(1)(C) (2012) (granting the Commission jurisdiction to "receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or 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"). The letter sets forth the category of claims as follows:

claims of U.S. nationals for compensation for serious personal injuries knowingly inflicted upon them by Iraq<sup>1</sup> in addition to amounts already recovered under the Claims Settlement Agreement for claims of hostage-taking<sup>2</sup> provided that (1) the claimant has already received compensation under the Claims Settlement Agreement from the Department of State<sup>3</sup> for his or her claim of hostage-taking, and such compensation did not include economic loss based on a judgment against Iraq, and (2) the Commission determines that the severity of the serious personal injury suffered is a special circumstance warranting additional compensation. For the purposes of this referral, "serious personal injury" may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault.

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<sup>1</sup> A group of hostages, not including Claimant, received compensation for economic loss. The hostages that received compensation for economic loss are not before the Commission in this program.

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<sup>1</sup> For purposes of this referral, “Iraq” shall mean the Republic of Iraq, the Government of the Republic of Iraq, any agency or instrumentality of the Republic of Iraq, and any official, employee or agent of the Republic of Iraq acting within the scope of his or her office, employment or agency.

<sup>2</sup> Hostage-taking, in this instance, would include unlawful detention by Iraq that resulted in an inability to leave Iraq or Kuwait after Iraq invaded Kuwait on August 2, 1990.

<sup>3</sup> The payment already received by the claimant under the Claims Settlement Agreement compensated the claimant for his or her experience for the entire duration of the period in which the claimant was held hostage or was subject to unlawful detention and encompassed physical, mental, and emotional injuries generally associated with such captivity or detention.

*See Letter dated November 14, 2012, from the Honorable Harold Hongju Koh, Legal Adviser, Department of State, to the Honorable Timothy J. Feighery, Chairman, Foreign Claims Settlement Commission (“2012 Referral” or “Referral”) at ¶ 3 & nn.1-3 (footnotes in original). The Commission then commenced the Iraq Claims Program to decide claims under the 2012 Referral. Commencement of Iraq Claims Adjudication Program, 78 Fed. Reg. 18,365 (Mar. 26, 2013).*

Claimant submitted a timely Statement of Claim under the 2012 Referral, along with exhibits supporting the elements of his claim, including evidence of his U.S. nationality, his receipt of compensation from the Department of State for his claim of hostage-taking, and his alleged personal injuries.

## DISCUSSION

### Jurisdiction

The 2012 Referral’s statement of the category of claims defines the Commission’s jurisdiction. *See* 22 U.S.C. § 1623(a)(1)(C). Thus, the Commission has jurisdiction to entertain only claims of individuals who (1) are U.S. nationals and (2) “already received compensation under the Claims Settlement Agreement from the Department of State<sup>1</sup> for

[their] claim of hostage-taking,” where “such compensation did not include economic loss based on a judgment against Iraq[.]” 2012 Referral, *supra*, ¶ 3. Claimant satisfies both requirements, and the Commission thus has jurisdiction over this claim.

*Nationality*

This claims program is limited to “claims of U.S. nationals.” Here, that means that a claimant must have been a national of the United States at the time the claim arose and continuously thereafter until May 22, 2011, the date the Agreement entered into force. Claim No. IRQ-I-005, Decision No. IRQ-I-001, at 5-6 (2014) (Proposed Decision). Claimant satisfies the nationality requirement. He has provided a copy of two U.S. passports: one from the time of the hostage-taking (valid from June 1984 to May 1994) and his current one (valid from February 2013 to February 2023).

*Compensation from the Department of State*

The Claimant also satisfies the second jurisdictional requirement. He has submitted a copy of a Release he signed on August 8, 2011, indicating his agreement to accept a given amount from the Department of State in settlement of his claim against Iraq. He has also submitted a copy of an email from the Department of State indicating that this sum was sent for payment on September 9, 2011. Claimant further stated under oath in his Statement of Claim, and the Commission has confirmed to its satisfaction, that this compensation did not include economic loss based on a judgment against Iraq.

In summary therefore, the Commission has jurisdiction over this claim under the 2012 Referral.

### Merits

The 2012 Referral requires a claimant to satisfy three conditions to succeed on the merits of his or her claim. Claim No. IRQ-I-005, Decision No. IRQ-I-001 (2014) at 7-8 (Proposed Decision). First, the claimant must have suffered a “serious personal injury,” which may be “physical, mental, or emotional.” In order to satisfy this standard, the injury must have arisen from one of the four acts specifically mentioned in the Referral—i.e., sexual assault, coercive interrogation, mock execution, or aggravated physical assault—or from some other discrete act, separate from the hostage experience itself, that is comparable in seriousness to one of those four acts—that is, an act of a similar type or that rises to a similar level of brutality or cruelty as the four enumerated acts. *Id.* at 7.

The second requirement is that Iraq must have “knowingly inflicted” the injury. Thus, even where a claimant suffered a serious personal injury that satisfies the other requirements in the 2012 Referral, the claimant must prove that Iraq knowingly inflicted the injury.<sup>2</sup>

The third requirement is that the Commission determine that the severity of the serious personal injury suffered constitutes a “special circumstance warranting additional compensation.” In making this determination, the Commission will consider the nature and extent of the injury itself (including the specific acts committed by Iraq giving rise to the injury), the extent to which the injury substantially limits one or more of the claimant’s major life activities (both in the immediate aftermath of the injury and on a long-term basis), and/or the extent to which there is permanent scarring or disfigurement that resulted from the injury.

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<sup>2</sup> “Iraq” is defined in footnote 1 of the Referral.

Here, Claimant draws on the reference to “aggravated physical assault” in the Referral. He alleges that, in September 1990, he was arrested and brutally beaten by Iraqi soldiers, who “struck a hard blow to [his] head, knocking him off his feet and onto his backside[,]” and “kicked [him] savagely at the base of his ribs[,]” resulting in physical, mental, and emotional injuries whose effects linger to the present day. To prove these allegations, Claimant has submitted, *inter alia*, two of his own sworn statements describing his ordeal and his alleged personal injuries (one dated March 2004 from his federal court litigation and the other prepared specifically for this Commission in December 2013); sworn statements from his wife and two daughters describing his condition upon his return to the United States and his recounting to them of what had occurred in Iraq (all three of which were prepared in 2013); medical records; a copy of the visa pages from Claimant’s expired U.S. passport showing his entry into Kuwait in 1989 and his transit through Jordan on December 2, 1990, followed by his entry into the U.S. on December 4, 1990; a 1992 letter from the Department of State confirming Claimant’s hostage status between August 2, 1990 and December 2, 1990; news articles published shortly after Claimant’s release; and a photograph allegedly depicting Claimant with other released hostages shortly before their departure from Iraq. As explained in more detail below, Claimant’s evidence is not sufficient to prove his allegation that Iraqi soldiers beat him, and Claimant has thus failed to carry his burden of proof to establish that he suffered a “serious personal injury” within the meaning of the 2012 Referral.

Hiding in Kuwait: Claimant was living with his wife in Kuwait when Iraq invaded on August 2, 1990. The morning of the invasion, a colleague advised him to prepare to evacuate and, on the advice of the U.S. Embassy, he and his wife

“sequestered” themselves in their apartment. According to Claimant, “[w]ithin hours, Iraqi troops were swarming all over [their] neighborhood.” Claimant states that he and his wife remained in their apartment for the first three weeks of the invasion as the violence and chaos unfolded around them. After learning that Saddam Hussein had ordered that all American citizens be rounded up, Claimant and his wife no longer felt safe at their apartment. So, on August 21, 1990, they moved to a villa belonging to a Kuwaiti colleague’s relatives. However, after hearing that Iraq had made the harboring of Americans punishable by death, his colleague asked them to leave after just one day. They then moved to a safe house where an American and his Yugoslav girlfriend were already staying.

Capture by Iraqi Forces: Claimant states that he and his wife remained in the safe house for the next three weeks, “liv[ing] in a state of constant anxiety and fear . . . .” In early September, they learned that Iraq would allow American women and children to leave, and Claimant’s wife reluctantly left the safe house. She then boarded an evacuation flight on September 12, 1990. Two days later, on September 14, 1990, Claimant alleges that a dozen Iraqi troops kicked in the door to the safe house and entered, “pointing their weapons at [Claimant and the others] and shouting orders out in Arabic.” Claimant states that the Iraqis demanded their passports, and when they saw that two of them were Americans, they “instructed [them] to pack [their] things.” He alleges that, “[b]ecause [he] was not moving fast enough . . . , one of the soldiers struck a hard blow to the side of [Claimant’s] head near [his] ear with his rifle butt, knocking [Claimant] off his feet and onto [his] backside.” Claimant further alleges that, “[a]s [he] lay groaning on the floor, [the soldier] kicked [him] savagely at the base of [his] ribs.

Dizzy and doubled over with pain, [he] struggled to [his] feet, as the soldiers laughed and taunted [him].”

Claimant alleges that the Iraqi soldiers placed him in a vehicle and drove him and the other American around Kuwait City; eventually, they “drove [them] into a car park and ordered [them] to get out and stand against a wall.” He adds that when “a truckload of soldiers pulled up just moments later, [he] went numb with fear, thinking that they were a firing squad and that [he and his companion] were about to be executed.” However, they were then placed back in the car, taken to a local police station, and interrogated. According to Claimant, his interrogators told him he had been mistaken for a CIA agent. Despite apparently clearing up the confusion, his captors nonetheless took him to a “hot, fetid jail cell” where he spent the night and had to listen to “the intermittent screams of [his] fellow prisoners . . . .”

Detention in Iraq: Claimant states that, the following morning, he was taken to a hotel, where he was permitted to contact the U.S. Embassy; after being held there for three days, he was then driven by bus to Baghdad with a group of other hostages and taken to the Mansour Melia Hotel, where he was detained for an additional three days. On the evening of September 19, 1990, Claimant was placed on another bus with several other hostages and driven north for several hours. According to Claimant, they arrived the following morning at “a huge chemical and biological weapons complex sprawled over several square miles of land near Samarra.” Claimant states that he was detained there for the next ten weeks in “dilapidated worker huts” that were infested with rats and insects. In addition, he states that they were only allowed outside the huts for about one hour each day for exercise, that they “had no protection from the blistering desert heat[.]”



and that they were unable to clean themselves or their clothes. Further, Claimant states that their drinking water “had a foul taste and was of questionable purity[,]” and that the kitchen was highly unsanitary. According to Claimant, “it was no wonder that [they] all got sick.” Indeed, Claimant alleges that he eventually developed chronic diarrhea and was taken to a Baghdad hospital, where he received antibiotics. Following this episode, Claimant states that his appetite waned and that he lost approximately 20 pounds.

Finally, on December 2, 1990, Claimant was returned to Baghdad and allowed to board a plane to Jordan. It appears that Iraq chose to release him at that time because of a medical condition, apparently an ulcer. He then reunited with his family in the United States two days later.

Injuries Alleged: Claimant alleges both physical and mental injuries stemming from his alleged physical assault and his captivity in Iraq and Kuwait. As an immediate result of the alleged beating, he states that

[he] re-injured a ruptured hernia that had been surgically repaired just prior to [his] move to Kuwait, and also sustained a dislocated denture, a bleeding gash over [his] eye that left [him] with a nasty scar, a bruised tailbone that has led to a disintegrated disk and given [him] pain ever since, a displaced diaphragm that has permanently affected [his] breathing, and the loss of hearing in [his] right ear.

He states that he “continued to be bothered by [his] ruptured hernia and back pain as a result of the beating[.]” and that he “sustained two more hernias from lifting objects while in detention at the complex.” In addition, Claimant alleges that he “encountered frequent difficulties with breathing due to [his] displaced diaphragm . . . and suffered vertigo due to the damage to [his] ear.” Claimant’s wife states that, upon his release, his ruptured hernias “were bulging outside his stomach and causing him to lose a lot of blood.” Further, she alleges that Claimant’s “left pinky finger was broken during the beating and

was never able to heal properly.” The sworn statements of Claimant’s two daughters also reference the injury to his finger; for example, one of them states that when she accompanied her mother and sister to pick Claimant up at the airport, she “was holding [Claimant’s] hand and could see that his left hand pinky was badly broken.” Moreover, Claimant “looked horrible; gaunt, drawn and nervous.”

Claimant states that, after returning to the United States, he “was hospitalized for several days, while [he] received treatment for [his] three hernias and internal bleeding.” He adds that, “[w]hile those conditions eventually got better, [he has] continued to this day to suffer lower back pain that began with the injury that [he] suffered to [his] tailbone when [he] was beaten at the time of [his] capture.” In addition, Claimant’s wife states that “a few of [Claimant’s] teeth were knocked loose as a result of the blows to his head[,]” and Claimant alleges that the beating left him with “continuing dental damage.” Claimant’s wife further states that Claimant consulted with dentists to discuss ways to fix the damage, but because they could not afford the necessary dental work, the problem went untreated. As a result, she alleges, “several of [Claimant’s] front teeth fell out,” which they could only afford to treat after the State Department provided him money for his hostage claim in 2012.

Claimant also alleges “severe psychological consequences that have persisted to this day.” He states that “[i]n the months following [his] release, [he] was plagued by intense anxiety attacks and had flashbacks of being captured and beaten.” He also suffered, and continues to suffer, from loss of appetite, sexual dysfunction, depression, difficulty with concentration, and short-term memory problems. Further, he alleges that he “became and remain[s] chronically lethargic[,]” has “an exaggerated startle response

to loud noises and grind[s his] teeth . . . .” Claimant’s wife makes similar allegations in her own sworn statement, and his daughters likewise maintain that he became withdrawn and morose. Because of these various conditions, Claimant contends, he “was unable to resume [his] career after [his] release.” He notes that he has “sought psychiatric counseling from three different therapists, all of whom have diagnosed [him] with post-traumatic stress disorder.”

Analysis: Claimant bears the burden to prove his allegations. *See* 45 C.F.R. § 509.5(b) (2013) (“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.”); *see also* Claim No. LIB-II-150, Decision No. LIB-II-115 (2012) (denying claim because claimant failed to establish either the extent of the injury actually suffered as a result of the attack or that the severity of the injury was more than superficial). As explained further below, the evidence Claimant submitted fails to meet that burden.

To establish that he suffered a “serious personal injury” within the meaning of the 2012 Referral, Claimant must show that his injuries arose from a discrete act, distinct from the hostage-taking itself, of cruelty or brutality comparable to “sexual assault, coercive interrogation, mock execution, or aggravated physical assault.” *See supra* at 6. Claimant argues that the alleged physical assault that occurred when he was arrested is the relevant discrete act. However, Claimant’s allegations about the assault rest almost entirely on his own statements and those of his wife and daughters, who themselves acquired the information through Claimant only upon his return to the United States three months later.

Given that the only direct evidence of physical assault comes solely from Claimant's sworn statements and those of his family members, we begin our analysis with an evaluation of those statements. In circumstances where, as here, a claim relies heavily on written declarations, certain factors must be considered in determining how much weight to place on them. *See generally* Claim No. IRQ-I-010, Decision No. IRQ-I-022 (Proposed Decision) (2014). These may include, for example, the length of time between the incident and the statement, *see Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 137 (Sept. 2, 1998), and whether the declarant is a party interested in the outcome of the proceedings or has a special relationship with the claimant, *see* Cheng, *supra*, at 312, 317. Sworn statements will carry much greater weight when there has been an opportunity for cross-examination. *See Akayesu*, Case No. ICT-96-4-T, ¶ 137; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 314 (Cambridge University Press 2006) (1953). In such cases, live, compelling testimony by the claimant can do much to support a claim. *See, e.g.*, Claim No. LIB-I-007, Decision No. LIB-I-024 (2011) (Final Decision). The clarity and detail of the declarations should also be considered, as should the existence of corroborating declarations and other evidence. *See Partial Award: Prisoners of War—Eritrea's Claim* 17, 26 R.I.A.A. 23, 42 (Eri.-Eth. Cl. Comm'n 2003).

The various declarations submitted by Claimant concerning his alleged physical assault are, in most respects, consistent. One notable exception, however, is the question of where the alleged physical assault occurred. In Claimant's wife's declaration, she expresses surprise that Claimant's 2004 declaration stated that the alleged assault occurred at the safe house where he was first apprehended. His wife states that Claimant

had always told her that it had occurred at a local police station after his seizure. In his 2013 supplemental declaration, Claimant confirms this, noting that he had been in error in the earlier declaration. He attributes this confusion to memory problems he experienced after his release; his wife confirms these problems, noting that Claimant's memory "has gotten progressively worse[,] and he has frequently gotten dates, names, places and events confused in his mind."

The Commission recognizes that " '[a]llowance must be made for infirmities of memory[.]' " Cheng, *supra*, at 316 (quoting *Studer (U.S.) v. Gr. Brit.*, 6 R. Int'l Arb. Awards 149, 152 (Gr. Brit-U.S. Arbitral Trib. 1925)). This inconsistency is therefore not necessarily dispositive to this claim. It does, however, heighten the importance of other corroborative evidence. This is especially true given that all of the declarations referencing the alleged assault—with the exception of Claimant's 2004 declaration that contains the alleged error—were sworn in 2013. It is also notable that the narrative of the assault in each of these declarations comes from a single source: Claimant himself. Moreover, all of the declarants are members of Claimant's immediate family. Under these circumstances, the Commission must look to other evidence to support a finding of serious personal injury arising from the alleged physical assault.

Evidence of physical injuries can be evidence of an assault, and Claimant has submitted medical records to show that he has suffered various physical injuries. Claimant alleges the assault led to injuries in six different parts of his body: (1) his diaphragm; (2) the location of a previous hernia; (3) his tailbone; (4) his teeth; (5) his left pinky; and (6) his head, including a spot over his eye where he received a "nasty scar" and hearing loss in his right ear. For each of these alleged injuries, however, there is

either no medical evidence to establish that the injury occurred or, if there is, no medical evidence that it was caused by an assault.

(1) Diaphragm: The only medical records prior to the 2012 Referral that reference physical injuries are those that evidence injuries to Claimant's diaphragm. The only pre-2012 medical records Claimant has submitted are three one-page documents, one from 1993 and two from 2002. Two of them reference the diaphragm. The first is a radiology report dated January 6, 1993. It does clearly indicate that Claimant has had a diaphragm abnormality, but it contains nothing that would indicate a connection to a physical assault. The report refers to "marked elevation of the right hemi-diaphragm[.]" but makes no reference to any physical trauma. It states only that it is "[u]ncertain whether [the elevation is] the result of phrenic nerve paralysis or eventration of the right hemi-diaphragm." The second medical report, from a 2002 physical examination, makes reference to some "previous x-rays," reiterating the finding of an "elevated diaphragm," and states "no breath sounds in the right lower [lung]." However, there is no mention in the report of any possible cause for this condition, let alone an indication that it is the result of physical trauma.<sup>3</sup> Claimant has also submitted the results of a recent (2013) Veterans Administration ("VA") chest x-ray; this report also makes reference to "[s]table elevation of the right hemidiaphragm[.]" but as with the earlier report, it says nothing about the possible cause of this condition. Certain other abnormalities are mentioned, but none of these are explicitly attributed to physical trauma either. The lack of evidence of a causal nexus in these medical records makes them insufficient to show that the physical

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<sup>3</sup> There is a hand-written notation right next to the finding of an elevated diaphragm. It states: "Due to Beating when taken from Kuwait." There is no indication, however, as to who made this notation. Without knowing the source of the notation (whether it was made by, for example, a medical professional or by Claimant himself or his wife or counsel) and on what basis it was made, the Commission cannot consider it a reliable indication of the cause of Claimant's elevated diaphragm.

assault said to have occurred in 1990 led to the elevated diaphragm. The records are thus also insufficient to show that such an assault occurred.

(2) Hernia: Claimant alleges that the Iraqi soldiers caused him to reinjure a pre-existing ruptured hernia, but Claimant offers no medical or other records, beyond the declarations, to support this allegation. Claimant indicates that he was hospitalized for several days upon his release to treat his hernias, but he has not provided any records of this hospitalization.<sup>4</sup> Nor has Claimant provided any recent records that provide evidence of this condition, let alone its cause or severity.

(3) Tailbone: Claimant alleges that he was injured in his tailbone and that he continues to suffer to this day from lower back pain from this injury. But, again, he has submitted no evidence other than his 2004 Declaration to support these allegations.

(4) Teeth: Claimant has submitted recent (2012) dental x-rays and photographs of his teeth, apparently to substantiate the allegation that some of his teeth were knocked out during the physical assault or that he suffered other damage to his teeth. These records do establish that Claimant suffers from significant dental problems; however, they do not establish the cause of these problems. Indeed, Claimant mentions in his 2004 declaration that he “sustained a dislocated denture” as a result of the alleged beating. The fact that Claimant had dentures at the time suggests that he may have had dental problems even before the alleged incident. This makes it even more difficult to attribute Claimant’s dental problems to a physical assault said to have occurred in 1990. Thus, without further evidence, the Commission is unable to conclude that Claimant’s dental problems were the result of a physical assault during his captivity in Iraq.

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<sup>4</sup> Records from a hospitalization soon after Claimant’s release might also contain evidence of other injuries he may have sustained during the alleged beating.

(5) Left pinky finger: Claimant's wife and daughter mention in their declarations that Claimant's "left pinky finger" was visibly broken, but again Claimant has submitted no medical records or photographs to verify this allegation. Claimant's wife indicates that this fracture was never able to heal properly, so it would seem possible to provide recent medical evidence of an old fracture; yet Claimant has not submitted any such evidence.

(6) Head: Claimant also alleges that he got a "nasty scar" over his eye when he was beaten by the Iraqi soldiers, but he has not submitted any photographs of this scar (contemporaneous or more recent), and it does not appear in any of the medical records. Nor can it be observed in any of the photographs that Claimant has submitted of himself (including his current passport photograph).<sup>5</sup> Finally, Claimant also alleges that the blow to his head resulted in loss of hearing to his right ear, but he has provided no records of this injury either. In the absence of such evidence, the Commission cannot conclude that any of these conditions, if indeed they are present, were the result of the alleged beating.

With regard to his mental and emotional injuries, Claimant has submitted one piece of medical evidence, the second of the two one-page reports from 2002. That record, a report from a follow-up visit for Claimant's hypertension and dyslipidemia, contains a reference to Claimant suffering from post-traumatic stress disorder ("PTSD"); however, there is no indication of the cause. Thus, it is not clear whether the PTSD is connected in any way with the alleged physical assault, or was due to the hostage experience itself or even perhaps some other cause. Claimant notes that he sought psychiatric counseling with three different providers, all of whom have diagnosed him

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<sup>5</sup> In the 1990 group photograph with some other hostages, one of Claimant's eyelids does appear slightly closed in such a way that he might be injured. On the other hand, he might also just be squinting with one eye.



with PTSD, but he has not provided any records from this counseling. Consequently, while there is some evidence that Claimant suffers from PTSD, it is not clear what caused the condition.

Other evidence in the record, while supporting Claimant's assertions about his captivity generally, raises further questions about his allegations of having been seriously beaten. For example, Claimant has submitted two contemporaneous newspaper articles published shortly after his release. Both verify his hostage experience but mention no medical problems other than the ulcer condition that apparently was the basis for his release. There is no indication that Claimant was beaten. Moreover, according to one of the articles, a friend who spoke with Claimant over the phone just after his release, when he was still in Amman, Jordan, said that Claimant "sounded good; he said he felt good[.]" The friend also relayed that Claimant "was reasonably well treated . . . ." Significantly, the friend also noted that Claimant "'sounded very upbeat,'" and that he "thought about remaining in England to visit cousins.<sup>6</sup> 'That's when [the friend] knew . . . [Claimant] hadn't suffered any serious consequences.'"

Finally, Claimant has not submitted any declarations, recent or otherwise, from any of the non-family members who were present during his ordeal and/or could verify his assertion that he suffered a brutal beating by Iraqi soldiers. He has not submitted a declaration from either of his two companions in the safe house, nor has he submitted any declarations from any of the other hostages who were with him at the Kuwaiti hotel in the days immediately after the alleged assault, the Mansour Melia Hotel in Baghdad in the days after that, or the chemical weapons complex near Samarra, any of whom might be

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<sup>6</sup> Claimant's passport has no indication of any stay in the United Kingdom, and it indicates that he returned to the U.S. two days after transiting through Jordan. It thus seems likely that he did not in fact visit his cousins in England, and that if he did, it wasn't for long.

able to say something about the nature and seriousness of his injuries. While the absence of these documents is not dispositive, such documentation could have provided much-needed support for Claimant's allegation that he was seriously beaten by Iraqi soldiers upon his capture in Kuwait and suffered permanent or semi-permanent injuries.

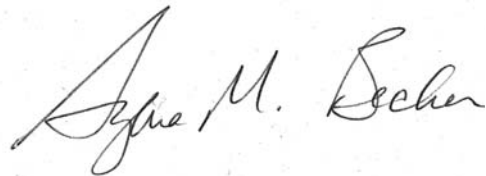
In sum, on the present record, Claimant has not provided evidence sufficient to establish that he suffered injuries from an aggravated physical assault, or any other discrete act comparable in brutality or cruelty, during his captivity in Iraq. Accordingly, the Commission concludes that Claimant has not satisfied his burden of proving that he suffered a "serious personal injury" within the meaning of the 2012 Referral. While the Commission sympathizes with all that Claimant has experienced both during and since his captivity in Iraq, in the absence of further evidence substantiating his claim, the claim must be and is hereby denied.

Dated at Washington, DC, July 24, 2014  
and entered as the Proposed Decision  
of the Commission.



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Anuj C. Desai, Commissioner



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Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days of delivery 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 delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2013).