

**TURKISH  
AMERICAN** **TALDF**  
**LEGAL DEFENSE FUND**

**STATEMENT OF THE TURKISH AMERICAN LEGAL DEFENSE FUND**

REGARDING: SR 31

“RELATIVE TO GENOCIDE ORAL HISTORY”

BEFORE THE CALIFORNIA SENATE  
COMMITTEE ON RULES

DECEMBER 2009

**TURKISH AMERICAN LEGAL DEFENSE FUND**  
1025 Connecticut Avenue, N.W., Suite 1000  
Washington, D.C. 20036

Dear Mr. Chairman and Members of the Committee:

The Turkish American Legal Defense Fund (TALDF) welcomes the opportunity to submit its views on Senate Resolution 31, a resolution relative to genocide oral history. TALDF opposes the resolution as currently written. Its official endorsement of the genocide thesis in interpreting the Ottoman Armenian tragedy during World War I unconstitutionally intrudes on the exclusive foreign policy powers of the federal government. Moreover, SR 31 does not require balance in the presentation of oral history featuring contrasting but educationally suitable and credentialed viewpoints. That should be required because of the dispute among experts over the Armenian narrative and new archival discoveries.. The resolution recommends that California public schools include an oral history of genocide with no quality controls to insure the truthfulness of the presentations addressing the historical event at issue.

TALDF would support SR 31 if it was amended to delete any reference to an Armenian genocide but instead recommended instruction about the Ottoman-Armenian historical controversy through oral presentations by adherents of both the genocide thesis and contra-genocide thesis.

- I. Continuing Turkish-Armenian Reconciliation Efforts are Part of U.S. Foreign Policy, Which is the Exclusive Constitutional Responsibility of the President and Congress.

As drafted, at present, SR 31 flagrantly violates the exclusive foreign affairs powers of Congress and the President. The resolution establishes a competing and

contradictory foreign policy for the State of California to the President's foreign policy towards Turkey, to which Congress has acquiesced.

The United States government sports a unitary foreign policy as mandated by the Constitution. States may not sabotage or compromise national policy. The framers of the Constitution recognized that the peoples of the several states must sink or swim together, and that in the long run security and national interests lie in a unified voice, not in a Tower of Babel.

The intent of SR 31 to create a foreign policy for California is constitutionally illicit. Alexander Hamilton, in *Federalist 80*, explained, “[T]he peace of the WHOLE ought not to be left at the disposal of a PART.” James Madison added in *Federalist 42*: “If we are to be one nation in any respect, it clearly ought to be in respect of other nations.” The United States Supreme Court emphasized in *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) that, “[o]ur system of government is such that the interest of cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”

The recent decision of the United States Court of Appeals for the Ninth Circuit in *Movsesian v. Victoria Versicherung AG* (August 20, 2009) expounding the doctrine of federal preemption unequivocally would render legislation like SR 31 inappropriate, and if passed in its present form, unconstitutional.

At issue in the *Movsesian* case was a California statute that enlarged the statute of limitations for claims arising from insurance policies that were held by

victims of an assumed Armenian genocide. The companion legislative findings accompanying the statute declared: “The Legislature recognizes that during the period from 1915 to 1923, many persons of Armenian ancestry residing in the historic Armenian homeland then situated in the Ottoman Empire were victims of massacre, torture, starvation, death marches, and exile. This period is known as the Armenian Genocide.”

The Court of Appeals held the statute was preempted by the exclusive power over foreign affairs constitutionally entrusted to the President and Congress. The Court reasoned that the Executive Branch, through executive agreements, letters, and congressional testimony, has fashioned a foreign policy prohibiting legislative or other official recognition of the Armenian genocide allegation. Under the United States Supreme Court’s precedent established in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), which also invalidated a California statute, the foreign policy of the United States articulated by the President alone carries the same preemptive force against a conflicting State statute or measure as do congressional statutes or treaties.

The Court explained that presidential foreign policy prohibits legislative recognition of an “Armenian Genocide.” Both Presidents William Jefferson Clinton and George W. Bush (and now followed by President Barack Obama) took specific action, whether privately or publicly, to defeat congressional resolutions that would have affirmed the Armenian narrative of World War I. Their centerpiece is a declaration that these controversial and tragic events constituted the crime of

genocide as defined in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. President Clinton worried about the negative impact of the resolution on relations between Armenia and Turkey; and, United States' interests in then containing Saddam Hussein, attaining peace and stability in the Middle East and Central Asia, stabilizing the Balkans, and developing new sources of energy. President Bush also opposed such a resolution because it could confound amicable relations between Armenia and Turkey; and, could jeopardize Turkey's assistance to the United States in the Iraq and Afghan wars and in defeating international terrorism.

The Court of Appeals added that the President's foreign policy need not be enshrined in executive agreements in order to have preemptive force. If the policy emerges from a constitutional assertion of presidential powers enumerated in Article II, then preemption follows. The President's primacy in foreign affairs over Congress, affirmed in such cases as *Medellin v. Texas*, 128 S.Ct. 1346 (2008), is rooted in the Constitution. And the President's policy against legislative enactments that endorse the Armenian genocide thesis received additional legitimacy when Congress repeatedly acquiesced when confronted with a presidential challenge to Armenian resolutions. The Court concluded:

“[T]here is an express federal policy prohibiting legislative recognition of an ‘Armenian Genocide,’ as embodied in the previously mentioned statements and letters of the President and other high-ranking Executive Branch officials. This policy is a valid exercise of the President’s Article II powers. In light of this, and in light of Congress’s deference to the Executive Branch on this matter, the policy is entitled to preemptive weight.”

The California statute contradicted the President's foreign policy by endorsing the Armenian genocide narrative and threatening the entire nation with adverse repercussions from Turkey. The statute was thus void under the federal preemption doctrine.

The Court of Appeals amplified:

“The federal government has made a conscious decision not to apply the politically charged label of ‘genocide’ to the deaths of these Armenians during World War I. Whether or not California agrees with this decision, it may not contradict it. When it comes to dealings with foreign nations, ‘state lines disappear.’ California may not assert a ‘distinct juristic personality.’ [citations omitted].

Serious injuries might be suffered by the United States if the California statute were sustained. The President must be permitted to speak for the nation with one voice in dealing with foreign governments if the United States foreign policy is to be effective.

Finally, the California statute at issue in *Movsesian* served no legitimate California interest, the court declared. “By opening its doors as a forum to all ‘Armenian Genocide’ victims and their heirs and beneficiaries, California expresses its dissatisfaction with the federal government’s chosen foreign policy path.”

Since the decision in *Movsesian*, the President’s foreign policy against any official government endorsement of the Armenian narrative has strengthened. President Barack Obama, both in his 2009 visit to Turkey and in his April 24, 2009 Remembrance Day address conspicuously rejected characterizing the tragic events of World War I as genocide. The President urged that the best way towards a “full, frank, and just acknowledgement of the facts ... is for the Armenian and Turkish

people to address the facts as part of their efforts to move forward.” He implied that a step backward would be to indoctrinate American students into ahistorical conclusions about the Armenian claims.

Further, Secretary of State Hillary Clinton has applauded the 2009 Protocols contemplating a full rapprochement between Armenia and Turkey, including opening borders and the establishment of an international commission to determine the historical facts and proper characterization of the massacres that afflicted both Ottoman Muslims and Ottoman Armenians during World War I. In addition, the 111th Congress has declined to pass an Armenian genocide resolution, which has thus far received less support than the resolution in the preceding Congress, which also failed. The number of co-sponsors has plunged and no congressional committee has approved the resolution. In sum, the rationale of *Movsesian* is stronger today than when the opinion was written.

SR 31 suffers from the same vice as the statute invalidated in that case. The resolution encourages California schools to include an oral history of the asserted “Armenian genocide.” That encouragement directly contradicts the President’s foreign policy against State endorsements of the genocide thesis to avoid harming American interests. The resolution is thus constitutionally void under the *Movsesian* precedent.

## II. SR 31 is Poor Pedagogy.

In addition to its constitutional infirmity, SR 31 is poor pedagogy. It does not require that all educationally suitable and credentialed oral histories-whether

tending to disprove or prove the genocide or alleged genocide in question--be given classroom voices. The presentation of conflicting viewpoints to students for their evaluation, however, is the heart of teaching young adults how to reason. Further, oral histories should be confined to personal knowledge, not dubious hearsay. The speaker's background should be disclosed to students to identify probable bias or conflicts of interest. For instance, some Armenian Americans might be inclined to exaggerate their suffering and numbers who died during World War I while ignoring or minimizing massacres of Ottoman Muslims. And, oral histories may be unreliable because of the age of the speaker and a dimmed or failing memory that comes with time and afflictions. Students should be alerted to these potential flaws in oral histories to enable them to determine whether what they hear smacks of truth or economizing on the truth.

Genocide is a crime specifically defined in the U.N. Genocide Convention of 1948, which the United States has ratified as a treaty, and under the United States criminal code, 18 U.S.C. § 1091. SR 31 invents a new definition for the crime in contravention of the treaty and federal criminal code. It defines genocide for purposes of California as five specifically enumerated events, the "Darfur, Rwandan, Cambodian, Jewish Holocaust, and Armenian genocides."

In contrast to SR 31, the federal government's much narrower definition is drawn directly from the U.N. Genocide Convention of 1948. It describes genocide as certain types of acts committed with the specific intent of physically destroying a racial, ethnic, religious, or national group in whole or in substantial part.

No impartial and independent body authorized to try cases alleging the crime of genocide has ever characterized the tragic events of the late Ottoman Empire as genocide. No individual has ever been tried or convicted of the crime of genocide stemming from the Armenian Revolt and the Ottoman military response. In contrast, approximately 1,400 Ottoman citizens were tried for war crimes against Armenians with 26 death sentences issued by the Ottoman government. After the war, the British sought evidence of higher crimes by Ottoman officials, but declined to prosecute for lack of evidence. In contrast to the Ottoman regime, Russia and Armenia ignored the harrowing but open and notorious war crimes perpetrated by their subjects or citizens against Ottoman Muslims. The community of genuine Middle East scholars is divided on the Armenian genocide narrative. Renowned author and White House adviser, Bernard Lewis of Princeton University, is in the contra-genocide camp.

The California Senate may be uninformed that the Turkish Government has agreed to accept the findings of an international commission of experts with access to all relevant archives who would study every shard of historical evidence pertaining to the Ottoman-Armenian experience. But Armenia and the Armenian Diaspora have sneered at the idea. They apparently would prefer to have their genocide thesis decided by political clout rather than history and law because worried that admissible evidence before an impartial judge or jury would destroy their case.

SR 31's attempt to define genocide is misplaced and amateurish. In addition to the Ottoman-Armenian controversy, SR 31 labels as genocide events in Rwanda, Darfur, Cambodia, and the Jewish Holocaust. The reference to Cambodia should be re-examined. None of the five Khmer Rouge defendants currently undergoing trial for mass killings and torture from 1975-1979 before a mixed foreign-Cambodian tribunal, called the "Extraordinary Chambers in the Court of Cambodia," have been charged with genocide. The Darfur case is also instructive. The United State Congress has declared that the Darfur atrocities are genocide. But the United Nations has issued a 176-page report concluding that the necessary intent for the crime of genocide may be missing. On 14 July 2008, the prosecutor at the International Criminal Court (ICC) filed ten charges of war crimes against Sudan's President Omar al-Bashir, including three counts of genocide. When the arrest warrant was issued on March 4, 2009, the genocide counts were dropped for insufficient evidence.

In short, genocide is a tightly defined legal concept. It should be employed with restraint in accord with the definition and because of the severe moral stigma and legal ramifications associated with the crime. In creating a simplistic list of, "genocides such as ...", SR 31 is heedless of the law and the complexity of history.

In conclusion, TALDF opposes SB 31 because of its unconstitutionality. It would consider supporting the bill if it were amended to reflect sound pedagogy as described above.