TURKISH AMERICAN LEGAL DEFENSE FUND

ADDENDUM

TO THE

STATEMENT OF THE TURKISH AMERICAN LEGAL DEFENSE FUND

REGARDING: AB 961

"PROHIBITION ON CONTRACTS WITH
COMPANIES THAT AIDED
GENOCIDAL REGIMES"

BEORE THE CALIFORNIA STATE ASSEMBLY
COMMITTEE ON BUSINESS AND PROFESSIONS
AND
COMMITTEE ON THE JUDICIARY

APRIL 2009

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

Dear Mr. Chairman and Members of the Judiciary Committee:

Several developments since TALDF delivered its Statement on AB 961 on April 21, 2009 have further underscored the bill's flagrant unconstitutionality. In addition, an interpretation of the bill by its author before the State Assembly Committee on Business and Professions on April 21, 2009 merits a response.

I. Continuing Turkish-Armenian Reconciliation Efforts Are Part of U.S. Foreign Policy Toward at least Two Sovereign States

First, on April 22, 2009, the day following the bill's presentation to the Business and Professions Committee, both the Republic of Turkey and the Republic of Armenia issued identical statements announcing that the two countries had achieved "tangible progress and mutual understanding" in normalizing their bilateral relations; and, that they had agreed on a "comprehensive framework" towards that end. On the same day, the United States Department of State welcomed the statement and contemplated "working with both governments in support of normalization…." On April 24, 2009, President Barack Obama issued a Statement on Armenian Remembrance Day that addressed what he carefully termed, the terrible events of 1915, the historic episode at the center of AB 961. 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." The April 22 and April 24

statements further demonstrate that the Armenian genocide thesis is an active element of the federal government's foreign policy towards the sovereign States of Turkey and Armenia, and possibly also toward other neighboring States; and, that the President of the United States has declared that the question should be answered in negotiations between the two countries, not by unilateral decrees by any of the United States or other bystanders. AB 961 directly conflicts with President Obama's policy, thus potentially sabotaging the foreign policy of the United States, which would be unconstitutional. It makes California characterize as genocide events of 1890-1908 and 1915-1923 despite the President's narrower limiting of the period in question and his declaration that the characterization should be a collaborative decision of Turkey and Armenia.

We respectfully suggest that if the bill passes into law, a court, upon motion from an aggrieved party, would immediately pronounce California's foreign policy constitutionally illicit, enjoin its implementation, and award attorneys fees to the Plaintiff under the Civil Rights Attorneys Fees Awards Act of 1988 to be paid by the State of California.

II. Florida Statute With Same Problem Recently Declared Unconstitutional

AB 961 is indistinguishable from a Florida "human rights" statute masquerading as a business regulation to punish the Castro regime in Cuba that was held unconstitutional by the U.S. District Court in *ABC Charters, Inc. v. Bronson* (S.D. Florida, April 17, 2009). There, the Florida legislature enacted a

statute requiring that companies offering lawful travel-related services to Cuba to post a bond of $250,000, as opposed to the customary $25,000; to authorize the State to draw on the bond for its own investigatory expenses; to authorize surcharges on Cuba travel service providers to Cuba; to make any violation of federal restrictions on Cuba a third-degree felony under Florida law; and, to disclose publicly every other company with whom Cuba travel service providers do business.

The U.S. State Department attacked the constitutionality of the Florida statute as encroaching on the exclusive federal authority to fashion a foreign policy towards Cuba. In its statement of interest, the State Department reminded the court that, "The United States Constitution vests exclusive authority for the conduct of foreign relations in a single, national government. This structure ensures that the United States is able to speak with one voice when managing relations with other nations…. With regard to Cuba, Congress has passed several laws governing permitted travel, while leaving to the Executive Branch discretion to adjust many aspects of the travel regulations as circumstances dictate…."

The District Court granted summary judgment holding the Florida law unconstitutional. The District Judge acknowledged: "*The State of Florida is not entitled to adopt a foreign policy under our Constitution or interfere with the exclusive prerogative of the United States to establish a carefully balanced approach to relations with foreign countries, including Cuba."* (emphasis added).

AB 961 fits the squarely within the precedent of *ABC Charters.* It is a foreign policy bill for California. It is no more a regulation of public contracting than

the unconstitutional Florida statute was a regulation of travel agents. The Turkish Consul General has dispatched a letter in opposition to Assembly Speaker Karen Bass. Turkey, we believe, has communicated to the U.S. Department of State its concerns. AB 961's author described the bill as a genocide or human rights law to express California's revulsion at alleged atrocities of the Ottoman Empire and Turkey against Armenians; and, to impose certain sanctions in the guise of California's public contracting regime.

As noted in our earlier statement, AB 961, if passed likely could impact most severely companies doing business in Turkey or with companies, domestic and foreign, that have long done business in Turkey. To borrow from the District Court in *ABC Charters*, by adding burdens on companies doing business with Turkey, AB 961 would be deterring business endeavors that the federal government has deemed consistent with United States foreign policy objectives.

III. The *Deirmenjian* Case Closed a Chapter that AB 961 Cannot Reopen

Deirmenjian v. Deutsche Bank AG (CV 06-00774 C.D. Cal.) concerned the implementation of California Code of Civil Procedure § 354.45, which extended until December 31, 2016 the statute of limitations for, *inter alia*, looted assets claims brought by those claiming to be victims or heirs of victims of the Armenians killed during the late Ottoman Empire. However, on December 14, 2007, Judge Morrow dismissed the claims of the "Class B" plaintiffs – those whose proof relied on

demonstrating that (a) there existed looted assets and (b) that they remained in the hands of the defendants.

In her unpublished opinion, Judge Morrow concluded that § 354.45 exceeded California's power to enact legislation that might incidentally affect foreign affairs. She wrote, "The Constitution allocates 'the foreign relations power' to the federal government and vests the authority to decide what the nation's foreign policy should be in the executive branch. See *Garamendi*. The executive has authority to enter into treaties and 'executive agreements' with foreign governments, including agreements that resolve the wartime claims of American citizens. The power of the federal government to resolve wartime claims extends not only to claims against a foreign government itself, but also to claims against its nationals, including corporations…." We note that the decision in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), cited and relied upon by Judge Morrow invalidated a California holocaust-related statute that parallels § 354.45.

She continued, "The question is whether the federal government previously exercised its exclusive power to resolve claims arising out of World War I through post-war diplomacy, and thus whether the state statute impermissibly intrudes on the federal government's foreign affairs power. The answer to this question is clearly yes. In the Claims Agreement Between the United States of America and Turkey (the "Ankara Agreement"), the Republic of Turkey agreed to pay the United States a "lump sum" of $1,300,000 'in full settlement of the claims of American citizens which are embraced by the Agreement of December 24, 1923.'" Following

the submission of claims to a commission, on October 25, 1934 Turkey and the United States negotiated a closing agreement rendering final the settlement of all outstanding claims of the nationals of each country against the other.

"In short," Judge Morrow concluded, "the executive agreements into which the United States and Turkey entered following World War I demonstrate that the United States elected to settle the claims of victims of the Armenian Genocide through the Ankara Agreement. While California may consider the settlement the United States reached inadequate, … [it] has no power to modify that resolution."

In other words, the United States agreed to waive all compensation for claims of Armenian Americans, and thereby preempted the right of those individuals to individually pursue their claims.

Thus, passing AB 961 would also be tantamount to reopening a closed chapter in United States-Turkey relations. In 1923, the two countries negotiated a full and final settlement of all private and public United States claims against Turkey for the events of 1914-1922 for $1.3 million. AB 961 would, therefore, extract an additional financial sanction against Turkey for the same actions in contravention of the definitive federal settlement. Accordingly, it would be unconstitutional under the recent holding in *Deirmenjian v. Deutsche Bank A.G.*, 526 F. Supp. 2d 1068 (C.D. Cal. 2007).

IV. Sudan Divestment Legislation is a Poor Model

AB 961's author has pointed to comparable California legislation imposing sanctions on Sudan as evidence of his bill's constitutionality. But a virtual carbon copy of the California law in Illinois was held unconstitutional for encroaching on the exclusive foreign affairs power of the President and Congress and the Foreign Commerce Clause in *National Foreign Trade Council v. Giannoulias* (Memorandum Opinion and Order, N.D. Ill. February 23, 2007).

V. Omissions and Misleading Statements in AB 961's Author's Presentation

A. Failure to Acknowledge Invalidation of Prior Statute

During the hearing on AB 961 before the State Assembly Committee on Business and Professions, its author emphasized that California had enacted comparable legislation to assist Holocaust victims. But he neglected to add that the United States Supreme Court held the statute unconstitutional in *American Insurance Association v. Garamendi*, supra. This failure we judge akin to performing *Hamlet* without the Prince of Denmark.

B. Claimed Due Process Language Absent From the Bill

In response to a question from the Committee, the author also asserted that no "scrutinized company" would be sanctioned unless a victim of one of the five

declared genocides proved by a preponderance of the evidence both victimhood and rightful ownership of looted or deposited assets held by the current or proposed contractor with the State of California. That statement, however, finds no expression in the text of AB 961. The bill does not saddle an alleged victim of one of its defined genocides with the burden of proving anything. It does not provide for notice or a hearing of any type before the Director of General Services sanctions a scrutinized company. As plainly written, the bill endows the Director with arbitrary power to sanction companies summarily on his say-so alone.

VI. The Bill's Goals Can Be Achieved Via a Resolution, Which Would Be Constitutional

Finally, the Constitution does not leave California voiceless on human rights or alleged genocide issues. The state legislature is authorized to pass resolutions urging the President or Congress to adopt and implement particular foreign policies. The resolutions could address the ongoing wars in Iraq or Afghanistan, relations with Iran or North Korea, the Irish Potato Famine, Germany's slaughter of the Herero in Southwest Africa, Belgium's atrocities in the Congo, the 2.4 million Ottoman Muslims who died in Anatolia in World War I, or the apparently controversial Armenian genocide thesis. But if *E Pluribus Unum* means anything, it means each State must stand foursquare behind the federal government's final and authoritative decisions in its relations with foreign countries. No Member of the

Assembly's Judiciary Committee could vote in support of AB 961 without flouting his or her oath of office to support the Constitution of the United States.