



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 8, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 621, the "Wartime Treatment Study Act." We have several concerns about the bill.

Constitutional Concerns

1. Separation of Powers

The bill would create two commissions, one the Commission on Wartime Treatment of European Americans, the other the Commission on Wartime Treatment of Jewish Refugees. Each commission would have seven members, some appointed by the President, some by members of Congress:

- (1) Three members shall be appointed by the President.
- (2) Two members shall be appointed by the Speaker of the House of Representatives, in consultation with the minority leader.
- (3) Two members shall be appointed by the majority leader of the Senate, in consultation with the minority leader.

Sections 101(b) (European American Commission), 201(b) (Jewish Refugee Commission).

By creating hybrid commissions composed of members appointed by both the Executive and Legislative branches, subsections 101(b) and 201(b) raise separation of powers concerns that we have long cited with respect to such provisions. *See, e.g., Common Legislative Encroachments on the Executive Branch*, 13 Op. O.L.C. 248, 251-52 (1989). The commissions could not be considered to be a part of either the Executive or Legislative branch, but are instead placed in the difficult position of having to serve two masters. *See id.* Separation of powers principles flow from the fundamental premise that each Branch must maintain its identity and oversee and account for its functions without encroachment or interference from other Branches.

These concerns are heightened where, as here, a hybrid commission's activities could be construed to encompass formulating legislative recommendations to Congress (a function that "falls squarely within the duties and powers of the Executive"), *Applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Commission*, 6 Op. O.L.C. 292, 295 (1982), and could be avoided, in the case of this bill, by modifying subsections 101(b) and 201(b) to vest appointment power in the President alone or the Head of a Department, *see* U.S. Const., art. II, § 2, cl. 2.

2. Recommendations Clause

As noted, the bill also would require both commissions to make legislative recommendations. Paragraph 102(b)(4) states that:

[the European American Commission's review] shall include . . . [a] recommendation of appropriate remedies including how civil liberties can be protected during war, or an actual, attempted, or threatened invasion or incursion, an assessment of the continued viability of the Alien Enemies Acts (50 U.S.C. 21 et seq.), and public education programs related to the United States Government's wartime treatment of European Americans and European Latin Americans during World War II.

Subsection 102(d) further states:

The European American Commission shall submit a written report of its findings and recommendations to Congress not later than 18 months after the date of the first meeting called pursuant to section 101(e).

Finally, section 202(d) states:

The Jewish Refugee Commission shall submit a written report of its findings and recommendations to Congress not later than 18 months after the date of the first meeting called pursuant to section 201(e).

Legislation that purports to direct or require the President or his subordinates to submit legislative recommendations to Congress infringes upon the Executive's exclusive authority to decide whether to make such recommendations. U.S. Const., art. II, § 3 ("[The President] shall from time to time . . . recommend to [the Congress's] Consideration such measures as he shall judge necessary and expedient . . ."). Therefore, we would suggest that, to mitigate the separation of powers policy concerns associated with requiring legislative recommendations from a hybrid committee that includes Executive branch representation, paragraph 102(b)(4) be modified to state that the Commission "shall include . . . [a] recommendation, if any, of appropriate . . .", and subsections 102(d) and 202(d) be similarly modified by inserting the phrase "if any" after the word "recommendations."

Other Concerns

1. Commission on the Wartime Treatment of European Americans

We are concerned that although the bill calls for the creation of a Federal commission to conduct what it terms an “independent review” of the wartime treatment by the United States Government of Axis nationals and Americans of European descent in the United States, it predetermines the results presumptively to be derived through the Commission’s research. Thus, the bill states, at section 2 (entitled “Findings”), paragraphs (1) through (5), that “thousands” of these individuals were subjected to “devastating” “violat[ions]” of their civil rights through arrest, internment, property confiscation, and deportation, and that detrimental effects “are still being experienced.” When a similar bill was introduced in 2001 (S. 1356), we contacted the Senior Historian of the United States Holocaust Memorial Museum (“USHMM”), who advised that that bill’s identical depiction of the treatment of Axis citizens and European Americans was “outrageously exaggerated.” For example, section 2, paragraph (1) implies that the United States Government improperly harmed the personal property rights of more than 900,000 German- and Italian-born United States permanent resident aliens and their families, and paragraph (2) states that the United States Government interned thousands of European Americans, expelling some of them – including United States-born children – “to European Axis nations. . .” during World War II. The USHMM Senior Historian is aware of no historical facts to support these conclusions. Indeed, we are aware of an analysis by one reputable scholar that terms the treatment of European enemy aliens “benign” and humane.¹ Any commission established to perform an “independent” inquiry into the United States Government’s wartime treatment of Axis citizens and others should be directed to do so *without* congressional predetermination of the conclusions that the commission’s investigations will yield. (In contrast, there was *no* such predetermination in the 1998 statute that mandated the creation of the still-extant interagency working group to locate, declassify, and disclose classified Holocaust-related information in United States Government possession, *see* P.L. No. 105-246, 112 Stat 1859.)

The importance of fidelity to historical truth is heightened by the bill’s requirement that the Commission recommend “appropriate remedies” (which could include financial compensation), and that it perform an analysis of “how civil liberties can be protected during war, or [during] an actual, attempted, or threatened invasion or incursion,” and “an assessment of

¹Robert H. Abzug (University of Texas, Austin), review of John Christgau, “Enemies,” *World War II Alien Internment* (Ames, Iowa: Iowa State U. Press, 1985), in *HOLOCAUST AND GENOCIDE STUDIES*, Vol. 1, No. 2, pp. 330-31 (Washington: U.S. Holocaust Memorial Museum, 1986) (“[O]ne is struck by the rather benign treatment of aliens and the extraordinary access they had to the legal system and to appeal procedures,” with “even openly pro-Nazi German aliens . . . [having been] treated far less shabbily than [interned Americans of Japanese descent]”). Abzug notes that after the war, most of the German aliens quickly returned home or became United States citizens, and “few emerged with permanent scars.”

the continued viability of the Alien Enemies Acts (50 U.S.C. 21-24).” This analysis and assessment also may implicate the United States current homeland defense efforts. We do not believe that the proposed commission is the best Federal vehicle for exploring these potentially significant issues of national security.

2. Commission on Wartime Treatment of Jewish Refugees

Although the bill’s recitation of the facts concerning the United States Government’s efforts to reduce the number of European Jews granted refuge in the United States before and during World War II is accurate, it is unclear why this subject necessitates an additional independent review. This topic has been the subject of extensive scholarship over many years and is, in fact, one of the most thoroughly studied aspects of American wartime history. Indeed, entire books, some authored by renowned scholars (who are arguably more “independent” than would be a Federal commission), have been devoted to this subject.² Moreover, one major Federal institution, the USHMM, covers this subject in its permanent exhibition and has also addressed the subject repeatedly in its scholarly journal, *HOLOCAUST AND GENOCIDE STUDIES*.³ The topic also was the subject of at least one acclaimed documentary, “America and the Holocaust,” which has aired on the PBS series “The American Experience” and is available for purchase from PBS. In our view, funds devoted to reexamining this oft-examined topic could be better spent on studying other aspects of United States WWII-related history.

²Among the major works on this subject are: Richard Breitman and Alan M. Kraut (eds.), *AMERICAN REFUGEE POLICY AND EUROPEAN JEWRY* (Indiana U. Press, 1987); Henry Feingold, *THE POLITICS OF RESCUE: THE ROOSEVELT ADMINISTRATION AND THE HOLOCAUST* (Rutgers U. Press, 1970); Jack R. Fischel, “American Response to the Holocaust, 1933-1945,” in Saul S. Friedman (ed.), *HOLOCAUST LITERATURE: A HANDBOOK OF CRITICAL, HISTORICAL, AND LITERARY WRITINGS* (Westport, CT: Greenwood Press, 1993); Verne W. Newton, *FDR AND THE HOLOCAUST* (The Franklin and Eleanor Roosevelt Institute Series on Diplomatic and Economic History, 1996); David Wyman, *THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST: 1941-1945* (NY: Random House, 1984); Walter Laqueur, *THE TERRIBLE SECRET: THE SUPPRESSION OF THE TRUTH ABOUT HITLER’S “FINAL SOLUTION”* (Boston: Little Brown, 1980); and Arthur Morse, *WHILE SIX MILLION DIED* (NY: Random House, 1967).

³See, e.g., Frank W. Brecher, “David Wyman and the Historiography of America’s Response to the Holocaust: Counter-Considerations” (Vol. 5, No. 4, 1990); Review of Judith Tydor Baumel, *UNFULFILLED PROMISE: RESCUE AND RESETTLEMENT OF JEWISH REFUGEE CHILDREN IN THE UNITED STATES, 1934-1945* (Vol. 7, No. 2, 1993); Review of William Rubenstein, *THE MYTH OF RESCUE: WHY THE DEMOCRACIES COULD NOT HAVE SAVED MORE JEWS FROM THE NAZIS* (Vol. 12, No. 2, 1998); Review of Robert H. Abzug, *AMERICA VIEWS THE HOLOCAUST, 1933-45: A BRIEF DOCUMENTARY HISTORY* (Vol. 14, No. 1, 2000).

3. Ending Date of World War II

We note that although the bill's "Definitions" section treats World War II as having ended on December 31, 1948, previous statutes and other sources have deemed the war to have ended on various other dates, including:

- December 31, 1945 (in P.L. No. 106-451, the "Wartime Violation of Italian American Civil Liberties Act" ("The report shall cover the period between September 1, 1939, and December 31, 1945"));
- December 31, 1946 (in H.R. 1126, 105th Cong., the "Merchant Mariners Fairness Act of 1997"; this date was selected because it was the date proclaimed by President Truman as marking the "cessation of hostilities of World War II" (Presidential Proclamation 2714); the same date applies for eligibility for membership in the American Legion);
- April 28, 1952 (in the Department of Health and Human Services Manual for the Public Health Service regulating the wearing of medals and decorations for service in World War II ("For this purpose, time of war includes the period from December 7, 1941, until April 28, 1952, when World War II was officially terminated." This termination date coincides with the coming into force of the United States-Japan Peace Treaty.))

4. Records

We note that the bill does not mention the status of the records the commissions would create. Specifically, the bill does not state that the records of the commissions would be subject to the Federal Records Act ("FRA"). Similarly, the bill is silent as to whether the commissions would be subject to the Federal Advisory Committee Act ("FACA") or the Freedom of Information Act ("FOIA").⁴

5. Technical Clarifications

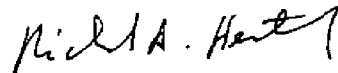
We understand that other Departments have identified several necessary technical clarifications. We understand that these Departments will communicate these clarifications to the Committee separately.

⁴For example, FACA regulations require that advisory committees determine whether their records are to be managed in accordance with the FRA. *See* 41 C.F.R. § 102-3.175(e).

The Honorable Patrick J. Leahy
Page 6

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink that reads "Richard A. Hertling". The signature is written in a cursive style with a large, sweeping flourish at the end.

Richard A. Hertling
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

The Honorable Richard B. Cheney
President of the Senate

The Honorable Harry Reid
Majority Leader