

Legal Objections to Bills S.447 and H.R.1226

Submitted by the Polish-American Constituency

The Justice for Uncompensated Survivors Today Act of 2017, S. 447, passed the Senate on December 12, 2017. A related House Bill H.R.1226 was introduced in the US House of Representatives on February 27, 2017 and was forwarded to the Committee on Foreign Affairs of the House of Representatives. The texts of both S. 447 and H.R. 1226 (the “Bills”) are similar. The Bills constitute the enforcement mechanism for the non-binding 2009 Terezin Declaration on Holocaust Era Assets and Related Issues by mandating the Department of State to report on “countries of particular concern” on the progress to: 1) return to the rightful owner any property wrongfully seized or transferred, including religious and communal properties; 2) provide property or compensation for so called heirless property in order to assist needy Holocaust survivors, to support Holocaust education, and for other purposes.

1. BILLS S.447 AND H.R.1226 VIOLATE INTERNATIONAL TREATY AND LAW

A. Compensation for private property in Poland already paid to rightful owners

In calling for the return to the rightful owner of a property that was “wrongfully seized or transferred,” the Bills violate the Agreement between the Government of the United State of America and the Government of the Polish People’s Republic regarding claims of nationals of the United States signed at Washington on July 16, 1960, and registered with the United Nations by the United States of America on January 6, 1961 (“1960 Treaty”).

Under the 1960 Treaty, Poland paid the United States \$40 million in full settlement of claims of nationals of the United States for nationalization or other taking of property, appropriation or loss of use of their property and debt owed by enterprises taken over by the State.¹ The \$40 million paid pursuant to the 1960 Treaty represents over a billion dollars in 2017. Hence, this substantial compensation was intended to settle property claims against Poland by US nationals. In accordance with Article IV of the 1960 Treaty, the United States agreed to fully indemnify Poland for any property claims of US nationals, which occurred on or before the entry into force of the 1960 Treaty.²

On March 31, 1966, the Foreign Claims Settlement Commission of the US completed its administration of the Polish Claims Program pursuant to the 1960 Treaty and submitted a final report to various committees of Congress. The principal amount of awards under the Polish Claims Program totaled \$100,737,681.63 plus interest in the amount of \$51,051,825.01.³

Accordingly, in light of the contractual obligation of the United States to provide indemnity to Poland for private property claims, the enactment of the Bills that direct the US Secretary of State to pressure Poland to pay further private property claims violates the contractual obligation of the United States.

Also, it shall be noted that between 1948 and 1971 Poland concluded property restitution and compensation treaties not only with the United States but also with Austria, Belgium, Canada, Denmark, France, Great Britain, Greece, Holland, Luxembourg, Norway, Sweden and

Switzerland. All claims for property located in Poland by the citizens of these countries have been since settled in full and discharged.

Furthermore, since 1989, all legitimate property claims of private individuals can be freely pursued before the Polish courts in accordance with the provisions of the Civil Code. Every person regardless of their nationality or ethnic origin may enforce their property and inheritance rights before the Polish courts in accordance with the procedures of the Code of Civil Procedure. Hence, every individual with a right title can file a request for declaration of the acquisition of the inheritance. Thousands of people with legitimate title claims - regardless of their ethnic origin - have recovered their properties in Poland pursuant to the private property law.

B. Religious and communal property returned or compensated for in Poland

The return of Jewish religious and communal properties has been implemented in Poland pursuant to the 1997 law on the relationship between the Polish State and Jewish religious organizations.⁴ On the basis of this unprecedented legislation, Poland granted the Jewish minority broad decision-making powers in the implementation of this legislation. The Commission for the Jewish Communities Affairs carried out the restitution of Jewish religious and communal properties in close cooperation with the Union of Jewish Communities.⁵ Over 2,500 communal properties, including synagogues, cemeteries and cultural centers, have been either returned or compensated for based on the Polish 1997 law. The returned communal properties, sometimes totally destroyed during the war, had been entirely renovated by the Polish. Accordingly, practically all religious and communal properties with adequately documented ownership have been either returned or compensated for by now. Therefore, claims for this type of property restitution have been settled in Poland.

C. Restitution for the so-called heirless property is against the law

If there are no heirs, the property is not "wrongfully seized or transferred." It escheats to the state. That's the law in every country. The Bills introduce a precarious precedent of "heirless property" compensation that is contrary to the Western legal tradition and principles of jurisprudence. In S. 447, the goal and objective relative to heirless property is "the provision of property or compensation to assist needy Holocaust survivors, to support Holocaust education, and for other purposes. . ." H.R. 1226 states the goal and objective as "the restitution of heirless property to assist needy Holocaust survivors, and for other purposes . . ."

"Restitution of heirless property" is an aberration by definition. "Restitution" means the restoration of something to its rightful owner. If the property is "heirless" then, by definition, restitution of the property to the rightful owner is impossible. The property might have been "wrongfully seized or transferred" originally, but if the property is now heirless, it escheats to the state. That's the law everywhere, including the United States.

The Bills call on the Secretary of State to present reports that are to address "wrongfully seized or transferred Holocaust era assets." Hence, such reports should not include "heirless property" which always and everywhere escheat to the state. Such escheat is considered lawful and legal, regardless of whether the property was earlier wrongfully seized or transferred.

This issue is of crucial importance to Poland since most of the heirless property claims are against Poland. Creating *ex post facto* a legal precedent of property restitution to “non-heirs” for “other purposes” amounts to extortion of funds from “other” uncompensated victims of the German WWII genocide. Such scheme treats the Polish taxpayers, who themselves are victims of the German genocide and wrongful seizure of property, as those guilty of the Jewish Holocaust, hence it is unconscionable.

Finally, the establishment of the rights of Jewish organizations to heirless property of the Jewish people all over the world introduces a concept of a tribal law and tribal rights to the non-tribal legal tradition of the US law. Such precedence will result in the rise of tribal claims by Native Americans and others in the United States.⁶

Multiple compensations for the same loss are wrong in law and equity

Poland has implemented numerous laws and procedures under which WWII property claims have been effectively pursued. In addition Poland has been compensating needy Holocaust survivors on an ongoing basis. All Jewish Holocaust survivors of Polish origin are eligible to receive monthly pension from the Polish Government pursuant to the law on war veterans and victims of war and post-war oppression. Thus all Holocaust survivors who were Polish citizens during WWII have been receiving monthly assistance from the Polish Government regardless of their current place of residence. This pension is provided to many Holocaust survivors living outside of Poland. Accordingly, the heirless property claim based on appeal to assist needy survivors is duplicative with respect to Poland.⁷

Furthermore Since 1952 Germany has paid the equivalent of over 100 billion dollars to Jewish individuals, Jewish organizations and the State of Israel. The German payments covered all of the Jewish property seized and expropriated by Germany during WWII, including the immovable property located on the Polish territory conquered and occupied by the Third Reich.

2. THE BILLS ARE UNCONSTITUTIONAL

The US Congress does not have the constitutional power to enact either of the two Bills.

Rule XII Clause 7(c) of the House of Representatives requires that all bills and joint resolutions provide a document stating "as specifically as practicable (...) powers granted to Congress in the Constitution to enact the bill or joint resolution" to be accepted for introduction by the House Clerk. According to the Constitutional Authority Statement, Congress has the power to enact these Bills pursuant to Article I Section 8 Clause 3 of the Constitution of the United States.⁸ The cited clause of "Article I Section 8 Clause 3" is commonly known as the Commerce Clause.⁹ It gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

Clearly, neither S 447 nor HR 1226 are related to the regulation of commerce and the Commerce Clause because they deal with the welfare of Holocaust survivors. Perhaps this legislation is intended to gather information, under Congress' investigatory power, to be used in future legislation that would impose sanctions on countries that are deemed not to have made sufficient

progress towards the Holocaust (Shoah) restitution claims. If so, this purpose should be stated explicitly in both bills.¹⁰

3. THE BILLS ARE GROSSLY DISCRIMINATORY IN NATURE

The Bills refer to the Terezin Declaration adopted at the 2009 Holocaust Era Assets Conference held in Terezin, Czech Republic. The Terezin Declaration is concerned with the welfare of the Holocaust survivors. Throughout the text, the Terezin Declaration defines Holocaust survivors as "Holocaust (Shoah) survivors and other victims of Nazi persecution." However, in the key section entitled "Immovable (Real) Property" a more narrow definition of Holocaust victims is used. Only "Holocaust (Shoah) victims" are included in this section while "other victims of Nazi persecution" are clearly excluded from property compensation section. Clearly the use of the term "Shoah" restricts those entitled to property compensation to Jewish victims only. It boldly excludes "other victims of Nazi persecution" such as millions of Polish Holocaust Survivors.

The United States must not discriminate against racial, ethnic or religious groups whose members may be in the exact same situation as Jews. Millions of non-Jews (mostly Christians) were killed by the Germans in WWII. In particular, close to 3 million Poles were killed in WWII by Hitler's Germany and the Soviet Union. The "other victims of Nazi persecution" in particular the Polish victims of German persecution, must be explicitly included in the real property restitution claims to avoid misunderstandings and complaints of appearance of impropriety, favoritism, undue influence and outright discrimination.

Both Bills would require the US Secretary of State to submit a report "that assesses and describes the nature and extent of national laws and enforceable policies" of "covered countries" regarding the "identification and the return of or restitution for wrongfully seized or transferred Holocaust era assets." The report would also assess and describe the covered countries' progress towards meeting the goals and objectives of the 2009 Holocaust Era Assets Conference (S. 447), or the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues (H.R. 1226).

The Bills give the Secretary of State in cooperation with the Holocaust Envoy the power to determine, "in consultation with expert nongovernmental organizations" whether the proposed law applies to a particular country. The term "expert nongovernmental organizations" is one of several unacceptable ambiguities in these Bills. Requiring the Secretary of State or Special Envoy for Holocaust Issues to consult with undefined NGOs before choosing "covered countries" gives the Secretary or Envoy full discretion and invites claims of bias and discrimination of ethnic Poles and the Polish American community. More so considering that the compensation for so-called heirless property is intended to support Jewish organizations.

The NGOs that are to be consulted in designating "covered countries" should be explicitly named. As most of the potential claims will involve Polish properties, Polish-American NGOs shall be clearly identified for consultation, and Poland should be given full opportunity to be heard. Poland and the Polish Americans should give input and present their position regarding the issues involved before any decision to apply the Bills to Poland is made.

4. THE BILLS ARE DUPLICATIVE OF ESLI STUDY

The US Secretary of State report required by the Bills would be duplicative of a comprehensive study published after the Bills were introduced. In accordance with the Terezin Declaration, in 2010 the Czech government established the European Shoah Legacy Institute (ESLI) in Terezin to monitor the progress and advocate for the principles of the Terezin Declaration.¹¹ In fulfillment of its mission, ESLI commissioned in 2014 the Holocaust (Shoah) Immovable Property Restitution Study (the “Study”). Published on April 24, 2017,¹² the Study is the comprehensive compilation of the legislation passed by the 47 states since 1945, dealing with the return or compensation of land and businesses confiscated or otherwise misappropriated during the Holocaust era.¹³

According to the Executive Summary of the Study, Jewish and non-Jewish claimants, heirs, governments, NGOs, and other stakeholders will now have a one-stop resource where all significant Holocaust restitution legislation and case law dealing with immovable property over the last 70 years has been compiled and analyzed.

Therefore, any report pursuant to the Bills would substantially duplicate the ESLI's Study Report. The cost of a US Secretary of State report is estimated by the Congressional Budget Office to be less than \$500,000. That money would be wasted because most of the work has already been done. Therefore, the Bills' duplicative objectives represent waste of government money.

5. GENOCIDE DENIAL UNDERLINES THE PREMISE OF THE BILLS

It shall be noted that the Executive Summary of the Study states” “In the aftermath of the Holocaust, returning victims – not only surviving European Jews but also Roma, political dissidents, homosexuals, persons with disabilities, Jehovah’s Witnesses, and others – had to navigate a frequently unclear path to recover their property from governments and neighbors who had failed to protect them, and often, who had been complicit in their persecution.”¹⁴

The above statement is of great significance and real concern to the Polish Americans because it excludes from the definition of victims the second-largest group of WWII German genocide, i.e. ethnic Poles. These victims are either omitted all together or covered under "others." Such omission of this important ethnic group is not coincidental considering that almost half of all Holocaust (Shoah) restitution claims under the Terezin Declaration are against Poland.

It shall be noted that Poland was the greatest victim of WWII in terms of the loss of human life and treasure. In 1939 Hitler declared: “The destruction of Poland shall be the primary objective. The aim is elimination of living forces, not the arrival at a certain line.” About equal number of ethnic Poles and ethnic Jews perished in Poland during WWII. About 40% of Poland's national assets were totally destroyed. Most of the Polish infrastructure was ruined. Warsaw and many other cities were leveled to the ground experiencing destruction and devastation beyond compare.

The marginalization of the Polish victims, systemic efforts to diminish their suffering, suppress their voices and ignore their interests by proponents of the Holocaust (Shoah) restitution claims is directed against the second most persecuted ethnic group by Nazi Germany. Such treatment of the Polish victims of German WWII genocide represents grave distortion of history and borders on genocide denial. Such actions are not only illegal but also morally repugnant, grossly unjust, and hence contradictory to the stated objectives of the Terezin Declaration and the Bills.

RECOMMENDATION

Considering all the above, the Polish American community urges its congressional representatives to vote against unjust bills S. 447 and H.R. 1226. We also urge the US Congress NOT to endorse discriminatory treatment of “other victims of Nazi persecution” with respect to property restitution claims, and NOT to enforce any “heirless property” compensation schemes that are contrary to Western legal tradition and detrimental to the long-term interests of the United States.

Furthermore, it is the request of the Polish American community that Special Envoy for WWII Genocide on Ethnic Poles be established at the same administrative level as the Special Envoy for Holocaust of the Jews. Such Envoy on WWII Genocide of Ethnic Poles shall be consulted on any WWII restitution issues, whether against Poland or on behalf of Poland.

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¹ Art. II of the 1960 Treaty provides compensation for the following: (a) the nationalization or other taking by Poland of property and of rights and interests in and with respect to property; (b) the appropriation or the loss of use or enjoyment of property under Polish laws, decrees or other measures limiting or restricting rights and interests in and with respect to property, and (c) debts owed by enterprises which have been nationalized or taken by Poland and debts which were a charge upon property which has been nationalized, appropriated or otherwise taken by Poland.

² Article IV of the 1960 Treaty provides: After the entry into force of this Agreement the Government of the United States will neither present to the Government of Poland nor espouse claims of nationals of the United States against the Government of Poland to which reference is made in Article I of this Agreement. In the event that such claims are presented directly by nationals of the United States to the Government of Poland, the Government of Poland will refer them to the Government of the United States.

³ Final Report of the Polish Claims Program, Foreign Claims Settlement Commission of the U.S.
https://www.justice.gov/sites/default/files/pages/attachments/2014/10/22/polish_final_report.pdf

⁴ Law dated February 20, 1997, DZ. U. 1997 No. 41 Item 251.

⁵ Art. 32.1, 1997 Law.

⁶ Historically, such legal precedence had been applied by an ensemble of Jewish organizations, linked together in the Claims Conference against Germany established in 1951, which raised demands for compensation, reparation and restitution. Formative as a matrix here was in particular the fact that the reality of the genocide perpetrated by Nazi Germany and the resultant phenomenon of “heirless property” brought about a kind of transformation in the web of claims in civil law, raising these to a public level of quasi-international law — in this way enabling the “Jewish people” to constitute itself as the claimant putting forward a collective demand (See: Dan Diner, Gotthart Wunberg “Restitution and Memory: Material Restoration in Europe”). Applying the above claim demands to Poland, another victim of the genocide perpetrated by Nazi Germany, would destroy the foundations of international law, duplicate the compensation already made by the Federal Republic of Germany to Israel, legalize the attempted robbery by self-appointed US claims organizations and twist the Polish victims with the German perpetrators. Should such a tribal law concept be applied again, then Germany would have to first compensate Poland and the Polish victims analogically to the Luxembourg Agreement of 1952 between Germany and Israel and not Poland compensate the self-appointed claims organizations.

⁷ Polish Benefits for Holocaust Victims of Polish Origin, see <https://wjro.org.il/polish-benefits/>

⁸ See: <https://www.congress.gov/bill/115th-congress/house-bill/1226> From the Congressional Record Online the Government Publishing Office; By Mr. CROWLEY: H.R. 1226 - the following: Article I Section 8 Clause 3, US Constitution [Page H1355].

⁹ https://www.law.cornell.edu/wex/commerce_clause.

¹⁰ But even in the area of commercial law the application of US legislation is limited. In 2010, the Morrison v. National Australia Bank case, the U.S. Supreme Court ruled that securities traded outside the U.S. are no longer within U.S. jurisdiction, effectively forcing actions against securities traded on foreign exchanges to be pursued outside of the United States. The case changed the global landscape for class action recoveries. (Allison Gosman, The Rise of International Claims Filings, <http://firtservices.com/the-rise-of-international-claims-filings/>)

¹¹ See the ESLI website: <http://shoahlegacy.org>

¹² According to the World Jewish Restitution Organization website, the Holocaust (Shoah) Immovable Property Restitution Study was published on April 24, 2017.

¹³ <http://shoahlegacy.org/property-issues/immovable-property/immovable-property-study-2014-2017>. Prof. Michael J. Bazylar and Lee Crawford-Boyd led the project, which brought together the research efforts of over 40 pro bono attorneys from major global law firms, including White & Case, O'Melveny & Myers, Morgan Lewis, Fried Frank, and Brownstein Hyatt Farber & Schreck. These pro bono attorneys, under the guidance of Firm directors and associates, completed research reports addressing the status of restitution legislation in an assigned Terezin Declaration country. In addition, the reports provide a preliminary analysis of the country's compliance with its Terezin Declaration commitments. The Study is available in three versions: The first one is a 1200 page interactive PDF document that can be downloaded in full from this website; the second is an interactive map organized from which individual country reports can be downloaded; and the third is a hard-copy publication of the study through Oxford University Press, which we consider an enormous achievement confirming the high quality and standard of the study.

¹⁴ Executive Summary, 2014 Holocaust (Shoah) Immovable Property Restitution Study, Page 1.