

On June 29, 2009, the Supreme Court refused to consider the case captioned in re Terrorist Attacks on September 11, 2001,<sup>xv</sup> in which the families of the 9/11 victims sought damages from Saudi Arabian princes personally, not as government actors, for financing Muslim charities knowing those funds would be used to carry out Al Qaeda jihads against the United States.<sup>xvi</sup> The plaintiffs sought an exception to the sovereign immunity specified in the Foreign Sovereign Immunities Act of 1976. Plaintiffs' counsel had developed considerable evidence showing Saudi complicity. Had the case gone forward, discovery proceedings had the prospect of developing additional incriminating evidence.

My questions are:

1) Do you agree with the testimony of Chief Justice Roberts at his confirmation hearing that the Court "could contribute more to clarity and uniformity of the law by taking more cases?"

2) If confirmed, would you favor reducing the number of justices required to grant petitions for certiorari in circuit split cases from four to three or even two?

3) If confirmed, would you join the cert. pool or follow the practice of Justices Stevens and Alito in reviewing petitions for cert. with the assistance of your clerks?

4) Would you have voted to grant certiorari in the case captioned in re Terrorist Attacks on September 11, 2001?

5) Would you have voted to grant certiorari in *A.C.L.U. v. N.S.A.*—the case challenging the constitutionality of the Terrorist Surveillance Program?

Sincerely,

ARLEN SPECTER.

#### ENDNOTES

<sup>i</sup>Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 337 (2005) (statement of John G. Roberts Jr.).

<sup>ii</sup>Edward A. Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill," 100 Colum. L. Rev. 1643, 1650 (Nov. 2000).

<sup>iii</sup>See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 Minn. L. Rev. 1363, 1368 (May 2006); Supreme Court of the United States, 2008 Year-End Report on the Federal Judiciary, Dec. 31, 2008, available at <http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf>.

<sup>iv</sup>See *Dep't of Energy v. Brett*, 659 F.2d 154, 156 (Temp. Emer. Ct. App. 1981) (holding that the trial court erred in ruling the deliberative process privilege could only be invoked by an Agency head); *Marriott Int'l Resorts, L.P., v. United States*, 437 F.3d 1302, 1306-08 (Fed. Cir. 2006) (finding that it was proper for IRS Commissioner to delegate responsibility for invoking deliberative process privilege to Assistant Chief Counsel); *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1135-36 (D.C. Cir. 2000) (commenting that lesser officials can invoke the deliberative process and law enforcement privileges), *cert. denied*, 531 U.S. 924 (Oct. 10, 2000); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 882-83 (5th Cir. 1981) (commenting that, while *United States v. Reynolds*, 345 U.S. 1 (1953), indicates that Agency head must invoke, the EEOC sufficiently complied when the director of its Houston office, a subordinate, invoked the privilege on the EEOC's behalf). *Contra United States v. O'Neill*, 619 F.2d 222, 225 (3d Cir. 1980) (rejecting invocation of executive privilege by an attorney rather than the department head).

<sup>v</sup>See *United States v. Brown*, 449 F.3d 154, 155 (D.C. Cir. 2006) (considering increasing progression of penalties in the statute to imply an intent requirement in provision penalizing discharge of a firearm during commis-

sion of a crime of violence); *United States v. Dare*, 425 F.3d 634, 641 n. 3 (9th Cir. 2005) (noting that "'discharge' requires only a general intent"). *Contra United States v. Dean*, 517 F.3d 1224, 1230 (11th Cir. 2008) (finding *Brown* reasoning unpersuasive "because discharging a firearm, regardless of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it"); *United States v. Nava-Sotelo*, 354 F.3d 1202, 1204-05 (10th Cir. 2003) (finding the plain language of the statute to require mandatory minimum sentence even if discharge was accidental or involuntary).

<sup>vi</sup>*Compare Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002) (noting that it "has repeatedly held that compliance with this statutory requirement is a jurisdictional prerequisite to suit that cannot be waived") (citations omitted) with *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 185 (2d Cir. 2008) (declining to determine whether to apply equitable tolling to the FTCA statute of limitations); and *Hughes v. United States*, 263 F.3d 272, 277-78 (3d Cir. 2001) (holding that the FTCA's statute of limitations is non-judicial and applying equitable tolling).

<sup>vii</sup>*Compare N.C.P. Marketing Group, Inc. v. BG Star Productions, Inc.*, 279 Fed.Appx. 561 (9th Cir. 2008), *cert. denied*, *N.C.P. Marketing Group, Inc. v. BG Star Productions, Inc.*, 129 S.Ct. 1577 (Mar. 23, 2009) (affirming lower court decision, which used "hypothetical test" to "examin[e] whether, hypothetically without looking to the individual facts of the case, any executory contracts could be assumed under applicable federal law," *N.C.P. Marketing Group, Inc. v. Blanks*, 337 B.R. 230, 234 (D. Nev. 2005)); *In re James Cable Partners, L. P.*, 27 F.3d 534, 537-38 (11th Cir. 1994) (using "hypothetical test"); and *In re West Electronics, Inc.*, 852 F.2d 79, 83 (3rd Cir. 1988) (same); with *In re Sunterra Corp.*, 361 F.3d 257, 262 (4th Cir. 2004) (using "actual test," under which "a court must make a case-by-case inquiry into whether the non-debtor party would be compelled to accept performance from someone other than the party with whom it had originally contracted, and a debtor would not be precluded from assuming a contract unless it actually intended to assign the contract to a third party" (emphasis in original)).

<sup>viii</sup>*Compare United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008), *cert. denied Sorich v. United States*, 129 S.Ct. 1308 (Feb. 23, 2009) ("[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run-of-the-mill violations of state-law fiduciary duty . . . from federal crime" (quoting *United States v. Bloom*, 459 F.3d 509, 520-21 (7th Cir. 1998); with *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (concluding that the statute "applies to deprivations of honest services by state employees and that such services must be owed under state law"); and *United States v. Panarella*, 277 F.3d 678, 692 (3rd Cir. 2002) (rejecting "personal gain" as a requisite motivation of the crime).

Dissenting in the *Sorich* cert. denial, Justice Scalia wrote, "In light of the conflicts among the Circuits; the longstanding confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies, I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality of §1346. Indeed, it seems to me quite irresponsible to let the current chaos prevail." 129 S.Ct. at 1311.

<sup>ix</sup>*Compare Oliver v. Quarterman*, 541 F.3d 329, 340 (5th Cir. 2008), *cert. denied, Oliver v. Quarterman*, 129 S.Ct. 1985 (Apr. 20, 2009) (holding that jury consultation of a Bible amounted to an unconstitutional outside influence on its deliberations); and *McNair v.*

*Campbell*, 416 F.3d 1291, 1307-09 (11th Cir. 2005) (noting that the use of a Bible during jury deliberations was presumptively prejudicial but that the state had "easily carried its burden of rebutting the presumption of prejudice."); with *Robinson v. Polk*, 438 F.3d 350, 363-65 (4th Cir. 2006) (holding that the lower court did not act unreasonably when it denied a defendant's claim that he was prejudiced by the jury's reading of the Bible during its deliberations, noting, "Unlike [private communications], which impose pressure upon a juror apart from the juror himself, the reading of Bible passages invites the listener to examine his or her own conscience from within.").

<sup>x</sup>*American Civil Liberties Union v. National Security Agency* ("*A.C.L.U. v. N.S.A.*"), 438 F.Supp.2d 754 (E.D.Mich. 2006) (Anna Diggs Taylor, J.).

<sup>xi</sup>*A.C.L.U. v. N.S.A.*, 493 F.3d 644 (6th Cir. 2007).

<sup>xii</sup>128 S.Ct. 1334 (2008).

<sup>xiii</sup>493 F.3d at 697.

<sup>xiv</sup>*Id.*

<sup>xv</sup>538 F.3d 71 (2d Cir. 2008).

<sup>xvi</sup>*Federal Ins. Co. v. Kingdom of Saudi Arabia*, —S.Ct.—, 2009 WL 1835181 (Jun. 29, 2009).

#### HEALTH CARE

Mr. SPECTER. Mr. President, moving on to a second subject, The New York Times today has an analysis of health care which bears directly upon the legislation which will soon be considered by the Congress on comprehensive health care. The article focuses on prostate cancer, for illustrative purposes, to raise the issue that the key factor of holding down costs is not being attended to under the current system because there are no determinations as to what is affected.

The article points out that the obvious first step is figuring out what actually works. It cites a number of approaches for dealing with prostate cancer, varying from a few thousand dollars to \$23,000, to \$50,000 to \$100,000. It notes that drug and device makers have no reason to finance such trials because insurers now pay for expensive treatments, even if they aren't effective. The article notes that the selection customarily made is the one which is the most effective.

I have talked to Senator BAUCUS and Senator DODD and have written to them concerning my suggestion in this field. I ask unanimous consent that the text of the New York Times article be printed in the RECORD, together with my letters to Senator BAUCUS, Senator DODD, and Senator KENNEDY.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the New York Times, July 8, 2009]

IN HEALTH REFORM, A CANCER OFFERS AN ACID TEST

(By David Leonhardt)

It's become popular to pick your own personal litmus test for health care reform.

For some liberals, reform will be a success only if it includes a new government-run insurance plan to compete with private insurers. For many conservatives, a bill must exclude such a public plan. For others, the crucial issue is how much money Congress spends covering the uninsured.

My litmus test is different. It's the prostate cancer test.

The prostate cancer test will determine whether President Obama and Congress put together a bill that begins to fix the fundamental problem with our medical system: the combination of soaring costs and mediocre results. If they don't, the medical system will remain deeply troubled, no matter what other improvements they make.

The legislative process is still in the early stages, and Washington is likely to squeeze some costs out of the medical system. But the signals coming from Capitol Hill are still worrisome, because Congress has not seemed willing to change the basic economics of health care.

So let's talk about prostate cancer. Right now, men with the most common form—slow-growing, early-stage prostate cancer—can choose from at least five different courses of treatment. The simplest is known as watchful waiting, which means doing nothing unless later tests show the cancer is worsening. More aggressive options include removing the prostate gland or receiving one of several forms of radiation. The latest treatment—proton radiation therapy—involves a proton accelerator that can be as big as a football field.

Some doctors swear by one treatment, others by another. But no one really knows which is best. Rigorous research has been scant. Above all, no serious study has found that the high-technology treatments do better at keeping men healthy and alive. Most die of something else before prostate cancer becomes a problem.

"No therapy has been shown superior to another," an analysis by the RAND Corporation found. Dr. Michael Rawlins, the chairman of a British medical research institute, told me, "We're not sure how good any of these treatments are." When I asked Dr. Danielle Perloth of Stanford University, who has studied the data, what she would recommend to a family member, she paused. Then she said, "Watchful waiting."

But if the treatments have roughly similar benefits, they have very different prices. Watchful waiting costs just a few thousand dollars, in follow-up doctor visits and tests. Surgery to remove the prostate gland costs about \$23,000. A targeted form of radiation, known as I.M.R.T., runs \$50,000. Proton radiation therapy often exceeds \$100,000.

And in our current fee-for-service medical system—in which doctors and hospitals are paid for how much care they provide, rather than how well they care for their patients—you can probably guess which treatments are becoming more popular: the ones that cost a lot of money.

Use of I.M.R.T. rose tenfold from 2002 to 2006, according to unpublished RAND data. A new proton treatment center will open Wednesday in Oklahoma City, and others are being planned in Chicago, South Florida and elsewhere. The country is paying at least several billion more dollars for prostate treatment than is medically justified—and the bill is rising rapidly.

You may never see this bill, but you're paying it. It has raised your health insurance premiums and left your employer with less money to give you a decent raise. The cost of prostate cancer care is one small reason that some companies have stopped offering health insurance. It is also one reason that medical costs are on a pace to make the federal government insolvent.

These costs are the single most important thing to keep in mind during the health care debate. Making sure that everyone has insurance, important as that is, will not solve the cost problem. Neither will a new public insurance plan. We already have a big public plan, Medicare, and it has not altered the economics of prostate care.

The first step to passing the prostate cancer test is laying the groundwork to figure out what actually works. Incredibly, the only recent randomized trial comparing treatments is a 2005 study from Sweden. (It suggested that removing the prostate might benefit men under 65, which is consistent with the sensible notion that younger men are better candidates for some aggressive treatments.)

"There is no reason in the world we have to be this uncertain about the relative risks and benefits," says Dr. Sean Tunis, a former chief medical officer of Medicare.

Drug and device makers have no reason to finance such trials, because insurers now pay for expensive treatments even if they aren't more effective. So the job has to fall to the government—which, after all, is the country's largest health insurer.

Obama administration officials understand this, and the stimulus bill included money for such research. But stimulus is temporary. The current House version of the health bill does not provide enough long-term financing.

The next step involves giving more solid information to patients. A fascinating series of pilot programs, including for prostate cancer, has shown that when patients have clinical information about treatments, they often choose a less invasive one. Some come to see that the risks and side effects of more invasive care are not worth the small—or nonexistent—benefits. "We want the thing that makes us better," says Dr. Peter B. Bach, a pulmonary specialist at Memorial Sloan-Kettering Cancer Center, "not the thing that is niftier."

The current Senate bill would encourage doctors to give patients more information. But that won't be nearly enough to begin solving the cost problem.

To do that, health care reform will have to start to change the incentives in the medical system. We'll have to start paying for quality, not volume.

On this score, health care economists tell me that they are troubled by Congress's early work. They are hoping that the Senate Finance Committee will soon release a bill that does better. But as Ron Wyden, an Oregon Democrat on the committee, says, "There has not been adequate attention to changing the incentives that drive behavior." One big reason is that the health care industry is lobbying hard for the status quo.

Plenty of good alternatives exist. Hospitals can be financially punished for making costly errors. Consumers can be given more choice of insurers, creating an incentive for them to sign up for a plan that doesn't cover wasteful care. Doctors can be paid a set fee for some conditions, adequate to cover the least expensive most effective treatment. (This is similar to what happens in other countries, where doctors are on salary rather than paid piecemeal—and medical care is much less expensive.)

Even if Congress did all this, we would still face tough decisions. Imagine if further prostate research showed that a \$50,000 dose of targeted radiation did not extend life but did bring fewer side effects, like diarrhea, than other forms of radiation. Should Medicare spend billions to pay for targeted radiation? Or should it help prostate patients manage their diarrhea and then spend the billions on other kinds of care?

The answer isn't obvious. But this much is: The current health care system is hard-wired to be bloated and inefficient. Doesn't that seem like a problem that a once-in-a-generation effort to reform health care should address?

U.S. SENATE,

Washington, DC, June 17, 2009.

Hon. MAX BAUCUS,  
Chairman, Senate Finance Committee, Washington, DC.

DEAR MAX: I write to call to your personal attention provisions on bio-medical research which, in my judgment, are critical—arguably indispensable—for inclusion in comprehensive health care reform legislation.

I urge that authorization for the National Institutes of Health be set at a new baseline of \$40 billion, reflecting the current \$30 billion level plus the \$10 billion from the stimulus package. The Administration's current request of \$443 million is totally insufficient since at least \$1 billion is necessary to keep up with inflation and additional funding is necessary to maintain an appropriate level for more innovative research grants.

When the appropriations for NIH, spearheaded by Senator Harkin and myself, were increased by \$3 to \$3.5 billion each year, there was a dramatic decrease in deaths attributable to many maladies. Since reform legislation has as two principal objectives, improving the quality of health care and reducing costs, the best way to reach those objectives is through increasing funding for bio-medical research at NIH.

The second item which I urge for inclusion in comprehensive health reform legislation is specified in S. 914, the Cures Acceleration Network Act which I introduced on April 28, 2009. That bill would help our nation's medical research community bridge what practitioners call the "valley of death" between discoveries in basic science and new effective treatments and cures for the diseases. This translational medical research will accelerate medical progress at the patient's bedside and maximize the return on the substantial investments being made on bio-medical research.

I look forward to working with you on these proposals as well as other facets of comprehensive health care reform.

I am sending an identical letter to Senator Kennedy.

Sincerely,

ARLEN SPECTER.

U.S. SENATE,

Washington, DC, July 8, 2009.

Hon. CHRISTOPHER J. DODD,  
U.S. Senate,  
Washington, DC.

DEAR CHRIS: Before the 4th of July recess, I mentioned to you on the Senate floor my strong interest in including a \$40 billion annual base for NIH and my proposed Cures Accelerated Network Act (S.914) in the comprehensive health care reform legislation.

I am enclosing a copy of a letter which I sent to Chairman Kennedy on June 17, 2009 which spells out in some detail my proposals.

Thanks very much for your consideration of this request.

My best.

Sincerely,

ARLEN SPECTER.

U.S. SENATE,

Washington, DC, June 17, 2009.

Hon. EDWARD M. KENNEDY,  
Chairman, Committee on Health, Education,  
Labor and Pension, Washington, DC.

DEAR TED: I write to call to your personal attention provisions on bio-medical research which, in my judgment, are critical—arguably indispensable—for inclusion in comprehensive health care reform legislation.

I urge that authorization for the National Institutes of Health be set at a new baseline of \$40 billion, reflecting the current \$30 billion level plus the \$10 billion from the stimulus package. The Administration's current request of \$443 million is totally insufficient

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I look forward to working with you on these proposals as well as other facets of comprehensive health care reform.

I am sending an identical letter to Senator Baucus.

Sincerely,

ARLEN SPECTER.

Mr. SPECTER. Mr. President, it is my view that this is a critical and arguably indispensable item to be taken up in this comprehensive health care reform—and certainly weighs heavily on my mind—and that is to fund the National Institutes of Health at the \$30 billion currently as the base, plus the \$10 billion in the stimulus package, for a base of \$40 billion. The results from medical research have been phenomenal, with decreases in fatality to stroke, breast cancer, and many other of the health maladies. Then, to combine that with legislation which I have introduced, S. 914, the Cures Acceleration Network, which addresses the issue taken up by *The New York Times*, and that is to make a determination of what actually works.

There has been identified a so-called "valley of death" between the bench and clinical research and the bedside and application of the research. The pharmaceutical companies do not take up this issue because of the cost. This is something which ought to be taken up by the Federal Government as the dominant funder for the National Institutes of Health. So should the comprehensive health care include this issue to address, in a meaningful way, the very high costs of medical care? Certainly, if the tests make a determination that the less-expensive items are the ones which ought to be followed, that could meet the Federal standard and that could prevail.

#### HOLOCAUST LOOTED ART RETRIEVAL

Mr. SPECTER. Mr. President, moving to yet another subject, there is a major miscarriage of justice currently being perpetrated on the victims of the

Holocaust and their survivors. The *Washington Post*, 2 weeks ago Sunday, on June 28, pointed out that Holocaust survivors and their heirs are battling museums and governments for the return of thousands of pieces of looted art, despite pledges made by dozens of countries and Washington a decade ago to resolve the claims.

At a major conference underway in Prague, delegates from 49 countries acknowledged that Jews continue to be stymied in their efforts to reclaim art that was stolen by the Nazis and later transferred to museums and galleries around the world, especially in Europe. An estimated 100,000 artworks, from invaluable masterpieces to items of mostly sentimental value, remain lost or beyond legal reach of their victimized owners and descendants.

Stuart Eizenstat, head of the U.S. delegation to the conference said:

This is one of our last chances to inject a new sense of justice into this issue before it's too late for Holocaust victims.

The article goes on to point out that:

In December 1998, after many world-famous museums were found to have Nazi-tainted art in their collections, representatives from 44 countries met in Washington and endorsed guidelines for investigating claims of stolen items and returning them to their rightful owners.

Notwithstanding that international determination, the program has not been carried out.

The article goes on to cite the case involving Mr. Michael Klepetar, a real estate project manager from Prague, who has been trying for 9 years to persuade the Czech National Gallery to relinquish 43 paintings that once belonged to his great uncle, Richard Popper, a prominent collector who was deported to Poland and perished in the Jewish ghetto in the city of Lodz. Popper's wife and daughter also died in the Nazi camps. The National Gallery in Czechoslovakia has refused to part with the paintings, citing a law adopted in 2000 by the Czech Government that entitles only Holocaust victims or their "direct descendants" to file claims for the property. The Ministry of Culture in Czechoslovakia has classified 13 of the looted artworks as "cultural treasures," a designation that prevents them from being taken out of the country.

Mr. Klepetar went on to point out the salient underlying factor:

This country—

Referring to Czechoslovakia—like most of the region, has always been anti-semitic through the centuries. The only difference now is that it's not politically correct. That's the root of the whole problem.

I am writing today to Secretary of State Clinton asking her to use the persuasive power of the Department of State to rectify this problem. I am also writing to the State Department legal counselor, inquiring about what enforcement action might be taken in international legal tribunals to rectify this situation.

I ask unanimous consent that a copy of the *Post* article, and the copies of

my letters to Secretary Clinton and the State Department legal adviser be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the *Washington Post*, June 28, 2009]

JEWIS REMAIN STYMIED IN EFFORTS TO  
RECLAIM ART LOOTED BY NAZIS

(By Craig Whitlock)

Holocaust survivors and their heirs are still battling museums and governments for the return of thousands of pieces of looted art, despite pledges made by dozens of countries in Washington a decade ago to resolve the claims.

At a major conference underway here in Prague, delegates from 49 countries acknowledged that Jews continue to be stymied in their efforts to reclaim art that was stolen by the Nazis and later transferred to museums and galleries around the world, especially in Europe. An estimated 100,000 artworks, from invaluable masterpieces to items of mostly sentimental value, remain lost or beyond legal reach of their victimized owners and descendants.

"This is one of our last chances to inject a new sense of justice into this issue before it's too late for Holocaust victims," said Stuart Eizenstat, head of the U.S. delegation to the conference and a former ambassador and deputy Treasury secretary during the Clinton administration.

The Holocaust Era Assets Conference, hosted by the Czech Republic, is an attempt to revive a global campaign that began 11 years ago to track down long-lost art collections that were confiscated or acquired under dubious circumstances during the Holocaust.

In December 1998, after many world-famous museums were found to have Nazi-tainted art in their collections, representatives from 44 countries met in Washington and endorsed guidelines for investigating claims of stolen items and returning them to their rightful owners.

The guidelines, known in the art world as the Washington Principles, have eased the return of looted art in many cases. Despite their endorsement by most European countries and the United States, however, the guidelines are legally nonbinding. They are also often ignored in practice by museums and governments that profess in public to abide by them, according to art experts.

Michel Klepetar, a real-estate project manager from Prague, has been trying for nine years to persuade the Czech National Gallery to relinquish 43 paintings that once belonged to his great-uncle, Richard Popper, a prominent collector who was deported to Poland and perished in the Jewish ghetto in the city of Lodz.

Popper's wife and daughter also died in Nazi camps. Klepetar, 62, and his brother are their closest living relatives. But the National Gallery has refused to part with the paintings, citing a law adopted in 2000 by the Czech government that entitles only Holocaust victims or their "direct descendants" to file claims for stolen property.

In an interview, Klepetar argued that the Czech law was unconstitutional, unethical and particularly unfair to Jews. An estimated 6 million Jews were killed in the Holocaust; many families were survived only by distant relatives.

"This country, like most of the region, had always been anti-Semitic through the centuries," he said. "The only difference now is that it's not politically correct. That's the root of the whole problem."

Klepetar's great-uncle had amassed a collection of 127 artworks—mostly Flemish and