STATEMENT OF SENATOR ARLEN SPECTER

S. 4033, Restoration of Legal Rights for Claimants Under Holocaust-Era Insurance Policies

December 15, 2010

Mr. President. I have sought recognition to urge my colleagues to support and take up next Congress the bill I just introduced, the "Restoration of Legal Rights for Claimants Under Holocaust-Era Insurance Policies." The bill would restore the right of Holocaust survivors and their descendants—many of them United States citizens—to maintain lawsuits in our courts to recover unpaid proceeds under Holocaust-era life insurance policies. Recent decisions of the federal courts about which I have spoken at length in prior floor statements and confirmation hearings have denied survivors and their descendants that right.

The insurance policies at issue were issued to millions of European Jews before World War II. During the Nazi era, European insurers largely escaped their obligations under the policies—sometimes by participating with the Nazis in what one Supreme Court Justice has characterized as "larcenous takings of gigantic proportions." [*Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 430 (2003) (Ginsburg, J., joined by Stevens, Scalia, and Thomas, JJ., dissenting).] In the aftermath of World War II, insurers dishonored the policies for one shameful reason or another. The most shameful of them was that a claimant could not produce a death certificate of a deceased insured who had been murdered in a Nazi death camp.

In the 1990s survivors turned, as a last resort, to the courts of the United States. Numerous suits were filed seeking compensation from European insurers for dishonoring Holocaust-era insurance policies during and especially after the War. Several states, for their part, attempted to facilitate recovery under unpaid policies by requiring insurers doing business in their states (as most did) to disclose information about those policies.

European insures responded to these developments by agreeing to establish a private claims resolution process. Their agreement resulted in the establishment of a voluntary organization in 1998—formed by, among others, the insurers, the State of Israel, and state insurance commissioners in the United States—known as the International Commission on Holocaust Era Insurance Claims (ICHEIC). "The job of ICHEIC," according to the Supreme Court, "include[d] negotiation with European insurers to provide information about unpaid insurance policies and the settlement of claims under them." [*Garamendi*, 539 U.S. at 407.]

Many survivors and their descendants filed claims through ICHEIC. How fairly ICHEIC decided their claims remains a debated question. Testimony before Congress at least raises serious questions as to whether meritorious claims were denied. I do not wish to enter that debate today except to emphasize that ICHEIC was not a neutral, governmental adjudicatory body. It was, as then-Judge Michael Mukasey said, a "an ad-hoc non-judicial, private international claims tribunal" created, funded, and to a large extent controlled by the insurance companies—in short, again in Judge Mukasey's words, "a company store." [*In re Assicurazioni Generali, S.p.A Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 356-57 (S.D.N.Y. 2002).]

I also wish to emphasize that by filing a claim through ICHEIC, a claimant did not waive his right to file suit. Only claimants who received payments under insurance policies did so.

Despite the creation of ICHEIC, litigation continued in American courts. Foreign protests over the litigation led the United States to negotiate several executive agreements with foreign governments. Of these, the most important was the 2000 German Foundation Agreement. It obligated Germany to establish the German Foundation, which was funded by Germany and German companies, to compensate Jews "who suffered" various economic harms "at the hands of the German companies during the National Socialist era." As for insurance claims in particular, the agreement obligated German insurers to address them through ICHEIC. Similar agreements between the United States and Austria and France followed. No agreement was reached, though, with Nazi Germany's principal ally, Italy.

In negotiating the 2000 agreement, Germany sought immunity from suit—"legal peace" as Germany calls it—in American courts for German companies. The United States refused to provide it, and could not have provided it, in my view, in the absence of a Senate-ratified treaty or some other such authoritative Congressional action. Instead the United States agreed only to the inclusion of a provision obligating the United States to file in any suit against a German company over a Holocaust-era claim a precatory statement informing the court that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." The United States also agreed in any such filing to "recommend dismissal on any valid legal ground (which, under the U.S. system of jurisprudence, will be for the U.S. courts to determine)." The 2000 agreement makes explicit, however, that "the United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal."

But what the 2000 executive agreement expressly denied Germany companies—that is, immunity from suit—our federal courts have now given them at the urging of the executive branch. I refer first and foremost to the Supreme Court's much-criticized, five-to-four decision in *American Insurance Co. v. Garamendi* (2003). The Court held there that the executive branch's foreign policy favoring the resolution of Holocaust-era insurance claims through ICHEIC preempted a California law requiring the disclosure of information about Holocaust-era insurance policies to potential claimants. It did not matter, the Court said, that the executive agreement said nothing whatsoever about preemption, let alone that no federal statute or treaty actually preempted disclosure statutes like California's. It was enough that the agreement embodied a general policy—reaffirmed over the years by statements by sub-cabinet officials—with which California's disclosure statute could be said to conflict. Four Justices with very different views on executive power—Ginsburg, Scalia, Stevens, and Thomas—dissented. While conceding the (questionable) argument that the President can under some circumstances preempt state law by executive agreement, they emphasized the obvious flaw in the Court's position on the facts at hand: The 2000 agreement says nothing about preemption. Insofar as it says anything on the subject, it actually disclaims any preemptive effect.

On the authority of *Garamendi*, the federal district court before which lawsuits to recover on policies issued by the Italian insurer Generali had been consolidated dismissed

those suits as preempted. The court rejected the plaintiffs' argument that the suits could not be preempted because Italy and the United States had never entered into an executive agreement addressing claims against Italian insurers. Appeals to the Court of Appeals for the Second Circuit followed. While the appeals were pending, a class action settlement was reached and approved by the court under which most of the class members received nothing. The plaintiffs' lead counsel has said that *Garamendi* left them no choice but to settle. Several plaintiffs who opted out of the settlement nonetheless pressed on with the appeals. Early this year the Second Circuit affirmed the dismissal of their cases. [*In re Assicurazioni Generali, S.P.A.*, 529 F.3d 113 (2d Cir. 2010).]

The plaintiffs then asked the Supreme Court to hear their case by filing a petition for certiorari. They raised two main questions. (1) Whether *Garamendi* preempts the generally applicable state common law under which the plaintiffs sought recovery, as opposed to the disclosure-specific law California enacted. (2) Whether *Garamendi* should be read to preempt state-law claims in the absence of any executive agreement addressing those claims. (Recall that Italy and the United States never entered into an executive agreement with which claims against Generali, an Italian insurer, could be said to conflict.) A post-*Garamendi* decision of the Court, *Medellin v. Texas* (2008), suggests that *Garamendi* cannot be so broadly read—that an executive-branch foreign policy can preempt state law only if it becomes law through the means prescribed by the Constitution or, in some limited class of cases at least, find expression in an executive agreement entered with Congress's acquiescence. Despite the importance of these questions and an apparent split among the lower courts in answering them, the Supreme Court denied certiorari.

My legislation would achieve two narrow, but important, objectives: First, it would restore Holocaust survivors and their descendants to the legal position they occupied before *Garamendi* and *Generali*. Second, it would allow states to enforce the sort of disclosure laws at issue in *Garamendi*. With limited exceptions tailored to achieve these objectives, the legislation would otherwise leave undisturbed any defenses that insurers may have to Holocaust-era insurance claims, including the defense that they were settled and released through ICHEIC.

Of equal significance, my legislation would vindicate two important Constitutional principles—one involving separation of powers, the other federalism. The principle of separation of powers is that the Constitution vests all lawmaking authority in Congress and none in the executive branch. The principle of federalism is that, under the Constitution's supremacy clause (Article VI), only the Constitution, Congressionally enacted law, and Senate-ratified treaties can preempt state law. Some executive agreements, if entered at least with Congress's acquiescence, arguably may also do so. But executive-branch policies plainly do not.

One final point: A similar House bill (H.R. 4596) has been objected to on the ground that it will disserve aging Holocaust survivors because it will create unrealistic expectations of recovery. Claims that were not successful before ICHEIC, the House bill's critics claim, are almost certain to fail in court. That is a debatable objection. It is, in any event, beside the point. Holocaust survivors and their descendants should be allowed to decide for themselves whether to file suit. Neither the executive branch nor the federal courts should make that decision for them.