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United States Senate
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The Honorable Elena Kagan
Solicitor General of the United States
c/o The Department of Justice
Washington, DC

May 25, 2010

Dear Solicitor General Kagan:

At our meeting on February 4, 2009, your confirmation for Solicitor General was pending before the Senate. We discussed, among other things, two cases that raise important questions about Executive-branch incursions on Congress's law-making powers with respect to the jurisdiction of the lower federal courts: *Weiss v. Assicurazioni Generali, S.P.A.* (hereafter *Generali*), 529 F.3d 113 (2d Cir. 2010), and *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2859 (2009) (hereafter *9/11 Litigation*). I write to notify you of the topics I intend to cover at your upcoming confirmation hearing with respect to these and related cases.

Holocaust Litigation (*Generali*)

This litigation was brought by victims of the Holocaust and their heirs to recover on unpaid World War II-era insurance policies issued by an Italian insurance company. Just a few months ago, the United States Court of Appeals for the Second Circuit affirmed the dismissal of the plaintiffs' claims on the ground that they were preempted by an Executive-branch foreign policy favoring the resolution of such claims through an international commission. The Second Circuit did so in reliance on the Supreme Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). There the Court held that this policy, though not formalized in an executive agreement or treaty, preempted a state law requiring insurers to disclose information about certain Holocaust-era insurance policies. The Court relied on cases addressing the preemptive effect of executive agreements purporting to settle claims of private litigants in federal courts. A post-*Garamendi* development of note is the Court's decision in *Medellin v. Texas,* 552 U.S. 491 (2008), where the Chief Justice suggested that the executive branch could settle claims by executive agreement only in the face of acquiescence by Congress.

I intend to ask you, among other questions:

(1) whether you understand the Supreme Court's case law to require a finding of Congressional acquiescence as a condition of giving preemptive effect to an executive agreement;

(2) whether you agree with Justice Ginsburg's dissenting opinion in *Garamendi* (joined by Justices Stevens, Scalia and Thomas) that an Executive-branch foreign policy not formalized in a treaty or an executive agreement cannot preempt state law; and

(3) what considerations you would bring to bear in deciding whether to vote to grant certiorari in this case, if confirmed. (My office has been advised that a petition for certiorari will be filed soon.)

9/11 Litigation

This litigation was brought by over 6,000 victims of the September 11 terrorist attacks against, among other defendants, the Kingdom of Saudi Arabia and five Saudi princes. The plaintiffs pleaded various claims arising from their allegation that the defendants financed the attacks. None of these defendants, though, ever had to defend the case on the merits. The United States Court of Appeals for the Second Circuit ruled that they were immune from suit under the Foreign Sovereign Immunities Act (FSIA). The plaintiffs petitioned the Supreme Court for certiorari. You filed a brief on behalf of the United States urging the Supreme Court to deny the petition. *The New York Times* reported that your filing came less than a week before President Obama's trip to the Middle East to meet with Saudi Arabia's King Abdullah. *See* Eric Lichtblau, "Justice Department Bakcs Saudi Royal Family on 9/11 Lawsuit," *New York Times*, May 30, 2009. The Court denied the petition.

One of the two key questions in the petition was whether, as the Second Circuit had held, the FSIA addressed the immunity of the Saudi officials. There is, as you acknowledged in your brief, a circuit split on the question: Some circuits have concluded that the FSIA governs the immunity of foreign officials, as distinct from foreign states. Others have concluded that their immunity is governed by non-statutory principles articulated by the Executive branch. The United States argued that the split was not worthy of the Court's review because the "disagreement appears to be of little practical consequence." In earlier cases, however, the United States argued repeatedly that the distinction is indeed of practical consequence in numerous respects. And you have since filed a brief on behalf of the United States in *Samantar v. Yousuf* (No. 08-1555) urging the Court to hold that the FSIA does not displace "principles adopted by the Executive branch" governing the immunity of foreign officials.

The second of the questions raised was whether the defendants could be sued under the FSIA's domestic tort exception. That exception permits suits against sovereigns arising from injuries "occurring in the United States and caused by the tortuous act or omission of the foreign state." 28 U.S.C. § 1605(a)(5). You argued in your brief that the exception did not apply.

I intend to ask you, among other questions:

(1) whether you would have voted to grant certiorari in the 9/11 Litigation had you been sitting on the Court;

(2) whether the United States may have placed diplomatic concerns above the rights of 9-11 victims in urging the Court not to grant certiorari;

(3) whether the FSIA governs all questions of sovereign immunity in the federal courts; and

(4) whether you believe that the FSIA's tort exception should have been interpreted to confer immunity on the defendants.

At our meeting on May 13, 2010, when we discussed your confirmation for the Supreme Court, we discussed, among other things, the constitutionality of the Terrorist Surveillance Program (TSP), which brought into sharp conflict Congress's authority under Article I to establish the 'exclusive means' for wiretaps under the Foreign Intelligence Surveillance Act with the President's authority under Article II as Commander-in-Chief to order warrantless wiretaps.

The TSP operated secretly from shortly after 9/11 until a *New York Times* article detailed the program in December 2005. In August 2006, the United States District Court for the Eastern District of Michigan found the program unconstitutional. In July 2007, the Sixth Circuit reversed 2-1, finding lack of standing. The Supreme Court then denied certiorari.

The dissenting opinion in the Sixth Circuit demonstrated the flexibility of the standing requirement to provide the basis for a decision on the merits. As Judge Gilman noted, "the attorney-plaintiffs in the present case allege that the government is listening in on private person-to-person communications that are not open to the public. These are communications that any reasonable person would understand to be private." After analyzing the standing inquiry under a recent Supreme Court decision, Judge Gilman would have held that "[the attorney-plaintiffs have thus identified concrete harms to themselves flowing from their reasonable fear that the TSP will intercept privileged communications between themselves and their clients."

I intend to ask you, among other questions, whether you would have voted to grant certiorari in this case had you been on the Supreme Court.

Sincerely,

Arlen Specter

cc: Chairman Patrick J. Leahy, Senate Judiciary Committee
Ranking Member Jeff Sessions, Senate Judiciary Committee
All Members of the Senate Judiciary Committee