

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 German’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 Germany 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 statute’s 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 state 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. Whether *Garamendi* preempts the generally applicable state common law under which the plaintiffs sought recovery, as opposed to the disclosure-specific law California enacted. 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.

#### AMENDMENTS SUBMITTED AND PROPOSED

SA 4810. Mr. BAUCUS submitted an amendment intended to be proposed by him to the bill H.R. 4849, to amend the Internal Revenue Code of 1986 to provide tax incentives for small business job creation, extend the Build America Bonds program, provide other infrastructure job creation tax incentives, and for other purposes; which was ordered to lie on the table.

SA 4811. Mr. DEMINT submitted an amendment intended to be proposed by him to the bill H.R. 3082, making appropriations for military construction, the Department of

Veterans Affairs, and related agencies for the fiscal year ending September 30, 2010, and for other purposes; which was ordered to lie on the table.

SA 4812. Mr. MCCAIN submitted an amendment intended to be proposed by him to the bill H.R. 3082, supra; which was ordered to lie on the table.

SA 4813. Ms. SNOWE (for herself and Ms. COLLINS) submitted an amendment intended to be proposed by her to the bill S. 3454, to authorize appropriations for fiscal year 2011 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes; which was ordered to lie on the table.

#### TEXT OF AMENDMENTS

SA 4810. Mr. BAUCUS submitted an amendment intended to be proposed by him to the bill H.R. 4849, to amend the Internal Revenue Code of 1986 to provide tax incentives for small business job creation, extend the Build America Bonds program, provide other infrastructure job creation tax incentives, and for other purposes; which was ordered to lie on the table; as follows:

Strike all after the enacting clause and insert the following:

#### SECTION 1. REPEAL OF EXPANSION OF INFORMATION REPORTING REQUIREMENTS.

(a) REPEAL OF PAYMENTS FOR PROPERTY AND OTHER GROSS PROCEEDS.—Subsection (b) of section 9006 of the Patient Protection and Affordable Care Act, and the amendments made thereby, are hereby repealed; and the Internal Revenue Code of 1986 shall be applied as if such subsection, and amendments, had never been enacted.

(b) REPEAL OF APPLICATION TO CORPORATIONS; APPLICATION OF REGULATORY AUTHORITY.—

(1) IN GENERAL.—Section 6041, as amended by section 9006(a) of the Patient Protection and Affordable Care Act and section 2101 of the Small Business Jobs Act of 2010, is amended by striking subsections (i) and (j) and inserting the following new subsection:

“(i) REGULATIONS.—The Secretary may prescribe such regulations and other guidance as may be appropriate or necessary to carry out the purposes of this section, including rules to prevent duplicative reporting of transactions.”

(2) EFFECTIVE DATE.—The amendment made by this subsection shall apply to payments made after December 31, 2010.

SA 4811. Mr. DEMINT submitted an amendment intended to be proposed by him to the bill H.R. 3082, making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2010, and for other purposes; which was ordered to lie on the table; as follows:

On page \_\_, between lines \_\_ and \_\_, insert the following:

#### SEC. \_\_\_\_ . PROHIBITION ON FUNDING EARMARKS.

(a) IN GENERAL.—Notwithstanding any other provision of this Act, none of the funds provided in this Act may be expended to fund an earmark. Any account in this Act from which an earmark is made shall be reduced by an amount equal to any such earmark.

(b) EARMARK DEFINED.—The term “earmark” means a congressionally directed

spending item, limited tax benefit, or limited tariff benefit as defined in paragraph 5 of rule XLIV of the Standing Rules of the Senate or a congressional earmark as defined in clause 9(e) of rule XXI of the Rules of the House of Representatives.

SA 4812. Mr. MCCAIN submitted an amendment intended to be proposed by him to the bill H.R. 3082, making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2010, and for other purposes; which was ordered to lie on the table; as follows:

On page 383, beginning on line 24, strike “\$10,000,000 to the John P. Murtha Foundation;”.

SA 4813. Ms. SNOWE (for herself and Ms. COLLINS) submitted an amendment intended to be proposed by her to the bill H.R. 3454, to authorize appropriations for fiscal year 2011 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes; which was ordered to lie on the table; as follows:

At the end of the table VI, add the following:

#### Subtitle E—Other Matters

#### SEC. 641. CONTINUED OPERATION OF COMMISSARY AND EXCHANGE STORES SERVING BRUNSWICK NAVAL AIR STATION, MAINE.

The Secretary of Defense shall provide for the continued operation of each commissary or exchange store serving Brunswick Naval Air Station, Maine, through September 30, 2011, and may not take any action to reduce or to terminate the sale of goods at such stores during fiscal year 2011.

#### AUTHORITY FOR COMMITTEES TO MEET

#### COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY

Mr. BAUCUS. Mr. President, I ask unanimous consent that the Committee on Agriculture, Nutrition, and Forestry be authorized to meet during the session of the Senate on December 15, 2010, at 12 p.m. in room S-219 of the Capitol Building.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### COMMITTEE ON FINANCE

Mr. BAUCUS. Mr. President, I ask unanimous consent that the Committee on Finance be authorized to meet during the session of the Senate on December 15, 2010, immediately following a vote on the Senate Floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### PRIVILEGES OF THE FLOOR

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that Nancy Peterson, a fellow in Senator WEBB’s office, be granted the privilege of the floor throughout the Senate’s consideration of the New START treaty and the fiscal year 2011 Omnibus Appropriations Act.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### UNANIMOUS CONSENT AGREEMENT—EXECUTIVE CALENDAR

Mr. DURBIN. Mr. President, as if in executive session, I ask unanimous consent that on Thursday, December 16, following leader time, the Senate proceed to executive session to begin consideration of Calendar No. 7, the START treaty, and that the treaty be considered read.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### ORDER FOR PRINTING OF TRIBUTES

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the printing of tributes be modified to provide that Members have until sine die of the 111th Congress, 2d session, to submit tributes and that the order for printing remain in effect.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### MAKING TECHNICAL CORRECTIONS TO THE COAST GUARD AUTHORIZATION ACT OF 2010

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of H.R. 6516, which was received from the House and is at the desk.

The PRESIDING OFFICER. The clerk will report the title of the bill.

The bill clerk read as follows:

A bill (H.R. 6516) to make technical corrections to provisions of law enacted by the Coast Guard Authorization Act of 2010.

There being no objection, the Senate proceeded to consider the bill.

Mr. DURBIN. I ask unanimous consent that the bill be read three times and passed, the motions to reconsider be laid upon the table, with no intervening action or debate, and any statements related to the bill be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (H.R. 6516) was ordered to be read a third time, was read the third time, and passed.

#### ORDERS FOR THURSDAY, DECEMBER 16, 2010

Mr. DURBIN. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 9:30 a.m. on Thursday, December 16; that following the prayer and the pledge, the Journal of proceedings be approved to date, the morning hour be deemed to have expired, and the time for the two leaders be reserved for their use later in the day; and that following any leader remarks, the Senate proceed to executive session for the consideration of the New START treaty, as provided under the previous order.