

United States Senate

WASHINGTON, DC 20510-3802
specter.senate.gov

The Honorable Sonia Sotomayor
c/o The Department of Justice
Washington, D.C.

July 7, 2009

Dear Judge Sotomayor:

As noted in my letters of June 15 and June 25, I am writing to alert you to subjects which I intend to cover at your hearing. During our courtesy meeting you noted your appreciation of this advance notice. This is the third and final letter in this series.

The decisions by the Supreme Court not to hear cases may be more important than the decisions actually deciding cases. There are certainly more of them. They are hidden in single sentence denials with no indication of what they involve or why they are rejected. In some high profile cases, it is apparent that there is good reason to challenge the Court's refusal to decide.

The rejection of significant cases occurs at the same time the Court's caseload has dramatically decreased, the number of law clerks has quadrupled, and justices are observed lecturing around the world during the traditional three-month break from the end of June until the first Monday in October while other Federal employees work 11 months a year.

During his Senate confirmation hearing, Chief Justice John G. Roberts, Jr. said the Court "could contribute more to the clarity and uniformity of the law by taking more cases."ⁱ The number of cases decided by the Supreme Court in the 19th century shows the capacity of the nine Justices to decide more cases. According to Professor Edward A. Hartnett:

"...in 1870, the Court had 636 cases on its docket and decided 280; in 1880, the Court had 1,202 cases on its docket and decided 365; and in 1886, the Court had 1,396 cases on its docket and decided 451."ⁱⁱ

The downward trend of decided case is noteworthy since 1985 and has continued under Chief Justice Roberts' leadership. The number of signed opinions decreased from 161 in the 1985 term to 67 in the 2007 term.ⁱⁱⁱ

It has been reported that seven of the nine justices, excluding Justices Stevens and Alito, assign their clerks to what is called a "cert. pool" to review the thousands of petitions for certiorari. The clerk then writes and circulates a summary of the case and its issues suggesting justices' reading of cert. petitions is, at most, limited.

At a time of this declining caseload, the Supreme Court has left undecided circuit court splits of authority on many important cases such as:

- 1) The necessity for an agency head to personally assert the deliberative process privilege;^{iv}
- 2) Mandatory minimums for use of a gun in drug trafficking;^v

- 3) Equitable tolling of the Federal Tort Claims Act's statute of limitations period;^{vi}
- 4) The standard for deciding whether a Chapter 11 bankruptcy may benefit from executory contracts;^{vii}
- 5) Construing the honest services provisions of fraud law;^{viii} and
- 6) The propriety of a jury consulting the Bible during deliberations.^{ix}

One procedural change for the Court to take more of these cases would be to lower the number of justices required for cert. from four to three or perhaps even to two.

Of perhaps greater significance are the high-profile, major constitutional issues which the court refuses to decide involving executive authority, congressional authority and civil rights. A noteworthy denial of cert. occurred in the Court's refusal to decide the constitutionality of the Terrorist Surveillance Program which brought into sharp conflict Congress' authority under Article I to establish the exclusive basis for wiretaps under the Foreign Intelligence Surveillance Act with the President's authority under Article II as Commander in Chief to order warrantless wiretaps.

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

The dissenting opinion in the Sixth Circuit demonstrated the flexibility of the standing requirement to provide the basis for a decision on the merits. 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."^{xiii} After analyzing the standing inquiry under a recent Supreme Court decision, Judge Gilman would have held that, "[t]he 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."^{xiv} On a matter of such importance, the Supreme Court could at least have granted certiorari and decided that standing was a legitimate basis on which to reject the decision on the merits.

On June 29, 2009, the Supreme Court refused to consider the case captioned *In re Terrorist Attacks on September 11, 2001*,^{xv} 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.^{xvi} 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,

A handwritten signature in black ink, appearing to read "A. Specter", written in a cursive style.

Arlen Specter

ⁱ 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.).

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

ⁱⁱⁱ 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>.

^{iv} 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).

^v 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 commission 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).

^{vi} 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-jurisdictional and applying equitable tolling).

^{vii} 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 nondebtor 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 preclude from assuming a contract unless it *actually* intended to assign the contract to a third party" (emphasis in original)).

^{viii} 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.

^{ix} 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.”).

^x 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.).

^{xi} A.C.L.U. v. N.S.A., 493 F.3d 644 (6th Cir. 2007).

^{xii} 128 S.Ct. 1334 (2008).

^{xiii} 493 F.3d at 697.

^{xiv} Id.

^{xv} 538 F.3d 71 (2d Cir. 2008).

^{xvi} Federal Ins. Co. v. Kingdom of Saudi Arabia, --- S.Ct. ----, 2009 WL 1835181 (Jun. 29, 2009).