payments. She is barely scraping by. She refinanced her condo twice this year to stay out of credit card debt.

She has tried everything to bring down her health care costs. She has looked for other health insurance options in the private market, but because her son has what we call a preexisting condition, in this case asthma, she has been denied coverage.

Karen Gulva is not looking for a handout from this government. She just wants some help from the country she supports as a loyal tax-paying American citizen. All she wants is affordable health insurance. All she wants is some peace of mind as a mom that her kid is going to have what he needs to lead a normal life.

That is what the debate is about. It is about the uninsured—50 million people who do not have insurance—but it is also about Karen, a hard-working mom who has watched the cost of health insurance triple in a short period of time and who worries about whether she can keep up with it.

I have listened to a lot of debate coming from the other side of the aisle, and I hope I am not misinterpreting it. But it seems for some on the other side of the aisle they do not view this as a matter of urgency. They do not see this as an issue that requires our immediate, full-scale attention.

I see it differently. I think this gets to the heart of why we are here in the Senate. We are not here to stand on the floor and make speeches. We are here to pass laws that make life better for America and give us a chance for a stronger Nation with stronger families in the years to come. Sometimes we have to tackle some of the issues that are the hardest.

President Obama has told many of us privately and said publicly many times: If health care reform were easy, they would have done it a long time ago. It is not easy. It is not easy because the current expensive system is rewarding people, unfortunately, for the wrong things.

I have referred on the floor before to an article in the New Yorker from June 1 by a doctor, Atul Gawande. It is titled ''The Cost Conundrum.'' Dr. Gawande went to McAllen, TX, to figure out why in the world in that small town the average spent on Medicare recipients was $15,000 a year—one of the highest in the Nation. He could not find a reason. This is not the situation where there is a disease there or elderly people are sicker.

What he found out was the doctors in that town were billing everything imaginable. They were throwing in tests and procedures, piling one on top of the other because they get paid more. The more they do, the more they bill, the more they get paid.

One of the doctors said: Well, you know, it is defensive medicine. We can get sued. And another doctor said: That is not the case at all. Texas has one of the tightest med mal laws in the Nation. It limits the amount anybody could recover for a medical malpractice lawsuit, and there are not many suits that are filed. No. The bottom line is, these doctors have an incentive to bill more to the Medicare system because they get paid more when that happens.

If you go to a place such as Rochester, MN, and the Mayo Clinic, where the doctors are on salary, and their goal is not to pile up the procedures but to get the patient well, you will find the cost of treating Medicare patients is dramatically less in Rochester, MN, than it is in McAllen, TX.

How do you create an incentive in our system for the right outcomes—healthy people with quality care available to them—and reduce the overall cost? Our health care system spends twice as much per person than any other nation on Earth. Our results do not show why that money is being spent. They do not prove that is working to make us a safer, healthier nation.

So now the argument on the other side is that we have to be careful because we might end up with a public option; that is, a health insurance plan as an option that Americans can choose that might be government sponsored. I do not think that is wrong. In fact, I think that is healthy. It is important the private health insurance companies who now rule the roost have competition—somebody keeping an eye on them to make sure they treat people fairly. I think a public plan that does not have a profit motive, that does not worry about marketing, and does not have high administrative costs could be that plan, that competitive option that keeps the private health insurance companies honest.

Many on the other side have stood up and said: Government health insurance plans are a bad idea. Really? Forty-five million Americans are under Medicare today—elderly, disabled Americans covered by Medicare. I have not heard a single person on the other side of the aisle say: Let's get rid of Medicare. It is a bad idea. And you will not hear that because it is a good idea, and it works. There are another 60 million who are covered by Medicaid, our health insurance for the poor. I have not heard any suggestions from the other side of the aisle of eliminating Medicaid.

So 105 million Americans, one-third of our population, are currently insured through a government plan. I think it is a healthy thing. As long as the government plan we are talking about is trying to bring costs down and expand coverage so everybody has the benefit of health insurance, then I think it is a good thing to build into this system.

So the debate will continue, as it should, at the highest levels now. But there is one option we cannot accept, and that is the option of stalemate and the option of failure. I do not know I will ever have another moment in time in my public career to seriously take on the health care reform issue. The last time was 15 years ago under President Clinton.

We have to seize this opportunity. We are lucky to have a President who has stated to many of us and many of the leaders in Congress that this is a priority he is willing to fight for. Even at the expense of his political popularity he wants to get this job done. That is the kind of leadership this country needs on an issue that is critically important to every single person, every family, every business, and, frankly, to the economic future of our Nation.

I encourage my colleagues: Try to find that common ground, try to bring together a bipartisan approach here, some compromise on both sides that comes up with the best approach. Let's bring in those medical professionals who can help us get to a good place. Let's give peace of mind to Karen Gulva and so many others around America who worry every single day about coverage for their kids and for the people they love.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Pennsylvania is recognized.

SOTOMAYOR NOMINATION

Mr. SPECTER. Mr. President, I have sought recognition to discuss, first of all, the pending nomination of Judge Sonia Sotomayor for the Supreme Court of the United States.

Judge Sotomayor comes to this nomination with impeccable credentials: summa cum laude at Princeton; Yale Law School; was on the Yale Law Journal; had a distinguished career in private practice; an assistant district attorney with DA Morgenthau in Manhattan; service on a U.S. District court, a trial court; and now serves on the Court of Appeals for the Second Circuit.

The conventional wisdom is that Judge Sotomayor will be confirmed. But notwithstanding the conventional wisdom, under the Constitution it is the responsibility of the Senate, on its advice and consent function, to question the nominee to determine how she would approach important issues. It also presents a good opportunity to shed some light on the operations of the Supreme Court of the United States in an effort to improve those operations.

It has been my practice recently to write letters to the nominees in advance, as I discussed it with Judge Sotomayor during the so-called courtesy visit I had with her, and she graciously consented to respond or to receive the letters and was appreciative of the opportunity to know in advance the issues which would be raised.

Sometimes if an issue comes up fresh, the nominee does not know the case or does not know the issue and may be compelled to say: Well, let me consider that, and I will get back to you. So this enables us at the hearings

to move right ahead into the substantive materials.

The first letter I wrote involved congressional power and the adoption by the Supreme Court of a test on congruence and proportionality, which Justice Scalia called the ''flabby test,'' which enables the Court to, in effect, legislate.

The second letter involved the prospect of televising the Supreme Court to grant greater access to the public to understand what the Supreme Court does.

And the third letter, which I sent to Judge Sotomayor yesterday, involves the issue of the Court's backlog and the opportunities for the Court to take on more work.

Chief Justice Roberts, in his confirmation hearings, noted that the Court ''could contribute more to the clarity and uniformity of the law by taking more cases.''

The number of cases the Supreme Court decided in the 19th century shows it is possible to take up more cases. In 1870, the Court had 636 cases on the docket, decided 280; in 1880, the Court had 1,202 cases on the docket, decided 365; in 1886, the Court had 1,396 cases on the docket, decided 451.

Notwithstanding what Chief Justice Roberts said in his confirmation hearing, during his tenure the number of cases has continued to decline. In the 1985 term, there were 161 signed opinions. In the 2007 term, with Chief Justice Roberts in charge, there were only 67 decided cases.

The Court has what is called a ''cert. pool,'' where seven of the nine Justices—excluding only Justice Stevens and Justice Alito—have their clerks do the work, suggesting that the Justices spend little time if any on the cert. petitions except to examine a memo in this sort of a pool, raising questions as to whether that is adequate on individualized justice with the individual Justices considering these issues. The Justices can't consider the thousands of cases which are filed, but there may be a better system, as Justice Stevens and Justice Alito have it, with their taking their own individual responsibility.

There is another major problem in the Court and that is its failure to take on cases where the courts of appeals for the circuits are split. There are many such cases. In my letter to Judge Sotomayor, I have identified some. Illustrative of the cases are important issues such as mandatory minimums for the use of a gun in drug trafficking or the propriety of a jury consulting the Bible during its deliberations. Justice Scalia, in dissenting on one of the refusals to take up a case with a circuit split, said this—dissenting, Justice Scalia wrote:

In light of the conflicts among the circuits, I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality of the section involved.

He went on to say:

Indeed, it seems to me quite irresponsible to let the current chaos prevail.

Well, that is the kind of chaos which prevails when two circuits split. The case may come up in another circuit where the precedents are divided, and it seems to me that the Court ought to take up the issues. That could be ameliorated by a change in the rules. Four Justices must agree to hear a case, and I intend to ask Judge Sotomayor her views on this subject and on her willingness, perhaps, to be interested in taking cases with only three Justices or perhaps two Justices.

The refusal of the Court to take up these major cases is very serious, illustrated by its denial of consideration of perhaps the major—or at least a major—conflict between the power of Congress under article I of the Constitution to enact the Foreign Intelligence Surveillance Act, which provided for the exclusive means to have wiretap warrants issued, contrasted with President Bush's warrantless wiretap procedures under the terrorist surveillance program. The Detroit District Court found the terrorist surveillance program unconstitutional. The Sixth Circuit decided it would not decide the case by finding a lack of standing. In the letter to Judge Sotomayor, I cite the reasoning of the dissenting judge, showing the flexibility of the standing doctrine. Then the Supreme Court of the United States decides not to decide the case. It so happens, in so many matters, what the Court decides not to decide may well be more important than what the Court actually does decide.

These are issues which I intend to take up with Judge Sotomayor. I ask unanimous consent that the text of my letter to Judge Sotomayor be printed in the RECORD.

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

U.S. SENATE,
Washington, DC, July 7, 2009.

Hon. SONIA SOTOMAYOR,
c/o The Department of Justice,
Washington, DC.

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,

ARLEN SPECTER.

ENDNOTES

[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 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)).

[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] i 128 S.Ct. 1334 (2008).

[viii] 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).

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.