

*Statement of
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Testimony before the United States House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

Hearing on HR 4596:

The Holocaust Insurance Accountability Act of 2010
September 22, 2010

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My name is Michael P. Van Alstine and I am a Professor of Law at the University of Maryland School of Law in Baltimore, Maryland. I offer this Statement in connection with HR 4596 now pending before the House of Representatives, entitled “The Holocaust Insurance Accountability Act of 2010.” I have had no involvement with any of the persons or organizations whose interests would be affected by HR 4596 (other than being asked if I would be willing to provide this testimony). I instead offer this Statement in my individual capacity as a disinterested law professor whose areas of scholarly inquiry include the respective roles of Congress, the Executive, and the federal Judiciary in establishing and enforcing the foreign affairs law of the United States.

My motivation here is a deep concern about the constitutional issues that have made legislation such as HR 4596 necessary. HR 4596 has as its purpose to validate, against claims of federal law preemption, certain causes of action and disclosure requirements under the laws of the several states regarding Holocaust-era insurance policies. In my view, the legal grounds on which some recent federal courts have found such federal law preemption in the first place are profoundly flawed. Indeed, it is my opinion that these federal court preemption decisions are corrosive to our constitutional system in which federal law must be established by constitutionally empowered institutions following constitutionally prescribed procedures. It is

for this reason that I have joined certain *amici curiae* briefs before the Supreme Court of the United States in cases that raise similar issues on the power of the executive branch to preempt state law based on foreign policy preferences. *See Amicus Curiae* Brief of Constitutional and International Law Scholars in Support of Respondent, *Medellin v. Texas*, No. 06-984 (August 23, 2007); Brief of *Amici Curiae* of Professors of Constitutional Law and Foreign Relations Law in Support of the Petition for Writ of Certiorari, *Weiss v. Assicurazioni Generali, S.P.A.*, No. 10-80 (August 13, 2010).

The basic facts that provide the foundation for The Holocaust Insurance Accountability Act of 2010 are set forth in the congressional findings in section 2 of HR 4596 and should be well known to the members of the Subcommittee. I will focus here, therefore, on the legal matters that have made HR 4596 necessary. At the core of the numerous disputes that underlie HR 4596 are certain “executive agreements” concluded in 2000 and 2001 between the executive branch of the United States and the countries of Germany and Austria. To my knowledge, the executive branch concluded these agreements without any congressional involvement (and certainly without either prior or subsequent formal congressional approval). As relevant to HR 4596, these executive agreements designated the International Commission on Holocaust Era Insurance Claims (“ICHEIC”) to resolve Holocaust-era issues relating to German and Austrian insurance companies. *See* Congressional Findings, HR 4596, § 2, paras. (7), (8).

The essential legal issue is the extent to which the executive agreements have any force as law in the United States. The agreements made it clear that they did not, by themselves, “provide an independent legal basis for dismissal” of claims of Holocaust victims filed in any courts of the United States. Instead, the executive branch simply agreed to file a “statement of

interest” in such lawsuits to the effect “that U.S. policy interests favor dismissal on any valid legal ground.”

The force of the executive agreements ultimately came before the United States Supreme Court in the 2003 case *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). But that case related to the narrow issue of whether the executive agreements preempted a specific California state disclosure statute, the Holocaust Victims Insurance Relief Act. The Court in *Garamendi* first reaffirmed the unproblematic proposition that the President may conclude agreements to manage our routine external relations with foreign states without the consent of the Senate under Article II or the approval of Congress under Article I of the Constitution. 539 U.S. at 415. The Court also noted a specific historical practice in which Presidents have concluded such agreements with foreign states for the purpose of creating a forum for the settlement of claims. *Id.* Unfortunately, the Court then observed in immoderate rhetoric that “[g]enerally ... valid executive agreements are fit to preempt state law, just as treaties are.” *Id.*, at 416. It ultimately found that the foreign policy reflected in the executive agreements preempted the California insurance disclosure statute, even though the agreements did not in specific terms purport to preempt state law claims. *Id.*, at 420-429. Legal scholars on constitutional and foreign affairs laws were immediately highly critical of the *Garamendi* opinion’s rhetoric on the unilateral power of the President to preempt state law. *See, e.g.*, Bradford Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007); Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825 (2004); Michael D. Ramsey, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 283-299 (Harvard U. Press 2007).

Regrettably, the broad rhetoric of the Supreme Court in *Garamendi* has created a foundation for even greater assertions of a unilateral power of the executive branch to preempt otherwise valid private claims asserted in the courts of the United States. A particularly objectionable case is *In re Assicurazioni Generali S.p.A.*, 592 F.3d 113 (2d Cir. 2010). That case involved a claim against an Italian insurance company. Although there was no relevant executive agreement with Italy of any kind, the court of appeals in *Assicurazioni Generali* found that a mere executive branch statement of “foreign policy” preempted otherwise valid claims of private individuals founded on generally applicable state statutes and common law. 592 F.3d at 118-119. *See also Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009)(also relying on statements of executive foreign policy to dismiss an otherwise valid state law claim).

Put simply, these federal court decisions that give preemptive effect *as law* to statements of *policy* by the executive branch (even as reflected in executive agreements) violate fundamental principles of separation of powers and federalism at the core of our Constitution. These fundamental principles make clear that the executive branch may not—without the approval of Congress—make law on its own initiative to eliminate otherwise-enforceable rights of private individuals. My purpose in the paragraphs that follow is, first, to describe how fundamentally the federal court opinions noted above contravene core constitutional principles and, therefore, why the subject is worthy of congressional attention through legislation such as HR 4596. I will then explain that Congress clearly has the power to right this constitutional wrong by blocking any preemptive effect in the future for the unilateral executive branch actions that are the subject of HR 4596.

First, in my view the federal courts’ recognition of unilateral executive actions as preemptive federal law violates fundamental separation of powers principles by making the

President a lawmaker without the approval of Congress. The Constitution established “finely wrought and exhaustively considered” procedures for creating federal law. *Clinton v. New York*, 524 U.S. 417, 440 (1998)(quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). Congress, of course, is the preeminent lawmaking institution in this system. It holds “[a]ll legislative Powers herein granted.” U.S. Const., Article I, Section 1. But even in the exercise of these powers, the Constitution imposes significant procedural hurdles for the creation of federal law, hurdles that require either the cooperation of Congress and the President or the approval of a supermajority of Congress. The creation of federal law thus requires either (a) for statutes, the approval of majorities of both of the two separately-elected houses of Congress and of the President (or a supermajority of both houses in override of a presidential veto), or (b) for treaties, the approval of the President and a supermajority of the Senate. *See* Article I, Section 7; and Article II, Section 2. (Of course, executive agencies and similar institutions also may engage in federal rulemaking pursuant to and within the bounds of formal delegations of authority from Congress.)

The Constitution’s “finely wrought” procedures for federal lawmaking also serve important ends of transparency and justice. They ensure that law is made in the open and with the oversight and substantive input of the people’s elected representatives in Congress. The sole executive agreements and statements of “foreign policy” that recent federal court decisions have accorded the force of law, in contrast, are not subject to any of the Constitution’s important procedural protections against arbitrary governmental action. As a result, the very content of the law is subject to the unilateral preferences of executive branch officials from time to time, from subject to subject, and—as we have seen in the recent federal court opinions—even from case to case. Instead of the constitutionally required procedures for the creation of objective legal rules, the “law” exists at the whim of executive branch officials without congressional oversight.

Moreover, because the executive branch has discretion over where and when it will make statements of “foreign policy,” it may—under the radar, as it were—decide to intervene and block individual rights on a case-by-case basis. This type of discretionary “law” does not comport with our constitutional model in which objective rules of law adopted in accordance with prescribed procedures are to be applied on an impartial basis by an independent judiciary.

An example from recent events will illustrate the dangers of this type of discretionary, unilateral executive control over the very content and application of the law. Consider the recent oil spill from the BP Deep Water Horizon drilling platform in the Gulf of Mexico. BP is predominantly a British company whose interests, therefore, may have implications for the foreign policy of the United States. At the urging of the President, BP has made a special fund available for the compensation of victims of the oil spill. It remains very much unclear what procedures and substantive legal standards this *ad hoc* body will establish and apply. At the present time, the fund process does not purport to supersede the rights of individuals to assert their claims in a properly constituted state court. But under the recent federal court rulings, whether this remains true is subject to the policy preferences of the executive branch. If, at the behest of a foreign government, industry groups, BP itself, other interested parties, the executive branch were to determine that state law claims against BP were contrary to the “foreign policy” of the United States, the courts would be empowered to dismiss the court cases on that basis alone. In other words, a mere indication of executive policy, even an informal indication not made by the President himself, could displace the rights of private claimants under state law.

The recent federal court opinions on the subject also do not appear to impose any limits on the kinds of state law subject to discretionary executive preemption in this way. Even longstanding, neutral legal principles of general application (such as traditional common law

contract, tort, and restitution claims) are subject to federal preemption based on executive branch policy preferences. Moreover, in our highly interconnected modern world, virtually any issue could have implications for our nation's foreign policy. As a result, virtually any private rights in any court proceeding could be blocked by unilateral executive branch statements of "foreign policy."

The essential constitutional requirements for the valid creation of federal law also have important consequences for our federal system of government. As a group of concerned law professors recently observed in a brief to the Supreme Court, the Constitution's procedural hurdles "safeguard state interests and protect the Constitution's federal structure, assuring that state laws are not displaced unless multiple federal actors agree that they should be." Brief of *Amici Curiae* of Professors of Constitutional Law and Foreign Relations Law in Support of the Petition for Writ of Certiorari, *Weiss v. Assicurazioni Generali, S.P.A.*, No. 10-80 (August 13, 2010). As a result, state laws, including individual rights founded in state law, are valid and enforceable unless they are inconsistent with the U.S. Constitution itself or with a valid exercise of lawmaking powers conferred on federal institutions by the Constitution. The Supremacy Clause of Article VI thus makes clear that the "supreme Law of the Land" is found only the U.S. Constitution itself, the "Laws of the United States which shall be made in Pursuance thereof," and treaties validly approved by the Senate. U.S. Const., Article VI, cl. 2. In the case of HR 4596, there are no credible claims that the state insurance law rights and claims at issue contravene any formal aspect of the Constitution, any laws made "in Pursuance thereof," or any treaties approved by the Senate as required by Article II, Section 2.

Nothing in this constitutional system gives the force of federal law to the kind of unilateral executive agreements and mere statements of "executive foreign policy" that are the

subject of HR 4596. It is correct, as the Supreme Court stated in *Garamendi*, that “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” 539 U.S. at 414 (*quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952)(Frankfurter, J., concurring)). But this power exists in relation to our country’s *external* relations with foreign states, not to the unilateral creation of *domestic* law. Indeed, Article II, Section 3, of the Constitution obligates the President to “take Care that the Laws be faithfully executed.” The Supreme Court has emphatically, and repeatedly, declared that this injunction “refutes the idea that [the President] is to be a lawmaker.” *Medellin v. Texas*, 552 U.S. 491, 526-527 (2008) (*quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)). As the Supreme Court also observed in *Medellin v. Texas* in 2008, quoting James Madison in the *Federalist Papers*, “[t]he magistrate in whom the whole executive power resides cannot of himself make a law.” 552 U.S. at 528.

It is also true that the Supreme Court has, on a small number of occasions, stated that the President may conclude so-called “sole executive agreements” of sufficient moment to preclude direct obstruction by state law. But most recently the Supreme Court has emphasized that such agreements have preemptive force only in “a narrow set of circumstances” founded, significantly, on a “‘particularly longstanding practice’ of congressional acquiescence.” *Medellin v. Texas*, 552 U.S. at 531 (*quoting Garamendi*, 539 U.S. at 415).

The validity even of formal executive agreements with foreign states thus depends decisively on the existence of longstanding approval by Congress. I am not aware of any “particularly longstanding practice of congressional acquiescence” to support unilateral executive agreements, much less mere statements of “executive foreign policy,” with the power

to invalidate state law insurance claims in available state courts. See Bradford Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1618 (2007)(explaining that in the historical practice of claim settlement by executive agreement—on which Supreme Court precedent such as *Garamendi* is based—the executive *created* a settlement forum where “Americans with claims against foreign nations had no recourse” in domestic courts). In my view, therefore, federal courts should not have given effect to the unilateral executive agreements and policy statements to block such state law claims in the first place. In doing so, the courts improperly sanctioned a circumvention of the lawmaking powers the Constitution vests in Congress (or in the President and Senate through Article II treaties). In any event, it is entirely appropriate for Congress now to declare its *actual* intent on the validity of state law insurance claims of Holocaust victims through legislation such as HR 4596.

Finally, Congress certainly would act within its constitutional powers if it were to preclude federal preemption by enacting HR 4596. The Constitution expressly grants to Congress the authority “[t]o regulate commerce with foreign nations.” U.S. Const., Article I, Section 8, cl. 3. In contrast, as I noted above, the President’s obligation “to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” *Medellin v. Texas*, 552 U.S. 491, 526-527 (2008). Nor would HR 4596 illegitimately interfere with the executive branch’s responsibilities in the field of foreign affairs. The President indeed has extensive responsibilities in managing our nation’s *external* relationships with foreign states. But the law of the United States—our *domestic* law—is made by Congress in accordance with the prescribed procedures of Article I (or by the President and Senate through the treaty process of Article II). As a more specific matter, the Supreme Court has declared from some of its earliest cases that Congress has the power, for purposes of the domestic law of the United States, to abrogate by statute even a

formal treaty with a foreign country approved by the Senate under Article II. *See, e.g., United States v. Yen Tai*, 185 U.S. 213, 220 (1902)(“Congress may by statute abrogate ... a treaty previously made by the United States with another nation[.]”); *Cook v. United States*, 288 U.S. 102, 119-120 (1933); *Medellin v. Texas*, 552 U.S. 491, 509 (2008). Congress obviously also has the power—subject to possible rare exceptions not relevant here—to supersede a unilateral executive agreement concluded without the sanction of the Senate under Article II or of Congress as a whole under Article I. *See Weinberger v. Rossi*, 456 U.S. 25 (1982)(making clear from its analysis that Congress has the power to supersede an executive agreement through legislation).

In short, in my opinion the circumstances that are the subject of HR 4596 are highly worthy of the attention of Congress. The Constitution designates Congress as the preeminent federal lawmaking institution and establishes specific and detailed procedures for the creation of federal law. The recent federal court decisions discussed above, including the *Garamendi* opinion of the Supreme Court, improperly permit the executive branch to bypass these essential constitutional safeguards and create “law” on the basis of fleeting policy preferences without the express or implied approval of Congress. In any event, it is entirely appropriate for Congress now to reassert its proper authority and declare its actual intent on the enforceability of state law insurance rights and claims by victims of the Holocaust era. Congress also certainly has the constitutional power to do so.