

executive as unconstitutional. This is, by the way, exactly the standard Judge Sotomayor lived up to in Ricci, when she deferred to the elected local official in New Haven and to Federal title VII law and to firm Second Circuit precedent.

It has always been my view that a commitment to modesty is key in a judge. A judge who is modest understands that any concept of doing justice must have as its touchstone the meaning that the authors of the text intended to give it.

I also believe it is consistent with judicial modesty to acknowledge that our Constitution is written to endure. It does not live and breathe like a flesh-and-blood child does, who evolves through adolescence and adulthood to become unrecognizable.

I don't believe in using those terms. Rather, the Constitution endures. It endures because the people whom it governs, the people who retain all of the many rights that are not listed in the document itself, believe that it continues to apply to them. The only reason it continues to apply to them is through guardianship of judges who are modest in reaching their conclusions. They understand that people have to live by the Court's interpretation and judgment. They understand that people want justice and that justice means predictability, adherence to text, and the willingness to avoid patently absurd results.

I am looking forward to the confirmation hearing of Judge Sotomayor. She is a gifted lawyer, she is a respected and serious jurist, and her life experiences will only serve to enrich the views of the eight other justices, each of whom brings with him or her individual lessons, lessons taught by a hard-working grandfather in Pinpoint, GA; by an independent, studious-minded mother who died the day before her daughter graduated high school; by a hotel owner in Chicago, IL; or by a single Spanish-speaking mother who told her daughter that she could do anything through hard work and a good education.

Let's be reasonable and realistic. These experiences do not turn a good judge into a bad one or who is not an impartial one or whatever my colleagues on the other side of the aisle are suggesting.

To recognize the role of personal experience is simply to acknowledge that in the art and science of interpreting the Constitution and laws of our country we have to ask ourselves the following questions: Do we trust more the decisions of judges who, as I have said before, have ice water in their veins, who view their role as stripping themselves of their pasts and ruling in a vacuum, free of human experience and common sense, or do we trust more the decisions of judges who acknowledge and address their own life experiences even while striving always to be fair and within the law—as Judge Sotomayor herself has said?

These are questions I look forward to discussing at Judge Sotomayor's upcoming hearing.

HEALTH CARE

Mr. SCHUMER. Mr. President, I rise to discuss the necessity of including a public option in the health care legislation Congress is currently drafting. One of our top priorities, as we undertake health care reform, must be increasing competition among health insurance companies in order to get costs under control and give consumers better choices. A recent New York Times/CBS poll clearly shows that a large majority of the American people, 72 percent in fact, want a government-sponsored health care option that would compete with private health insurance companies—72 percent.

What is even more incredible, 50 percent of all Republicans in this country want a public option. There seems to be a disconnect between my colleagues on the other side of the aisle and even their Republican constituents.

Do you know why so many Americans want a public plan? Because, despite what many of my colleagues on the other side of the aisle would have you believe, they do not believe they have affordable choices. Fundamentally, this is what lies at the heart of our public plan proposal. We want to ensure all Americans have a guaranteed affordable choice when it comes to health insurance. Right now, too many of them do not.

In many areas of the country, one or two insurers have a stranglehold on the entire market, which produces costly premiums and health care decisions that often serve the interests of the insurer, not the patient. In fact, according to a study of the American Medical Association, 94 percent of insurance markets are highly concentrated. This is why a public health insurance plan is absolutely critical, to ensure the greatest amount of choice possible for consumers and provide at least one option that is patient—not profit—focused.

When you read what percentage one insurance company or two insurance companies have of a market in each State, you know that robust competition is missing from the health care market. That is why so many people are worried about the future of the plans that they now have.

The public plan is not about government-controlled health care, socialism or any of the buzz words that have been tossed around as part of this debate.

I ask my colleagues, do they consider Medicare socialism? Would they like to abolish Medicare? Probably some of them would. But Medicare—hello, my friends—is a government-run plan. It is very popular with the American people. Very few propose eliminating Medicare. So let's be real here. The public option is about offering Americans a choice in the market that, far too often, offers them none.

I will tell you the choices too many Americans face: whether to pay for

health insurance or health care or to pay for other necessities of life, because health care has become so expensive. That is not a choice anyone should have to make, and maybe that explains why the American people do not agree with the critics of the public plan.

Half of all Americans think the government plan will provide better health care coverage than private insurance companies, and a significantly lower percentage disagree with that statement.

Let's be clear: A public plan may not have special built-in advantages. It would be a coverage option that would compete on an equal footing alongside private insurance plans in the market for individual and small business coverage. If a level playing field exists, then private insurers will have to compete based on quality of care and pricing instead of just competing for the healthiest consumers. In this way, a public plan will accomplish many of our most important goals. It will not waste money on costs incidental to providing health care. It will not focus on profits at the expense of the best health outcomes. Instead, it will spend money on improving health delivery and on trying innovative technologies and systems in order to save, save money. It will force many insurers that have been shielded and protected from competition for far too long to compete with a plan that provides comprehensive care at an affordable rate. It will, most importantly, give all Americans a choice. In fact, I think the thing that really scares opponents of the public option is choice, that Americans might actually choose the public plan over the plan of private insurance companies, because then the curtain might be pulled back on their friends at the insurance companies and Americans will finally see the hidden costs that have caused their premiums to skyrocket, the wasteful spending that does not improve health outcomes but fattens bottom lines, and the protection from competition that has been offered to private insurers over the last decade.

To truly reform our health care system, Congress must pass legislation that includes a public option. A figleaf public plan is no plan at all, and I will not settle for such a figleaf.

It is important to remember how we arrived here. For a long time, when thinking hypothetically about health care reform, many in this country suggested that we move to a single-payer option.

The PRESIDING OFFICER (Mr. UDALL of Colorado.) I would note that the Senator has used 10 minutes.

Mr. SCHUMER. I ask unanimous consent that I be given 5 additional minutes.

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

Mr. SCHUMER. The Republicans rejected the single-payer plan. So at the onset of this debate, we met them halfway with a framework that continues

to largely rely on private insurers. So then we said: If we are going to continue to rely mostly on private insurance, can we at least introduce greater competition into the market by having a public plan as one option? The Republicans—most, at least; just about all, I think—rejected that too. We said: Well, what if we ensured that the public plan had to adhere to the same rules as private insurers, thus guaranteeing a level playing field? The Republicans here in the Senate—not in the country but the Republicans here in the Senate—still said no to even a level playing field.

So some Democrats came up with a new idea: What if we relied on a co-op model that has served rural States well? In a good-faith attempt to consider this idea, I proposed some ideas for ensuring that co-ops could do the job of keeping private insurers honest. Yesterday, Senator CONRAD indicated he could go along with many of these proposals. But Senator CONRAD has never been the problem here. He has been well open to negotiating on how to make a co-op plan have the kind of clout to go up against private insurance companies, be available to all Americans, be able to bargain with the providers, and be ready to go on day one to compete with the large nationwide insurance companies. Senator CONRAD has always been willing to entertain all of that. He has been a good-faith negotiator with the best interests at heart. It has been those on the other side of the aisle who have not been willing to negotiate. So I am losing confidence that Senate Republicans will ever agree to the types of changes to a co-op to make it a viable alternative, a viable substitute to a traditional public plan that is nationwide and available to everybody, that can go up against the private insurers and go up against the suppliers in buying power, that is formulated so that it hits the ground running on day one of the insurance exchange.

We can only bend so much to try to win over opponents of health care reform. We cannot bend so far that we break. We cannot say we are putting something else out there and not have it do the job because a public option is what really does the job. We must not let the scaremongering about the possible consequences of a public option deter us from doing what the American people overwhelmingly want and need. It is time to put the health needs of the American people, not the insurance companies, first. It is time to move past the partisan bickering and make sure the health care reform passed by Congress includes a real public option. It is the right thing, it is the smart thing, and it is what the American people want and what they deserve.

I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina

Mr. DEMINT. Mr. President, I ask unanimous consent to speak for 15 minutes as in morning business.

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

Mr. DEMINT. Mr. President, it seems that you are always stuck with listening to me. I apologize for that.

I wish to respond to my colleagues' grand design of our new health care system in just a moment, but I would like to back up a little bit and discuss health care and some other things in context.

There is no question in anyone's mind that these are difficult times for America. Millions are unemployed, and the unemployment rate continues to climb. Our economy has been in decline for a number of months. Our military is strained all around the world at a time when our enemies seem to be gaining strength and increasing in numbers. Back here at home, our spending and borrowing and debt are out of control, and this massive government spending plan we call the stimulus has yet to show any results. We see government intervention in many areas of our economy—in the banks, financial markets, the takeover of Fannie Mae and Freddie Mac, the takeover of large insurance companies, our auto industry. People back home and all around the country are alarmed. As I heard someone say last week as they tried to explain their alarm to me, they threw up their hands and they just said, "I am outraged out." They could not speak anymore.

My question for my colleagues today is, Is this a good time to create another government program? The answer on the other side has obviously been yes. Yesterday, they all voted, I believe, to get the Federal Government in the tourism business, to close off debate and pass a plan that would get the Federal Government to promote tourism in America all over the world. I think it is like \$400 million—in today's terms, a small amount of money. But the tourism industry, while hurting because of the economy, is certainly not in collapse, in need of a government bailout. The tourism industry spent billions of dollars on advertising last year.

It is not as if the rest of the world does not know we are here. The problem with tourism in America can be laid at the feet of an inept government. If you ask people abroad why they are not coming here in such numbers as they have in the past, we find the statistics show that we are the most unwelcoming at our Customs office, in the lines to get through to America. If you want to have a business convention or trade show in America, it is very likely you cannot get the visas for your customers to come here, so many of these conventions and trade shows have had to move overseas.

The problem with getting people here is in what the government is not doing well. We don't need to get the government in the tourism business. I have plants back home, such as BMW, that would like to bring people from their headquarters in Germany over here to

train the American workforce, but they found it is easier just to send our people over there because it is so hard to get their people to come here. They could come here and stay in our hotels, eat at our restaurants, and improve our economy. But instead an inept government causes us to send Americans to stay in their hotels, eat in their restaurants, and rent their cars.

It is illogical for us to create a Federal tourism agency, a la Fannie Mae, a new government-sponsored entity that is going to help promote tourism, but it is this same kind of logic we are now using for health care. We are saying we have a crisis in health care, so therefore the government needs to get more involved and to take over various aspects of the health care industry, such as was just described by my colleague from New York. But if we look at this situation a little more clearly, we will see that it is the government that is causing most of our problems and not allowing the free market health care system to work.

Let's look at this a little bit closer because there was a whole lot of misinformation that was just shared on the floor here today. Let's look at health care coverage in America. You have about 60 percent now who are in employer-sponsored plans and almost another 10 percent who have purchased their own insurance on the individual market. So we have about 70 percent of people with private insurance. You have about 25 percent Medicare-Medicaid and another 4 percent or so who are in military plans on the government side. So you have between 25 and 30 percent of Americans who are now in a government health plan. And my colleague from New York was just bragging about how well the government health plans work in Medicare. Certainly, if you have Medicare and you can get a doctor to see you, it works just fine. But the problem is, every dollar that has come in from Medicare since its inception has been spent. The 2.5 percent that comes out of every paycheck has not been saved for our senior citizens, to pay for their health care; it has been spent and there is absolutely no money in the system to take care of America's baby boomers. This works like a government plan my colleague was just bragging about. It has trillions of dollars of unfunded debt that will fall on the heads of our children and grandchildren, trillions of dollars that we have no idea how we are going to pay for. And Medicare is hopelessly in debt at the State and the Federal level.

But even worse is this problem. And let's keep looking at government versus the private plans. I think most people in America would believe the best situation now in health care is to have a health insurance policy so you can pick your own doctor and decide with your doctor what kind of health care you are going to get. No plan is perfect. There are always problems in health care. It is very complex. But

you have here about 70 percent of people who are in that situation, but every year their insurance costs more money.

My colleague was saying that is caused by private insurance, but let's find out the truth. Every year, these government plans pay physicians and hospitals less. They pay a physician less than their costs to see a patient. And I have doctors I know back in South Carolina and rural areas. They have to close their practice to new Medicare and Medicaid patients because once over 60 percent of their patients are Medicaid or Medicare, they can no longer make a living. That is happening all over the country. But you know how these costs are picked up. The hospitals and doctors who take Medicare and Medicaid have to charge private insurers more money every year because every year the government pays doctors less. That is why fewer and fewer of our best and brightest students are going to medical school and that is why we are headed for a real physician shortage in this country—not because of private health insurance but because of government plans.

We have about 16 percent who have no coverage in our country today. Those are the ones whom we say we are concerned with right now. The government requires hospitals to provide them service whether they have any insurance or money anyway, and where do these costs go? They are transferred to those who have private insurance. So every year the inept government is transferring huge amounts of costs over to those employers and those individuals who are buying private health insurance.

My colleagues are trying to say that the private market is what is failing us and we need to expand this part of the health care market—the part that is not paying doctors and hospitals to see patients, the part that is trillions of dollars in debt, and the part that is already beginning to ration health care for those who are under those plans.

If you want to know how the public option is going to work, I encourage you to drop by a Social Security office, take a number, and sit down and wait for them to get to you, or maybe go to a veterans hospital or another government service. Do we really want the government involved with health care? Health care is the most personal and private service we have as Americans. Do we want to turn health care over to the most impersonal, the most bureaucratic, the most wasteful and, in many cases, the most corrupt aspect of our society?

What we do need to do is look at how we can get these private plans in the hands of those who have no insurance. That is something we can do and we can do it for a lot less than the current administration is talking about. But before we talk about how we are going to get these people insured, let's look at who they are, because this is being misrepresented to exaggerate the prob-

lem, to create a crisis so we can justify another government takeover of another area of our economy.

We say we have about 46 million uninsured in America. Here is how that breaks down. We have about 6.4 million who actually have Medicaid today, but they are undercounted in the census. This has been proven and we know it to be true. We have another 4.3 million who are eligible for Medicaid or SCHIP or another government program, but they haven't signed up for it. We need to make more of an effort to get people to sign up for the programs they are eligible for. We have about 9.3 million who are noncitizens, many of whom are illegal in this country, and the taxpayer should not be paying for their health care. We have about 10 percent who have incomes of 300 percent or more over poverty and they are not buying health care. I have had some of those work for me when I was in business. I would offer to pay for most of their insurance. I would pay \$500 a month, they would pay \$50. Some people turn it down because they don't want to pay \$50. There are some people who don't want to buy insurance. We have some people between 18 and 34 years old without insurance, and we have 10.6 million who are uninsured. If we look at this, at least half of these should not be subsidized by any type of government plan who are not already eligible for a plan or not citizens of our country. We could look at 20 million to 25 million.

I want to make clear that if there is one person in America who doesn't have access to good health care, that is a crisis to them, and we need to do everything we can to make sure we are fair and that affordable health care policies are available to every American. That is my goal. That is the goal of the Republican Party.

This week—this afternoon, as a matter of fact—I am going to introduce a plan that will solve the problem at a fraction of the cost of what the Democrats and President Obama are proposing. In various ways, their plan is to expand the government option, whether it is a government health plan or a government-mandated plan on the private insurance market. One way or another, they want to expand government rather than expand private insurance. I know this for a fact.

This is my fifth year in the Senate. I have introduced a lot of resolutions that would help these people get insurance, and every time my Democratic colleagues have voted it down. We have had proposals for association health plans that would allow small businesses to come together and buy insurance at a lower price to offer their employees. They voted it down. I had a proposal I introduced called Health Care Choice that would do what my colleague from New York was talking about, which is break up that single State monopoly of a few health care plans. My plan would allow Americans to buy health insurance from any State

in the country. Wherever a plan is registered, certified by that State, someone in South Carolina could buy it from Arizona or Colorado, and that is how most industries work in America. If I want to go across the line and buy a car in North Carolina, I am not prohibited to do that, but I can't do it if it is a health insurance plan. So we allow these quasi-monopolies to develop in every State. I have introduced a plan that would allow Americans the freedom to buy health insurance from any State in the country, and to a person the Democrats voted it down.

I have introduced a plan that would allow people to use what they have in a health savings account to pay for health insurance premiums. Common sense, right? They voted it down.

The fact is this: The people who want to expand the government option do not want these people to have private insurance, because they believe in government and they do not believe the private market can keep itself accountable. But the problems we have with the private market now can be attributed, to a large degree, to the government not paying its share of the costs, to the government having policies that keep quasi-monopolies in every State.

I have had a proposal that would allow individuals to deduct the cost of their health insurance, just as we allow employers. The Democrats to a person voted it down.

Folks, we don't have to look far to understand what is going on. The people who like taking over General Motors and Fannie Mae and Freddie Mac want these government health plans to be expanded all the way around this circle. This is something we have to stop. We can do it very simply if we use fairness and freedom.

My plea to all Americans, and particularly my colleagues, is before we give up on freedom in the health care area, let's let it work. That is what my proposal is.

This afternoon I am going to introduce a plan that tells every American: If you like the plan you have, whether it be Medicare or Medicaid or an employer plan or a military plan, you keep it; we are not going to mess with it. But if you have no coverage at all, or if you are buying your policy on your own on the open market, we are going to, for the first time, treat you fairly and give you the same tax break we give the people in the employer-sponsored plan.

This plan does this: If you are a family, we are going to give you a certificate for \$5,000 to buy health insurance. If you are an individual, we will give you \$2,000 a year to buy health insurance. Some will scream and say, Oh, you can't get a good policy for that, and you can, because I have bought it for my adult children who aged out of my plan.

My plan also includes the option for an individual to buy health insurance in any State so we will increase competition and lower the prices. The plan

also allows an employer to put money in a health savings account for you that you can use to pay for your health care or to pay the premium to support you to buy additional coverage with your health insurance. We have a provision that deals with lawsuit abuse, and we have a provision that funds high-risk pools for States so people who have high-risk conditions, uninsurable conditions, preexisting conditions, can buy insurance they can afford at the State level.

The estimates are by the Heritage Foundation that within 5 years, more than 20 million of these uninsured—most of them—will have private insurance plans, because they can't use their health care certificate unless they use it to buy health insurance.

I would ask my colleagues this: If we had the option to get everyone in an individual or employer plan or expand these government plans, which aren't paying their way, which are transferring costs to other people, and which are hopelessly in debt, which way do we go? But we can fund my plan without one additional dollar of taxpayer money. The estimates are over the next 10 years, getting these people insured with private policies, giving them a \$5,000 a year health care certificate, will cost about \$700 billion. If that number sounds familiar, that is about how much money we have outstanding with the bailout money we call TARP here in this Congress. Instead of them bringing this money back and spending it on something else, my proposal pays for my plan by recapturing this TARP money. So as this bailout money comes back over the next 5 years, it can pay to give every American access to a plan they can afford and own and keep. It is basically no additional cost to the taxpayer at this point over what we are already committed for, for the bailout.

The choice belongs to Americans. Are we going to buy this idea that a government option is going to give us more choice, more quality, more personal attention? Will it attract more physicians into the profession? Any thinking American knows that isn't going to happen. The ideal plans now are those when individuals have a plan they own and can keep, they pick their own doctor, and the doctor and the patient decide what health care they are going to get. This is within our reach. We don't need a massive government takeover of health care in order to make health care accessible to every American. Let's not buy this idea that we are in such a crisis that we have to rush over the next couple of months to create another government program, another government takeover, when we see what happens to government-run health plans right in front of our eyes. It won't work. We can't afford it. They are going to end up rationing care. They are going to take employer plans, irrespective of what they say—if you have a low-cost government option that doesn't pay doctors enough to see you, you are going to see insurers dropping their health plans and you are

going to end up in the lap of government whether you like it or not.

Let's not give up on freedom. Let's look at the facts. Have we seen any government program, over your lifetime or mine, that has actually done what it said it was going to do at the cost it said it would be done at? My colleagues know that is not true.

Social Security is so important to seniors, and a promise we must keep. It is hopelessly in debt, because this government has spent every dime Americans have put in it, and there is not a dime in the Social Security account to pay future benefits. The same with Medicare—trillions of dollars. This is a commonsense solution that every American can see, if we don't listen to the misrepresentations we are starting to hear in this body. Every American with a policy they can afford and own and keep is available to us, within our reach, without any government takeover of health care. We just have to believe that what made America great can make health care work, and that is freedom.

Mr. President, I yield the floor and note the absence of a quorum.

Mr. CORNYN. Mr. President, would the Senator withhold the quorum call?

Mr. DEMINT. I withhold.

The PRESIDING OFFICER. The Senator from Texas.

KOH NOMINATION

Mr. CORNYN. Mr. President, I rise to speak on the nomination of Harold Koh whom the President has nominated to be legal advisor to the State Department. This is a relatively obscure but very important position at the State Department. The legal advisor operates frequently behind the scenes but on such important issues as international relations, national security, and in other areas.

One area that is very important is that the legal advisor is often the last word at the State Department on questions regarding treaty interpretation; that is, international agreements between countries. The legal advisor often gives legal advice to the Secretary of State and the President of the United States during important negotiations with other nations. We also know from experience that the legal advisor can be a very important voice in diplomatic circles, especially if he or she views America's obligations to other nations and multilateral organizations in a particular way, particularly if they have strong views.

Professor Koh has an impressive academic resume and professional background. He is an accomplished lawyer and a scholar in the field of international law. Nevertheless, I do not believe that Professor Koh is the right person for this job. I believe that many of his writings, his speeches, and other statements are in tension with some very core democratic values in this country. I believe that his legal advice on transnational law, if taken to heart, could undermine America's sovereignty or security and our national interests.

I urge my colleagues not to take my word for this but look for themselves at Professor Koh's record and consider whether he is the right person to be advising Secretary Clinton and other diplomats at the State Department on legal issues pertaining to our relationship with other nations and such key issues.

I mention this notion of transnational jurisprudence, which is a little arcane, but I will explain what it is all about. Professor Koh has been an advocate for transnational jurisprudence, which is the idea that Federal judges should look at cases and controversies as opportunities to change U.S. law and to make it look more like international or other foreign law.

I am not saying that all foreign law is bad, but our Founders acknowledged that when we take the oath of office here, we pledge to uphold and defend the Constitution of the United States of America, not some unsigned, unratified international treaty or an expansive notion of international common law which Professor Koh embraces and advocates.

We know Americans don't have a monopoly on virtue and wisdom and certainly we can benefit from exchanging ideas with other democratic countries. But Professor Koh's notion that it is appropriate and proper for a Federal judge to look at foreign law in deciding what the Constitution of the United States means, and what the laws of the United States require, to me, is at complete tension with this idea that we will uphold American values and the American Constitution and American laws passed by our elected officials. We do not appropriately ask Federal judges to look at unratified treaties, some notion of international common law and, certainly, the laws of other countries in interpreting our laws in the United States.

Professor Koh seems to have a different view. He said Federal judges should use their power to "vertically enforce" or "domesticate" American law with international norms and foreign law.

He has argued that Federal judges should help "build the bridge between the international and domestic law through a number of interpretive techniques."

Where will these "interpretive techniques" lead us? Evan Thomas and Stuart Taylor asked that question in *Newsweek* magazine earlier this year. They answered based on their investigation:

Were Koh's writings to become policy, judges might have the power to use debatable interpretations of treaties and "customary international law" to override a wide array of federal and state laws affecting matters as disparate as the redistribution of wealth and prostitution.

Transnational jurisprudence is not the only controversial view professor Koh holds.