HEALTH CARE WEEK V, DAY II

Mr. MCCONNELL. Mr. President, the American people want health care reform. There is no question about that. But they have serious concerns about some of the proposals coming out of Washington, concerns that I have outlined on the Senate floor over the past few weeks. And Americans are also increasingly concerned about the way these proposals are being sold. Specifically, they are concerned that the same mistakes that were made on the economic stimulus bill are about to be made again—only this time, those mistakes would be all but permanent and would directly affect every single American family.

Here is what they are concerned about:

Earlier this year, advocates of the stimulus said that the bill had to pass right away, with minimal scrutiny and minimal bipartisan support. They gave the American people less than 24 hours to review one of the costliest pieces of legislation in history, and then they hoped for a good result. The reason for the rush is clear. Proponents of the stimulus were concerned that public support would start to fade if people got a closer look at the details. So they short-changed the debate and overpromised on results. And now their predictions are coming back to bite them.

Here is what they said at the time.

They said that if the stimulus passed, unemployment wouldn't rise above 8 percent. Unemployment is now approaching 10 percent. They said the stimulus was necessary to jumpstart the economy. Yet now, with about a half million jobs lost every month, they have started to admit that they simply ''misread'' the economy.

These were costly mistakes, and we can't take them back.

But we can prevent these same kinds of mistakes on health care. If the stimulus taught us anything it is that Americans should be skeptical any time someone in Washington rushes them into a major purchase with taxpayer dollars. We would walk away from any car salesman who tried to rush us into buying a car—even if it was a cheap one.

We should be just as skeptical of a lawmaker who tries to do the same thing with our tax dollars and trillions in borrowed money. And now that Americans are hearing the same kinds of arguments about health care that we heard about the stimulus, the taxpayer antenna should begin to go up.

Now it is time for advocates of a government-run health plan to actually take the time to determine what reforms will actually save us money and increase access to care while preserving the things people like about our system.

Taking time may be frustrating to those who want to rush a health care bill through Congress before their constituents have a chance to see what they are buying. But the fact that the public is increasingly concerned about government-run health care isn't reason to rush. It is reason to take the time we need to get it right—and to make a serious effort to get members of both parties to work out reforms that a bipartisan majority can agree to, several of which I have enumerated many times already on the Senate floor.

We should reform our medical liability laws to discourage junk lawsuits and bring down the cost of care; we should encourage wellness and prevention programs that have been successful in cutting costs; we should encourage competition in the private insurance market; and we should address the needs of small businesses without creating new taxes that kill jobs.

Advocates of government health care should also be exceedingly cautious about the predictions they make this time around. We already know that many of the promises that are being made about a government-run health plan are unrealistic—such as the claim that everyone who likes the insurance they have will be able to keep it and that the cost of such health care proposals won't add to the national debt.

As Democrats rushed the stimulus funds out the door, they also predicted it wouldn't be wasted. Yet every day we hear about another outrageous project that it is being used to fund. I have listed some of these projects in previous floor remarks, such as a $3.4 million turtle tunnel in Florida. Americans struggling to hold onto their homes and their jobs want to know why their tax dollars are being spent on such wasteful and needless projects.

Americans were overpromised on the stimulus. This time they want the facts.

Soon, the Government Accountability Office will issue a report that gives us an even greater sense of the problems with the stimulus. I am concerned that this report provide an even clearer accounting of the mistakes that were made with that bill—and the flawed manner in which it was sold to the American people.

Americans who are now waking up to headlines about the problems with the stimulus don't want to be told a few months from now that the people who sold them a government-run health care system misread the state of our health care industry, or that the health care plan they are proposing was based on faulty assumptions.

Americans don't want to wake up a few years from now with their families enrolled in a government-run health care system because some here in Washington decided to rush and spend a trillion dollars and let the chips fall where they may.

The American people don't want us to rush through a misguided plan that pushes them off of their health insurance and onto a government plan that denies, delays, and rations care. On the stimulus, Americans saw what happens when Democrats rush and spend. When it comes to health care, they are demanding we take the time to get it right.

SOTOMAYOR NOMINATION

Mr. MCCONNELL. Mr. President, last week, the Supreme Court decided the case of Ricci v. DeStefano in which it ruled that the city of New Haven, CT, unlawfully discriminated against a number of mostly White firefighters by throwing out a standardized employment promotion test because some minority firefighters had not performed as well as they had.

In this case, the Supreme Court was correct in my view. The government should not be allowed to discriminate intentionally on the basis of race on the grounds that a race-neutral, standardized test—which is administered in a racially neutral fashion—results in some races not performing as well as others.

Yet regardless of where one comes out on this question, there are at least two aspects of how all nine Justices handled this very important case that stand in stark contrast to how Judge Sotomayor and her panel on the Second Circuit handled it—and which call into question Judge Sotomayor's judgment.

First, this case involves complex questions of Federal employment law; namely, the tension between the law's protection from intentional discrimination—known as ''disparate treatment'' discrimination—and the law's protection from less overt forms of discrimination, known as ''disparate impact'' discrimination.

It also involves important constitutional questions—such as whether the government, consistent with the 14th amendment's guarantee of equal protection under the law, may intentionally discriminate against some of its citizens in the name of avoiding possible discriminatory results against other of its citizens.

Every court involved in this case realized that it involved complex questions that warranted thorough treatment—every court, that is, except for Judge Sotomayor's panel. The district court, which first took up the case, spent 48 pages wrestling with these issues. The Supreme Court devoted 93 pages to analyzing them. By contrast, Judge Sotomayor's panel dismissed the firefighters' claims in just 6 sentences—a treatment that her colleague and fellow Clinton appointee, Jose Cabranes, called ''remarkable,'' ''perfunctory,'' and not worthy ''of the weighty issues presented by'' the firefighters' appeal.

It would be one thing if the Ricci case presented simple issues that were answered simply by applying clear precedent. But the Supreme Court doesn't take simple cases. And at any rate, no one buys that this case was squarely governed by precedent, not even Judge Sotomayor.

We know this because in perfunctorily dismissing the firefighters'

claims, Judge Sotomayor did not even cite a precedent.

Moreover, she herself joined an en banc opinion of the Second Circuit that said the issues in the case were ''difficult.'' So, to quote the National Journal's Stuart Taylor, the way Judge Sotomayor handled the important legal issues involved in this case was ''peculiar'' to say the least. And it makes one wonder why her treatment of these weighty issues differed so markedly from the way every other court has treated them and whether her legal judgment was unduly affected by her personal or political beliefs.

Second, all nine Justices on the Supreme Court said that Judge Sotomayor got the law wrong. She ruled that the government can intentionally discriminate against one group on the basis of race if it dislikes the outcome of a race-neutral exam and claims that another group may sue it. Or, as Judge Cabranes put it, under her approach, employers can ''reject the results of an employment examination whenever those results failed to yield a desired racial outcome, i.e., failed to satisfy a racial quota.''

No one on the Supreme Court, not even the dissenters, thought that was a correct reading of the law.

Justice Kennedy's majority opinion said that before it can intentionally discriminate on the basis of race in an employment matter, the government must have a ''strong basis in evidence'' that it could lose a lawsuit by a disgruntled party claiming a discriminatory effect of an employment decision. And even Justice Ginsburg and the dissenters said that before it intentionally discriminates, the government must have at least ''good cause'' to believe that it could lose a lawsuit by the disgruntled party.

Not Judge Sotomayor. She evidently believes that statistics alone allow the government to intentionally discriminate against one group in favor of another if it claims to fear a lawsuit.

Stuart Taylor notes why this is problematic. As he put it, the Sotomayor approach would, ''risk converting'' Federal antidiscrimination ''law into an engine of overt discrimination against high-scoring groups across the country and allow racial politics and racial quotas to masquerade as voluntary compliance with the law.'' Under such a regime, Taylor notes, ''no employer could ever safely proceed with promotions based on any test on which minorities fared badly.''

It is one thing to get the law wrong, but Judge Sotomayor got the law really wrong in the Ricci case, and the New Haven firefighters suffered for it. To add insult to injury, the perfunctory way in which she treated their case indicates either that she did not really care about their claims, or that she let her own experiences planning and overseeing these types of lawsuits with the Puerto Rican Legal Defense and Education Fund affect her judgment in this case.

As has been reported, before she was on the bench, Judge Sotomayor was in leadership positions with PRLDEF for over a decade. While there, she monitored the group's lawsuits and was described as an ''ardent supporter'' of its litigation projects, one of the most important of which was a plan to sue cities based on their use of civil service exams. In fact, she has been credited with helping develop the group's policy of challenging these types of standardized tests.

Is the way Judge Sotomayor treated the firefighters' claims in the Ricci case what President Obama means when he says he wants judges who can ''empathize'' with certain groups? Is this why Judge Sotomayor herself said she doubted that judges can be impartial, ''even in most cases''? It is a troubling philosophy for any judge, let alone one nominated to our highest court, to convert ''empathy'' into favoritism for particular groups.

The Ricci decision is the tenth of Judge Sotomayor's cases that the Supreme Court has reviewed. And it is the ninth time out of ten that the Supreme Court has disagreed with her. In fact, she is 0 for 3 during the Supreme Court's last term.

The President says that only 5 percent of cases that Federal judges decide really matter. I do not know if he is right. But I do know that, by necessity, the Supreme Court only takes a small number of cases, and it only takes cases that matter. And I know that in the Supreme Court, Judge Sotomayor's been wrong 90 percent of the time.

In the Ricci case, her third and final reversal of this term, Judge Sotomayor was so wrong in interpreting the law that all nine justices, of all ideological stripes, disagreed with her. As we consider her nomination to the Supreme Court, my colleagues should ask themselves this important question: is she allowing her personal or political agenda to cloud her judgment and favor one group of individuals over another, irrespective of what the law says?

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period of morning business for 1 hour, with the time equally divided and controlled between the two leaders or their designees, with the majority controlling the first half and the Republicans controlling the final half, with Senators permitted to speak for up to 10 minutes each.

The ACTING PRESIDENT pro tempore. The Senator from Illinois.

SOTOMAYOR NOMINATION

Mr. DURBIN. Mr. President, Republican Senate leader Senator MCCONNELL has just completed his leadership statement. I would like to respond to two or three of his points.

I am not surprised that he opposes Sonya Sotomayor, the President's nominee to the Supreme Court. He has stated that earlier, that he does not believe she should take this important position. I disagree. Sonya Sotomayor comes to us having first been nominated for a Federal judgeship under Republican President George H.W. Bush and then was nominated for a promotion to the circuit level, the next higher bench, by President Clinton. So she has enjoyed bipartisan support in her judicial career. In fact, she brings more experience on the bench to the Supreme Court if she wins the nomination, if it is approved by the Senate, than any nominee in modern memory. So there is no question she was qualified both under a Republican President and a Democratic President. Now she brings that accumulated experience in this effort to be part of the Supreme Court.

I have met her. She has met personally with over 80 Senators and talked to them, answering every question they had about her background, her approach to the law. She is an outstanding candidate.

Her life story is one that is inspiring to all. She was raised in public housing in the Bronx, NY. There has been some mention of the fact that she was a volunteer attorney for the Puerto Rican Legal Defense Fund. It is a fact that she is of Puerto Rican national descent. When she was 9 years old, her father passed away. Her mother, a very strong-willed and energetic person, raised her and her brother. Her brother is a medical doctor. She is an accomplished attorney. She went to Princeton University and graduated with one of the highest academic honors and then went on to Yale Law School, where she also was acknowledged as being one of the most outstanding law students in her class.

This is a person who comes to this job with a resume that, as a lawyer myself, I look at with a great deal of envy. She is an extraordinarily gifted person. There could be questions raised about any judge's ruling on any case. But the fact is, I believe she has a record that is unparalleled in terms of judicial experience. So I hope those who listened to Senator MCCONNELL's remarks will also reflect on the fact that Judge Sotomayor is an extraordinarily talented and gifted person. If Senator MCCONNELL is going to oppose her nomination—it sounds as if he will—I hope some on his side of the aisle will join us in a bipartisan effort to make her part of the U.S. Supreme Court.

THE ECONOMY FIT

Mr. DURBIN. Senator MCCONNELL was also critical of President Obama, the President's attempt to deal with the economy he inherited from the previous President. The economy was in