

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 McCON-

NELL 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

the worst shape we have seen it since the Great Depression when President Obama was sworn into office. It was not, as he said, his choice to face that kind of an issue or challenge, but it was the reality of what he faced. He did the right thing. He said: I am not going to stand idly by and observe this economy continue to decline, with more and more people facing unemployment, businesses failing, and people losing their savings. I am going to step up and try to create jobs, save and create jobs here in America so that we do not see more people in the unemployment lines.

I supported that. Luckily, three Republican Senators at the time joined us; otherwise, we could not have passed it. So we had a bipartisan vote supporting President Obama's recovery and reinvestment package. Senator MCCONNELL, the Republican leader, opposed it. He came to the floor today to say that we wasted our money on this stimulus package and that we should be very skeptical of these things. The fact is, the Republicans in the Senate had nothing to offer as an alternative. Their alternative was to stand idly by and watch the economy continue to descend, continue to deteriorate, and maybe with a little prayer and hope that it would turn around. That is not good enough.

President Obama said: Let's first, in this stimulus package, take at least 40 percent of all of the funds I am asking for and give it back to Americans in tax breaks for working families. Families need a helping hand, the President said. I voted for that. I think that was sensible. The President made that decision. Senator MCCONNELL thinks that is wasteful, to give tax breaks to working families—at least he said it was wasted. I do not believe it is wasteful. It is a good thing to do to try to revitalize the country.

The President said: Let's invest in what will pay off for a long time to come. Let's put money into infrastructure, let's build that which will serve our economy and serve America, and let's create good-paying jobs to do it. I thought that was sensible.

The President said: Let's look to the next generation of needs in America. Let's make sure we are investing in energy projects which will pay back in years to come and lessen our dependence on foreign energy sources—another good investment from where I am sitting.

He also said: Give a helping hand to those unemployed, a little extra money for them each month to get by. It was not a lot, but for many families it made a difference.

He also said: Give the unemployed a helping hand so they can keep their health insurance. If you lose a job, you lose your health insurance. Think about that if you are trying to raise a family. The President said: Let's try to reduce the premiums unemployed people will pay.

Now Senator MCCONNELL comes to the floor and said this was a waste of

time and a waste of money for us to make that kind of investment in America. I believe the President did the right thing. I would commend to Senator MCCONNELL, the Republican leader, the latest Pew Poll, which shows that when Americans were asked if America's economy is on the right track or wrong track, they have come in with the highest number—53 percent on the right track, 39 percent on the wrong track—we have seen in months. There is a feeling that we still have a long way to go. There are still too many people unemployed, too many businesses failing. But at least we are on the right track toward recovery. It may take some time. Nobody predicted this would be fast or easy. But the President showed leadership, inheriting a bad economy and showing leadership to deal with it.

#### HEALTH CARE

Mr. DURBIN. The major thrust of the remarks of the Senate Republican leader, day after day, has been in opposition to health care reform. I will tell you that I think the Republican leader is out of step with America. America understands we need to do something about our health care system. We are spending twice as much per person for health care in America as any nation on Earth—twice as much—and the medical outcomes, unfortunately, do not reflect that kind of major investment. In other words, we are wasting money in our current health care system.

That has to change. So what we need to do is preserve those things in our health care system today that are good and fix the things that are broken, and that is what the President has challenged us to do. This is not something new. This challenge has been waiting for 15 years since former President Clinton tackled it and, unfortunately, could not pass it. We have seen our health care costs in America continue to skyrocket and our costs for health insurance following in track. Now we have to do something about it.

Time and again, the Senator from Kentucky comes to the floor and says: We are rushing into this. I would just say to him that in the year 2008 the Senate Finance Committee, under Chairman MAX BAUCUS, held 10 hearings on health reform and a day-long bipartisan summit with the Finance Committee's ranking member, Republican CHUCK GRASSLEY. This year, the Finance Committee has held two reform-related hearings, three roundtables, three walk-throughs with policy options, and a number of closed-door sessions to discuss all of the issues on a bipartisan basis. The HELP Committee, which is another committee of the Senate also considering health care reform, has held 14 bipartisan roundtables, 13 committee hearings, and 20 walk-throughs. Democrats are not rushing this through. We have taken this up in an orderly way, trying to

analyze one of the most significant challenges ever facing Congress.

Time and again, Senator MCCONNELL has also come to the floor and argued that Americans should be afraid of change, be afraid, be very afraid. He argued before be afraid of closing Guantanamo; now he is saying be afraid of health care reform. This is not a fearful nation. We are a nation which accepts challenges and does our best to try to find solutions. We are a good and caring nation of people who want to make certain that, at end of the day, we reduce the cost of health care for everyone, bringing it more in line with efficiency and effective medical care, and we also pick up the 50 million Americans who have no health insurance and give them protection, bring them under the umbrella of protection. We should not be afraid of that challenge. Why would we be afraid? We know if we don't tackle it, it will continue to cost us more and more money.

One of the things the Senator from Kentucky says repeatedly, which is just plain wrong, is that under the proposals coming before the Senate, the government can take away health insurance people have today. I am sorry the Senator is not on the floor. I am sure some Members of his staff will alert him to the fact. I would like to read from the language from the HELP Committee bill which is presently being considered. This language makes it abundantly clear,—in fact, says directly—that we can keep our health care plans, that they would not be taken away. That is something most Americans want to have the benefit of. Let me read from the HELP Committee bill that will be considered by the Senate:

Nothing in this Act or an amendment made to this Act shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled prior to the date of enactment of this title.

That is what it says. If one likes their health insurance today, nothing we do in health care reform will take that away from them. It is expressly stated. Time and again, Senator MCCONNELL comes to the floor and says the opposite: Government is going to take away your health insurance. The clear language of the bill says: No, that is not our intention. That is not what we are going to do.

I am also concerned when I listen to the Senator from Kentucky talk about government-run health care. He says it in negative terms, as if the government's involvement in health insurance and medical care is inherently wrong or misguided or ineffective. Here are the realities: 45 million Americans out of 300 million currently are covered by Medicare. Does the Senator from Kentucky want to eliminate Medicare, a government-run health care plan? I am waiting for him to say that. He has never said it. Another 60 million Americans are under Medicaid, which provides health insurance for the poorest