

are making too much of it, that empathy sounds fine to me; I don't have any problem with that. Empathy is great, perhaps, if you are the beneficiary of it. The judge is empathetic with you, your side of the argument, but it is not good if you are on the wrong side of the argument, if you don't catch a judge's fancy or fail to appeal to a shared personal experience.

This approach to judging, as expressed in her speeches and writings, appears to have played an important part in the New Haven firefighters' case Senator MCCONNELL mentioned earlier. These are the 17 firefighters who followed all the rules, studied for the test. It was publicly set out how the promotions would take place in that department. A number of people passed, but a number of people did not, and there were a number of minorities who did not pass. They wanted to change the test after it had been carried out, to change the rules of the game after it had been carried out because they did not like the results. This is a results-oriented question.

Bowing to political pressure, the city government looked only at the test results and the statistical data and changed the rules of the game. They threw out the test. This was challenged by the persons who passed. The district judge then agreed with the city in a 48-or-so-page opinion. It was appealed to Judge Sotomayor's court. In one paragraph only, she agreed with that decision, even though it raised fundamental, important constitutional questions, important questions.

She concluded that the complaining firefighters were not even entitled to a trial, that the pretrial motions were sufficient to deny them the remedy they sought and to affirm the city's opinion in one paragraph.

The U.S. Supreme Court disagreed. They wrote almost 100 pages in their opinion, and all nine Justices voted to reverse the opinion. It was not 5 to 4. Five of the Justices, the majority, ruled that based on the facts in evidence that had been presented prior to trial, the firefighters were entitled to total victory and be able to win their lawsuit. This is a pretty significant reversal, I have to say.

The question is: Did she allow her prior experiences and beliefs to impact her decision in that case? I point out that she was an active member of the Puerto Rican Legal Defense Fund, where she spent a number of years working on cases such as this and filing litigation and challenging promotion policies in cities around the country, which is a legitimate thing for a group to do. But they did take a very aggressive standard criticizing tests and the standardized process of testing.

Of course, her stated philosophy is that a judge should use life experiences in reaching decisions. We do know she believes a judge is empowered to utilize his or her personal "opinions, sympathies, and prejudices" in deciding

cases. We do know her particular life experiences with the Legal Defense Fund were contrary to the claims brought by the New Haven firefighters. We know she was a leader and board member and chair of that organization's litigation committee. According to the New York Times, she "met frequently with the legal staff of the organization to review the status of cases." According to the New York Times, "she was involved and was an ardent supporter of their various legal efforts." She oversaw, as a board member and litigation chair, several cases involving the New York City Department of Sanitation, which challenged a promotion policy because Hispanics comprised 5.2 percent of the test takers but only 3.8 percent had passed the test. They declared that was an unfair result and challenged the test. Another involved the New York City Police Department on behalf of the Hispanic Police Society. Another one involved police officers in a discrimination case challenging the New York City Police Department's lieutenants exam, claiming that exam was biased.

Under her leadership, the Puerto Rican Legal Defense Fund, before she became a judge, involved itself in a series of cases designed to attack promotion exams because the group concluded that after the fact, after the test, not enough minorities were being promoted. It sounds a lot like this firefighters case we talked a good bit about so far.

We are left to wonder what role did the judge's personal experiences play when she heard the case. Did her personal views, as she has stated, "affect the facts she chose to see?"

The PRESIDING OFFICER. The Republican time has expired.

Mr. SESSIONS. Madam President, I ask unanimous consent for 1 additional minute.

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

Mr. SESSIONS. Madam President, those are important questions, and we will ask about them and give her full and ample opportunity to respond. I did wish to raise these issues.

The firefighters were denied promotion, and under her stated philosophy, her prior background, they are left to wonder: Was perhaps the reason they lost in her court because she brought her background and her prejudices to bear on the case and did not give them a fair chance? Very few cases are taken by the Supreme Court, but the Supreme Court did take this one, to the benefit of the firefighters, and reversed this decision. All nine Justices concluded the decision was improperly done and should be reversed, and five of them rendered a verdict in favor of the firefighters on the record as existed then.

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

ORDER OF PROCEDURE

Mr. DURBIN. Madam President, it is my understanding the Senator from North Carolina is going to make a unanimous consent request; is that correct?

Mr. BURR. Madam President, the Senator is correct. I believe the Senator from Nebraska, as well. I ask unanimous consent to be recognized after the Senator from Nebraska, it is my understanding, for up to 10 minutes as in morning business.

Mr. DURBIN. The time suggested for the Senator from Nebraska is how much?

Mr. JOHANNIS. Madam President, I anticipate 10 minutes, and I ask unanimous consent to speak for 10 minutes.

Mr. DURBIN. My only hesitation is the fact that we are having a Senator sworn in at 12:15 p.m., and there is going to be a speech given before that by his colleague. We also wanted to have opening statements on the bill. If I may ask the Senators—I will not object—but if I may ask them to be closer to the 5-minute mark, I think we can achieve all that in a timely fashion. I ask unanimous consent that the Senator from Nebraska be recognized for 5 minutes—

Mr. JOHANNIS. Five minutes.

Mr. DURBIN. In morning business and that the Senator from North Carolina be given up to 10 minutes. I know he said he would not use up to 10 minutes, and we will be protected with whatever time is used by these two Republican Senators being allocated to the Democratic side for morning business, which we will not likely use. I make that unanimous consent request.

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

The Senator from Nebraska.

HEALTH CARE

Mr. JOHANNIS. Madam President, I spent several days during the recess hosting a series of discussions on health care. I met with doctors and hospitals, underwriters, small business owners, and uninsured Nebraskans. Many of them feel as if they are one illness away from a crisis. The economic slowdown has only heightened this fear as they worry that they may lose their job and the health insurance their family depends upon to stay healthy.

Their concerns are real, and Congress should act carefully to address them. We need to create a health care system that protects patient rights, let's them see their doctor, and is affordable.

But I am concerned about the discussion that is occurring today. The American people deserve true solutions and should not be led down a path that is fraught with shadowy numbers and unfulfilled promises. Specifically, I have reservations about a government-run public plan. Some have attempted to sugar-coat this new bureaucracy as simply an option. However, the more you learn about it, the more you realize there is nothing optional about it.

In my judgment, it is a one-way ticket to a single-payer, government-run health care system, one that will compromise patient access to quality care.

It is impossible for private industry to compete with the government. The government can fix the prices and pick the rules that make only one plan feasible—the government plan. When the government acts as both the player and the umpire, it's not a level playing field. That close call at the plate will never go to the runner and the foul ball magically will become a home run.

Some will say the government-run option will increase competition and keep the private insurers honest. Left unsaid is that government underpayments on Medicaid and Medicare are creating enormous cost shifting and increase the health care costs for others. Underpayments for Medicare and Medicaid are estimated to shift about \$89 billion onto people who have private insurance. Each family pays an additional \$1,800 annually to make up for the government's flawed payment system. Hospitals and doctors literally told me they could not keep their businesses open on the Medicaid and Medicare reimbursement rate. So the creation of another plan, a government plan, will only rob from Peter to pay Paul. Eventually, there will be no private insurance companies left to bear the burden.

Bottom line is that government does not balance the books, and it views itself as not having to. Washington seems happy to keep on printing money and raising taxes. How can private business compete with that?

If a government-run public plan was truly going to compete, it would face the same regulations and the same risks that the private industry feels. No bailouts if it becomes insolvent. Does anyone think the bill's proponents would honestly let that happen? The Administration would probably claim it is too big to fail, like AIG, Citibank, General Motors.

A system with a competitive government option, I fear, is a fairy tale. A government-run plan will undercut the private market and ultimately drive them out of business. I am not defending the private insurance industry. Far from it. But we need to be honest with the American people. An uneven playing field is not right, and it will not benefit Americans.

The effect, I fear, will be longer waiting lines, less innovation, and rationing of care. In Canada, the average wait time for radiation treatment is 7 weeks. I cannot imagine asking Americans diagnosed with cancer to wait that long. There are some in Washington who have their heels dug in on a single-payer plan. It contradicts the President's promise. He has said over and over that people will be able to keep their health care. But Americans beware. One study estimates 119 million people will shift to the government plan. They will not choose that; their employer will choose it for them.

We cannot fault employers that are trying to save money.

In the committee draft, businesses that employ 25 or more employees would be required to pay an annual penalty of \$750 per employee. When you do the math, this is no penalty compared to the cost of private insurance.

In 2008, the average employer's cost for an individual health care plan was \$3,900. Putting their employees on the public plan option would save them over \$3,200 a year for each employee. So you can see why this shift would occur.

Ultimately, people will not have a choice. Their employer will make the choice, and they will be forced onto the government plan. To promise otherwise is misleading. Even the President has recognized that shift is going to occur.

I conclude my comments today by saying: Don't be fooled. A government plan that does not compete on a level playing field means people will migrate to the government plan, and the choice to keep private insurance will not be a viable option.

The PRESIDING OFFICER. The Senator from North Carolina.

HONORING OUR ARMED FORCES

MASTER SERGEANT BRENDAN O'CONNOR

Mr. BURR. Madam President, one of the privileges of being a Senator is that we have the opportunity to meet extraordinary people every day. Whether you are the Senator from Illinois or the Senator from Nebraska, extraordinary people walk through your door every day of the week. But sometimes we get to meet amazing individuals whom we can honestly call heroes, who lay their lives on the line for their country and sacrifice themselves for our freedom.

MSG Brendan O'Connor, a medic in the 7th Special Forces Group, is one of those very special people. In June of 2006, Master Sergeant O'Connor was deployed to Afghanistan in support of Operation Enduring Freedom. His group was stationed near Kandahar and charged with a variety of things, including security, training of the Afghan Army, and counterterrorism operations against a ruthless enemy.

We have all heard news reports and heard of suicide bombers driving cars loaded with explosives into markets and crowded areas killing innocent men, women, and children. We have all heard accounts of suicide bombers strapping explosives to their waists and walking through a market, intentionally killing individuals. All of these individuals have been branded as religious zealots willing to die for their cause. However, that is not always the case. Oftentimes, these Taliban warlords recruit suicide bombers in other ways. They go into small villages and they hold whole families hostage. They instruct the young men in the family that if they do not carry out a suicide mission, they are going to kill the rest of the family, or if they do, they will let them live.

Brendan's team was tracking one of these Taliban warlords, one of these thugs, outside of Kandahar, who was notorious for this type of "recruitment." They tracked the terrorist to a small farming village surrounded by vineyards and orchards. Once in the area, Brendan's team set up a perimeter and defensive position to root out these warlords. They arrived late one evening and, working under the cloak of darkness, proceeded to sweep the village, hoping to surprise the local Taliban leader. However, their arrival was tipped off to the Taliban, and they had fled just minutes before U.S. soldiers arrived.

Having found evidence of the Taliban's existence, the soldiers knew it was only a matter of time before they engaged the enemy. That first skirmish started the next day at dusk. Brendan's team, about 70 soldiers comprised of 8 U.S. special ops and 60 Afghan soldiers, took some small arms and rocket propelled grenade fire, but it didn't last long. The Taliban attacked the U.S.-led forces several more times over the next day and night but never amounting to much. U.S.-led forces didn't even sustain a single injury during those firefights.

After having arrived on Wednesday evening and sporadically fighting the Taliban for 2 days, Brendan's team decided it was time to take the fight to the enemy. On that Saturday, MSG Tom Maholluck led a small recon group to a Taliban stronghold, which was just outside the village in a cluster of farm buildings. The team was comprised of four special forces operators and a dozen Afghan Army. Sergeant Maholluck was able to get in close enough to the compound without being detected. Once he assessed the situation, Sergeant Maholluck thought he could take the compound with a simple recon team. He ordered two of his soldiers—SSG Matt Binnie and SSG Joe Feurst—to take a fire suppression position and cover Sergeant Maholluck and the remaining Afghan Army contingency while they stormed the compound.

When the U.S.-led recon team launched its first attack on the Taliban compound, they were quickly greeted with heavy machine gunfire. The first fire expression team returned fire; however, the machine gun nest had a tactical advantage over the fire team—they had the higher ground. Matt was struck first by a bullet that grazed his neck and stunned him for a moment. Matt regained his senses, and he and Joe returned fire, as much as they could, but the Taliban had them pinned down. Then an RPG round came and struck Staff Sergeant Feurst directly in the leg. It didn't explode, thankfully, but badly wounded SSG Joe Feurst. As Staff Sergeant Binnie was tending to Joe's leg, he was shot through the shoulder. The only thing left of the fire suppression team was a young Afghan interpreter who had stayed with them. Master Sergeant