

rise. Of course, all this means is that businesses would lay off some workers, or hire fewer new ones, or pay lower starting salaries or other benefits to the workers they do hire.

Cornell economists Richard Burkhauser and Kosali Simon predicted in a 2007 National Bureau of Economic Research study that a payroll tax increase of about this magnitude plus the recent minimum wage increase will translate into hundreds of thousands of lost jobs for those with low wages. Pay or play schemes, says Mr. Burkhauser, “wind up hurting the very low-wage workers they are supposed to help.” The CBO agrees, arguing that play or pay policies “could reduce the hiring of low-wage workers, whose wages could not fall by the full cost of health insurance or a substantial play-or-pay fee if they were close to the minimum wage.”

To make matters worse, many workers and firms would have to pay the Pelosi tax even if the employer already provides health insurance. That’s because the House bill requires firms to pay at least 72.5% of health-insurance premiums for individual workers and 65% for families in order to avoid the tax. A Kaiser Family Foundation survey in 2008 found that about three in five small businesses fail to meet the Pelosi test and will have to pay the tax. In these instances, the businesses will have every incentive simply to drop their coverage.

A new study by Sageworks, Inc., a financial consulting firm, runs the numbers on the income statements of actual companies. It looks at three types of firms with at least \$5 million in sales: a retailer, a construction company and a small manufacturer. The companies each have total payroll of between \$750,000 and \$1 million a year. Assuming the firms absorb the cost of the payroll tax, their net profits fall by one-third on average. That is on top of the 45% income tax and surtax that many small business owners would pay as part of the House tax scheme, so the total reduction in some small business profits would climb to nearly 80%. These lower after-tax profits would mean fewer jobs.

To put it another way, the workers who will gain health insurance from ObamaCare will pay the steepest price for it in either a shrinking pay check, or no job at all.

[From the New York Times, Aug. 1, 2009]

OBAMA’S PLEDGE TO TAX ONLY THE RICH  
CAN’T PAY FOR EVERYTHING, ANALYSTS SAY  
(By Jackie Calmes)

WASHINGTON.—Behind Democrats’ struggle to pay the \$1 trillion 10-year cost of President Obama’s promise to overhaul the health care system is their collision with another of his well-known pledges: that 95 percent of Americans “will not see their taxes increase by a single dime” during his term.

This will not be the last time that the president runs into a conflict between his audacious agenda and his pay-as-you-go guarantee, when only 5 percent of taxpayers are being asked to chip in. Critics from conservative to liberal warn that Mr. Obama has tied his and Congress’s hands on a range of issues, including tax reform and the need to reduce deficits topping \$1 trillion a year.

“You can only go to the same well so many times,” said Bruce Bartlett, a Treasury official in the Reagan administration.

In the budget, Mr. Obama and Congress have already agreed to let the Bush tax cuts for the most affluent expire after 2010, as scheduled, but to extend them for everyone else. The top rates, now 33 percent and 35 percent, will revert to Clinton-era levels of 36 percent and 39.6 percent.

The critics do not have a beef with the government’s taking more from the wealthiest

Americans, especially given the growing income gap between the rich and everyone else. They object to doing so for health care over other pressing needs.

“I want to tax the rich to reduce the deficit,” said Robert D. Reischauer, a former director of the Congressional Budget Office who heads the Urban Institute, a center-left research group. Similarly, Mr. Bartlett, a conservative analyst who often chastises Republicans for their antitax absolutism, supports overhauling the tax code to raise revenues.

As these analysts recognize, taxing the rich has its limits both economically and politically, such that members of Congress are not likely to tap that well again and again.

Polls show strong majorities supporting higher taxes on those earning more than \$250,000 a year, Mr. Obama’s target group. Yet some Congressional Democrats are fearful of Republicans’ attacks that “soak the rich” tax increases will douse small-business owners, too, even if the number of those affected is far less than Republicans suggest.

Also, higher rates like those in the House health care legislation could lead to tax avoidance schemes, reducing the government’s collections and warping business decisions, analysts say.

The House measure calls for surtaxes ranging from 1 percent on annual income of \$280,000 to 5.4 percent on income of \$1 million and more. The millionaires’ surtax would push the top tax rate to 45 percent, the highest since the 1986 tax code overhaul lowered all rates in return for jettisoning a raft of tax breaks for businesses and individuals.

But the effective top rate would be higher still, counting the 2.9 percent Medicare payroll tax and state and local income taxes. In the highest-tax states of Oregon, Hawaii, New Jersey, New York and California, it would be 57 percent, according to the conservative Heritage Foundation.

In the health debate, Democrats emphasize that they are not just raising taxes on the rich, but cutting spending, too, mostly for Medicare payments to doctors, hospitals and insurance companies.

Also, the Democrats say, at least they are trying to pay for the health care initiative, rather than letting the deficit balloon as the Republicans, along with President George W. Bush, did when they created the Medicare prescription drug benefit in 2003. That program will add a projected \$803 billion to the national debt in the decade through 2019, according to the White House budget office.

“They charged theirs on the government’s credit card,” Rahm Emanuel, the White House chief of staff, said of the Republicans.

Even so, Mr. Obama’s vow to tax only the rich is a variation “of Bush’s policy that nobody has to pay for anything,” said Leonard Burman, a veteran of the Clinton administration Treasury and director of the non-partisan Tax Policy Center.

“Democrats are more worried about the deficits,” Mr. Burman added, but “they put the burden on a tiny fraction of the population that they figure doesn’t vote for them anyway.”

Mr. Burman and others recall that in the creation of Social Security and Medicare, Presidents Franklin D. Roosevelt and Lyndon B. Johnson insisted that beneficiaries contribute through payroll taxes, both to finance the programs and to give all Americans a vested interest. The same philosophy should apply to seeking universal health coverage, they say.

This idea that everything new that government provides ought to be paid for by the top 5 percent, that’s a basically unstable way of governing,” Mr. Burman said.

Mr. Obama recently dismissed concerns that taxing the rich to pay for health care

would foreclose that option when he and Congress turn to deficit reduction. “Health care reform is fiscal reform,” he said.

“If we don’t do anything on health care inflation, then we might as well close up shop when it comes to dealing with our long-term debt and deficit problems, because that’s the driver of it—Medicare and Medicaid,” Mr. Obama said.

But his no-new-tax admonition for most Americans even now complicates the behind-the-scenes work of the panel he established to recommend ways to simplify the tax code and raise more revenue.

The panel, which is led by Paul A. Volcker, a former chairman of the Federal Reserve, is to report by Dec. 4. Overhauling the code, as in 1986, generally creates winners and losers across the board; leaving 95 percent of taxpayers unscathed will not be easy.

That has already proved true in the health care deliberations. Proposals to raise about \$50 billion over 10 years by taxing sugared drinks fundered partly because the levy would hit nearly everyone.

And when Congressional leaders opposed Mr. Obama’s chief idea for raising revenues—limiting affluent taxpayers’ deductions—his campaign vow against taxing the middle class made finding an acceptable alternative difficult.

While the president endorsed House Democrats’ surtax idea, saying it “meets my principle that it’s not being shouldered by families who are already having a tough time,” he could not embrace a bipartisan Senate proposal to tax employer-provided health benefits above a certain amount. He had criticized a similar idea as a middle-class tax during his presidential campaign.

Yet taxing at least the most generous employer-provided plans above a threshold amount would meet two elusive goals for Mr. Obama: It would raise a lot of money and, economists say, cut overall health spending by making consumers more cost-conscious.

Administration officials recently began promoting a fallback. Rather than tax individuals, it would single out insurance companies that sell “Cadillac” plans. David Axelrod, a White House strategist, has described the proposal in populist terms, saying it would hit “the \$40,000 policies that the head of Goldman Sachs has” and “not impact on the middle class.”

That position, analysts predict, cannot hold over time.

“There is no way we can pay for health care and the rest of the Obama agenda, plus get our long-term deficits under control, simply by raising taxes on the wealthy,” said Isabel V. Sawhill, a former Clinton administration budget official. “The middle class is going to have to contribute as well.”

The ACTING PRESIDENT pro tempore. The Senator from Arizona.

#### SOTOMAYOR NOMINATION

Mr. MCCAIN. Mr. President, it is with great respect for Judge Sotomayor’s qualifications that I come to the floor today to discuss her nomination to the U.S. Supreme Court. There is no doubt that Judge Sotomayor has the professional background and qualifications that one hopes for in a Supreme Court nominee. As we all know, she is a former prosecutor, served as an attorney in private practice, and spent 12 years as an appellate court judge. She is an immensely qualified candidate. And, obviously, Judge Sotomayor’s life story is inspiring and compelling.

As a child of Puerto Rican parents who did not speak English upon their arrival in New York, Judge Sotomayor took it upon herself to learn English and became an outstanding student. She graduated cum laude from Princeton University and later from Yale Law School. Judge Sotomayor herself stated that she is “an ordinary person who has been blessed with extraordinary opportunities and experiences.”

However, an excellent resume and an inspiring life story are not enough to qualify one for a lifetime of service on the Supreme Court. Those who suggest otherwise need to be reminded of Miguel Estrada. Mr. Estrada also was a supremely qualified candidate, and he, too, has an incredible life story. Miguel Estrada actually emigrated to the United States from Honduras as a teenager, understanding very little English. Yet he managed to graduate from Columbia University and Harvard Law School magna cum laude before serving his country as a prosecutor and a lawyer at the Department of Justice. Later, he found success as a lawyer in private practice. However, Miguel Estrada, in spite of his qualifications and remarkable background, in spite of the fact that millions of Latinos would have taken great pride in his confirmation, was filibustered by the Democrats seven times—most recently in 2003—because many Democrats disagreed with Mr. Estrada’s judicial philosophy. This was the first filibuster ever to be successfully used against a court of appeals nominee.

I supported Mr. Estrada’s nomination to the DC Circuit Court of Appeals, not because of his inspiring life story or impeccable qualifications but because his judicial philosophy was one of restraint. He was explicit in his writings and responses to the Senate Judiciary Committee that he would not seek to legislate from the bench.

In 1987, I had my first opportunity to provide “advice and consent” on a Supreme Court nominee. At that time, I stated that the qualifications I believed were essential for evaluating a nominee for the bench included integrity, character, legal competence and ability, experience, and philosophy and judicial temperament.

When I spoke of philosophy and judicial temperament, it is specifically how one seeks to interpret the law while serving on the bench. I believe a judge should seek to uphold all actions of Congress and State legislatures, unless they clearly violate a specific section of the Constitution, and refrain from interpreting the law in a manner that creates law. While I believe Judge Sotomayor has many of these qualifications I outlined in 1987, I do not believe she shares my belief in judicial restraint.

When the Senate was considering Judge Sotomayor’s nomination to the Second Circuit in 1998, I reviewed her decisions and her academic writings. Her writings demonstrated that she does not subscribe to the philosophy

that Federal judges should respect the limited nature of the judicial power under our Constitution. Judges who stray beyond their constitutional role believe judges somehow have a greater insight into the meaning of the broad principles of our Constitution than representatives who are elected by the people. These activist judges assume the Judiciary is a superlegislature of moral philosophers.

I know of no more profoundly anti-democratic attitude than that expressed by those who want judges to discover and enforce the ever-changing boundaries of a so-called “living constitution.” It demonstrates a lack of respect for the popular will that is at fundamental odds of our republican system of government. Regardless of one’s success in academics and government service, an individual who does not appreciate the commonsense limitations on judicial power in our democratic system of government ultimately lacks a key qualification for a lifetime appointment to the bench.

Although she attempted to walk back from her long public record of judicial activism during her confirmation hearings, Judge Sotomayor cannot change her record. In a 1996 article in the Suffolk University Law Review, she stated:

A given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction.

This is exactly the view I disagree with. As a district court judge, her decisions too often strayed beyond legal norms. Several times this resulted in her decisions being overturned by the Second Circuit. She was reversed due to her reliance on foreign law rather than U.S. law. She was reversed because the Second Circuit found she exceeded her jurisdiction in deciding a case involving a State law claim. She was reversed for trying to impose a settlement in a dispute between businesses, and she was reversed for unnecessarily limiting the intellectual property rights of free-lance authors.

These are but a few examples that led me to vote against her nomination to the Second Circuit in 1998 because of her troubling record of being an activist judge who strayed beyond the rule of law. For this reason, I closely followed her confirmation hearing last month. During the hearing, she clearly stated, “As a judge, I don’t make law.”

While I applaud this statement, it does not reflect her record. As an appellate court judge, Judge Sotomayor has been overturned by the Supreme Court six times. In several of the reversals of Judge Sotomayor’s Second Circuit opinions, the Supreme Court strongly criticized her decision and reasoning. In a seventh case, the Supreme Court vacated the ruling, noting that in her written opinion for the majority of the Second Circuit, Judge Sotomayor had ignored two prior Supreme Court decisions.

While I do not believe reversal by the Supreme Court is a disqualifying factor

for being considered for the Federal bench, I do believe such cases must be studied in reviewing a nominee’s record. Most recently, in 2008, the Supreme Court noted in an opinion overturning Judge Sotomayor that her decision “flies in the face of the statutory language” and chided the Second Circuit for extending a remedy that the court had “consistently and repeatedly recognized for three decades forecloses such an extension here.”

Unfortunately, it appears from this case—*Malesko v. Correctional Services Corp.*—that Judge Sotomayor does not seek “fidelity to the law” as she pledged at her confirmation hearing. As legislators, we must enact laws. The courts must apply the law faithfully. The job of a judge is not to make law or ignore the law.

Further, in *Lopez Torres v. N.Y. State Board of Education*, the Supreme Court overturned Judge Sotomayor’s decision that a State law allowing for the political parties to nominate State judges through a judicial district convention was unconstitutional because it did not give people, in her view, “a fair shot.” In overturning her decision, the Supreme Court took aim at her views on providing a “fair shot” to all interested persons, stating:

It is hardly a manageable constitutional question for judges—especially for judges in our legal system, where traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a “fair shot” at party nomination.

In her most recent and well-known reversal by the Supreme Court, the Court unanimously rejected Judge Sotomayor’s reasoning and held that white firefighters who had passed a race neutral exam were eligible for promotion. *Ricci v. DeStefano* raised the bar considerably on overt discrimination against one racial group simply to undo the unintentionally racially skewed results of otherwise fair and objective employment procedures. Again, this case proves that Judge Sotomayor does not faithfully apply the law we legislators enact.

Again and again, Judge Sotomayor seeks to amend the law to fit the circumstances of the case, thereby substituting herself in the role of a legislator. Our Constitution is very clear in its delineation and disbursement of power. It solely tasks the Congress with creating law. It also clearly defines the appropriate role of the courts to “extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties.” To protect the equal, but separate roles of all three branches of government, I cannot support activist judges that seek to legislate from the bench. I have not supported such nominees in the past, and I cannot support such a nominee to the highest court in the land.

When the people of Arizona sent me to Washington, I took an oath. I swore to uphold the Constitution. For millions of Americans, it is clear what the

Constitution means. The Constitution protects an individual's right to keep and bear arms to protect himself, his home, and his family. The Constitution protects our right to protest our government, speak freely and practice our religious beliefs.

The American people will be watching this week when the Senate votes on Judge Sotomayor's nomination. She is a judge who has foresworn judicial activism in her confirmation hearings, but who has a long record of it prior to 2009. And should she engage in activist decisions that overturn the considered constitutional judgments of millions of Americans, if she uses her lifetime appointment on the bench as a perch to remake law in her own image of justice, I expect that Americans will hold us Senators accountable.

Judicial activism demonstrates a lack of respect for the popular will that is at fundamental odds with our republican system of government. And, as I stated earlier, regardless of one's success in academics and in government service, an individual who does not appreciate the common sense limitations on judicial power in our democratic system of government ultimately lacks a key qualification for a lifetime appointment to the bench. For this reason, and no other, I am unable to support Judge Sotomayor's nomination.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Republican leader is recognized.

Mr. MCCONNELL. Mr. President, before I address the matter I came to the Senate floor to address today, I congratulate the Senator from Arizona for his thoughtful description of the process by which he has made a decision on the extraordinarily important issue we will have before the Senate later this week; that is, the confirmation of Judge Sotomayor for the Supreme Court. PERSONAL COMPUTER: J079060-A03AU6-003-\*\*\*\*\*-\*\*\*\*\*-Payroll No.: 96940 -Name: b7 -Folios: 303-303/4 -Date: 8/3/09 -Subformat:

#### HEALTH CARE WEEK IX, DAY I

Mr. MCCONNELL. Mr. President, over the past 2 months, I have come to the floor time and again to talk about one of the most important issues we face as a Nation: and that is the need for commonsense health care reforms which address the serious problems that all Americans see in the system as it is. I have done this in the context of a larger debate about a proposed reform that, in my view, could actually make our current problems worse. And I have had solid support for that view from a number of well-respected sources.

First and foremost is the independent Congressional Budget Office, which has refuted several estimates by the administration about the effect its health care proposals would have on the economy in general and health care costs in particular.

The Director of the CBO has said the Democrat proposals we have seen

would not reverse the upward trend of health care costs and would significantly increase the government's share of those costs. The CBO says these proposals would add hundreds of billions of dollars to the national debt. It says that one section of one of the proposals would cause 10 million people to lose their current health plans. And it says a so-called Independent Medicare Advisory Council designed to cut costs probably wouldn't.

These findings have helped clarify the debate over health care—and they have added to a growing perception that, though the administration is trying very hard, economic estimates are not the administration's strong suit.

First there was the stimulus. In trying to account for rising unemployment after a stimulus bill that was meant to arrest it, the administration said it misread the economy. It also said the stimulus would "create or save" between 3 and 4 million jobs, though now it says it can't measure how many jobs are created or saved. Meanwhile we have lost 2 million of them since the stimulus was passed.

Last week we saw the administration's tendency to miss the mark on economic estimates again with the so-called cash for clunkers program.

We were told this program would last for several months. As it turned out, it ran out of money in a week, prompting the House to rush a \$2 billion dollar extension before anybody even had time to figure out what happened with the first billion.

There is a pattern here, a pattern that amounts to an argument—and a very strong argument at that: when the administration comes bearing estimates, it is not a bad idea to look for a second opinion. All the more so if they say they are in a hurry.

Americans are telling us that health care is too important to rush. They are saying it is too important to base our decisions on this issue solely on the estimates that we are getting from the same people who brought us the stimulus and cash for clunkers.

The American people want to know what they are getting into when it comes to changing health care in this country. And while I have no doubt the administration is trying, Americans need some assurance that the estimates they are getting are accurate. And if recent experience is any guide, they have reason to be as skeptical as the car dealer who said this to a reporter last week:

If they can't administer a program like this, I'd be a little concerned about my health insurance.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MCCAIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

#### CONCLUSION OF MORNING BUSINESS

Mr. MCCAIN. Mr. President, what is the pending business before the Senate?

The ACTING PRESIDENT pro tempore. The Senate is in a period of morning business.

Mr. MCCAIN. What time does the Senate intend to move back to consideration of the fiscal year 2010 Agriculture appropriations bill?

The ACTING PRESIDENT pro tempore. The majority still has 8 minutes remaining in morning business.

Mr. MCCAIN. Mr. President, I ask unanimous consent that at this time we return to the Agriculture appropriations bill that was pending before the Senate.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. MCCAIN. I thank the Chair.

The ACTING PRESIDENT pro tempore. Morning business is closed.

#### AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2010

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of H.R. 2997, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 2997) making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs for the fiscal year ending September 30, 2010, and for other purposes.

Pending:

Kohl/Brownback amendment No. 1908, in the nature of a substitute.

Kohl (for Tester) amendment No. 2230 (to amendment No. 1908), to clarify a provision relating to funding for a National Animal Identification Program.

Brownback amendment No. 2229 (to amendment No. 1908), to establish within the Food and Drug Administration two review groups to recommend solutions for the prevention, diagnosis, and treatment of rare diseases and neglected diseases of the developing world.

Kohl (for Murray/Baucus) amendment No. 2225 (to amendment No 1908), to allow State and local governments to participate in the Conservation Reserve Program.

Kohl (for Nelson (FL)) amendment No. 2226 (to amendment No. 1908), to prohibit funds made available under this act from being used to enforce a travel or conference policy that prohibits an event from being held in a location based on a perception that the location is a resort or vacation destination.

The ACTING PRESIDENT pro tempore. The Senator from Arizona is recognized.

AMENDMENT NO. 1910 TO AMENDMENT NO. 1908

Mr. MCCAIN. I ask unanimous consent to call up amendment No. 1910 which is at the desk.

The ACTING PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

The clerk will report.