

floor, we used the example of a Canadian company that sued the State of California with regard to the use of MTBE. The elected representatives of the people of California determined that MTBE was not such a good thing for their health and environmental quality of life. We have that same proposition in New Jersey.

But the judgment of one of these international trade bodies could overrule that decision made by the people, in legislation that was properly passed, if the language is used that we talked about, that substantive quality principle that was mentioned. I think this is dangerous as we go forward, and it truly concerns me.

Mostly, I am concerned that the principle of privatization may very well be subject to rulings from trade bodies making a decision about whether something is appropriate or not, whether privatization is a restraint of trade or not. We had a very close vote with regard to the subject in the Senate, but I think, very possibly, you could see many services that are provided by State and local governments, and even Social Security by the Federal Government, being argued that it is a restraint of or a break in our trade agreements, restricting the ability of the foreign company to come in and provide those services on a private basis. This has been certainly challenged in other countries, and I am very fearful that we have set up a regimen that allows those kinds of processes to happen.

Finally, there is an area that also is quite concerning to me, and that deals with some of what I am concerned about with regard to civil liberties. I am pleased that included in the conference report was the Senate provision I authored with regard to the Customs inspection of mail, to make sure you have to get search warrants to look at small letter carrier mail.

But I am very concerned that the conference report includes a potentially egregious violation of civil liberties, in my view, and an expansion which is based on the expansion immunity for Customs officials. Quite simply, there is a blank check for Customs officers to engage in illegal behavior, particularly and including racial profiling.

I think the Presiding Officer knows I have long been an outspoken opponent of racial profiling. I introduced legislation with Senators FEINGOLD and CLINTON and Representative CONYERS in the House, the End Racial Profiling Act, which really does work against the kind of action I think we have seen documented with the Customs Service in previous measures. I think that needs to be addressed.

The President and the Attorney General have recognized that racial profiling is wrong and must be ended. The President acknowledged that in his very first State of the Union speech. I think we are taking a step backwards by providing these immu-

nity provisions on profiling for Customs officials that are included in this legislation.

Current law provides qualified immunity to Customs agents which is based on the assessment of what a reasonable officer should have done in any given situation. This means that the Customs agent is entitled to immunity from suits if they conduct an unconstitutional search based on a reasonable but mistaken conclusion that reasonable suspicion exists. This legislation expands that protection and establishes a new kind of immunity called good faith immunity.

Essentially, a victim of an unconstitutional search would not be entitled to relief unless the officer acted in bad faith, a nearly impossible standard to meet. So I think it is a significant weakening of the protections in our current law, and I find it dangerous.

In March 2000, the GAO had a report that found that African-American women were nearly nine times more likely to be subjected to x rays and customs searches than White women, and they were less than half as likely to be found carrying any kind of contraband: The whole point of why racial profiling is not only morally wrong, it is bad law enforcement, and doesn't lead to better results.

In fact, under the stewardship of Commissioner Ray Kelly of the Customs Service, they implemented significant changes in policies to stop the racial profiling that was occurring. I think we are taking a step backward here. It is just another one of the fine details that one sees in this conference report that make this not even ideal but, I believe, bad legislation.

For a whole host of reasons—the dilution of our trade adjustment authority; the issues with respect to the role of Congress, the role we rightfully should be playing in this process; the role of foreign investors in America and their ability to use trade agreements to supersede U.S. law; some of the civil liberties issues I pointed out and my concern about the use of the new trade laws to undermine public responsibility roles; the challenge to privatization that is a legitimate question that our elected officials should decide, not trade negotiators—I am led to the conclusion that we have the potential for what could be a very seriously flawed piece of legislation.

I voted against it in the Senate, and I am even more strongly opposed to the conference report. I hope I am wrong and the majority in the Senate are correct. But there are grave dangers embedded in this. We will need to monitor very carefully the application of this trade law as we go forward.

I yield the floor.

The PRESIDING OFFICER. (Ms. CANTWELL). The Senator from Florida.

#### GRAHAM-SMITH PRESCRIPTION DRUG COMPROMISE

Mr. GRAHAM. Madam President, yesterday, July 31, the Senate voted

not to waive the Budget Act to allow consideration of the Graham-Smith prescription drug compromise. This legislation was estimated by the Congressional Budget Office to cost \$390 billion over the 10-year period, a cost which turned out to be within a few percentage points of the legislation offered by the Republicans. Although unscored by the Congressional Budget Office, the sponsors of the Republican legislation estimated that their cost was in the range of \$370 billion.

However, in spite of the fact that both the Democratic and the Republican plans were above \$300 billion, which had been provided in the 2001 Budget Act, almost 18 months out of date, in spite of that fact, we could not get the 60 votes to waive the Budget Act and allow consideration of the substance of the proposal to provide a critical additional health care benefit for America's older citizens.

Had we gotten to the proposal, what would the Graham-Smith compromise have provided? It would have provided full coverage to the 47 percent of America's seniors whose incomes were below 200 percent of poverty, approximately \$17,700 for a single person. It would have provided a mechanism for significant discounts, in the range of 15 to 25 percent, as well as a Federal subsidy on top of those discounts for all Americans. For all Americans, it would have also provided insurance against catastrophic costs, costs beyond \$3,300 of payments made by the beneficiary.

Think of this: Had we been able to get to the substance of our amendment, Americans could have had the opportunity of purchasing an insurance policy for \$25 a year that would have given them the peace of mind they would not be crippled, potentially financially devastated, by the consequences of a major health emergency, such as a heart attack or being determined to have a chronic disease such as diabetes. All seniors who fell into that category would have had all of their prescription drug costs above \$3,300 per year paid with only a modest \$10-per-prescription copayment.

This compromise would have afforded very real protection and assistance to all Medicare beneficiaries at a cost which both Republicans and Democrats had deemed to be reasonable.

One of the fundamental reasons this failed yesterday and I appear today is because at the last minute—I correct that to say, within the last hour before the vote was taken, the information on this chart was dragged from some source and reproduced on a floor chart used by one of my colleagues and in handouts which were circulated in the Chamber, which purported to show that the effect of adopting our amendment would be to impose massive new costs on the States.

It was stated that the first-year cost would be over \$5 billion, and the 10-year cost would be \$70 billion.

Madam President, I accept the fact that we have rules in the Senate and

that one of those rules requires that to waive the Budget Act, you have to have 60 votes. But what I cannot accept is the method that some of our opponents used to defeat our plan.

There is an old adage: Everyone is entitled to their opinion; no one is entitled to their own facts.

It is impossible to have an honest debate without everyone using the same factual basis as the premise for their arguments and opinions. We can't pass legislation in 1 week to make businesses adopt honest accounting practices and standards and then not apply honest accounting standards to ourselves. Using only partial information that intentionally misleads U.S. Senators—in this case, misleading them to the wrong conclusion—is demeaning to this, the world's greatest deliberative body.

Several of our colleagues used a chart which misled other Senators into believing that the Graham-Smith amendment imposed these massive unfunded mandates. In the words of one of our colleagues: "\$70 billion on the States."

This is simply untrue. It is, in my opinion, an intentional misrepresentation of the facts.

The floor chart used yesterday, as well as the paper distributed on the Senate floor, contained no source as to where the data was analyzed, or who among our colleagues would assume responsibility for distributing this information. No one—in violation of the spirit of the Senate rules—would accept personal responsibility for these distortions.

What happened yesterday was Enron accounting come to the Senate Chamber. It makes a point based on an inaccurate representation of the facts. It seems to me that if we are going to require companies to be more accountable, require their chief executives to sign the financial statements before they are released to the public, we should require the same of ourselves in the Senate.

In addition to distributing this distorted information, there were also statements made as to the motivation of the sponsors of this amendment. I will quote a statement made by one of our opponents who stated that:

The sponsors chose to spring the text of this amendment on the Senate yesterday for the first time. Perhaps they thought they could slip in something new that we would not catch. Well, we caught it, and you know we have caught it by the speeches of the Senator from Maine. We actually have had a chance, and we have studied the Graham amendment. The Graham amendment imposes a massive new burden on States just when State treasuries are in terrible shape.

We have been accused of bad faith in offering this amendment, surreptitiously attempting to commit the States to a massive new unfunded commitment. That is not true. In fact, the Congressional Budget Office is the

basis of the analysis that we have done. It was the basis of the support that was sought and gathered for the Graham-Smith amendment. None of its supporters, intentionally or otherwise, would have allowed a provision to be included that increased State costs.

On the other hand, we have an analysis that was developed by an unknown source, distributed by unknown persons to the Senate floor.

The basis of our estimate is the non-partisan Congressional Budget Office, a set of experts with no political stake in this debate. The Congressional Budget Office estimates that the Graham-Smith amendment would not increase State spending.

Let's look at an analysis upon which the Congressional Budget Office predicated that statement, realities which the Republican analysis totally ignores: States would receive considerable relief from the creation of this new Medicare prescription drug benefit.

Let me explain why. Under current law, States are required to provide drug benefits to those eligible for Supplemental Security Income, SSI—generally, those below 75 percent of poverty—and others fully eligible for Medicaid.

In addition, some States have elected to go up to 100 percent of poverty. Those seniors' drug costs are now paid by the States at their regular Medicaid matching rate. Therefore, States are paying for part of total drug costs for these seniors, and the Federal Government is paying for part.

Under our proposal, the Federal Government would assume 100 percent of the cost above \$3,300 incurred by each senior currently covered by the Federal-State match.

In addition, the Federal Government would be solely responsible for 5 percent of the costs incurred by each senior currently covered by the Federal-State match; that is, 95 percent of the costs below the stop loss would continue to be shared between the State and the Federal Government.

However, all the costs above \$3,300 would be assumed by the Federal Government. Additionally, the Federal Government will pay for 100 percent of 5 percent of the drug costs.

The 100-percent Federal assumption of costs that are currently shared between the Federal and State governments would result in substantial savings to the States. None of these savings are included in this analysis.

Just yesterday, the administration approved a Medicaid waiver for the States of Maryland and Florida. This waiver will allow those States to extend coverage for prescription drug costs to their citizens between 175 percent and 200 percent of poverty, respectively, at the regular Medicaid matching rate.

These States, plus others with similar waivers, would receive significant relief from having both a Medicare drug benefit and a higher Federal

matching rate—including 100 percent matching rate for costs of those with incomes between 150 and 200 percent of poverty. None of these savings are included in the analysis presented by my Republican colleagues.

The Graham-Smith amendment does not include a "maintenance of effort" provision on current State spending on these programs.

According to the National Council of State Legislators, 31 States already provide pharmacy assistance programs and Medicaid drug waiver programs to seniors above 100 percent of poverty. Three more are authorized to do so, but have not yet implemented their authorization. All of these States would receive significant relief under my proposal. Yet, none of these savings are included in the analysis presented by my Republican colleagues.

According to the Congressional Budget Office, states are currently spending roughly \$95 billion on prescription drugs for Medicare beneficiaries through the Medicaid program. A significant portion of this amount would be assumed by the Federal Government under the Graham-Smith compromise amendment, resulting in savings to the States.

The floor chart used by my colleagues showing \$70 billion of new expenses was incomplete. I don't know if the \$70 billion figure is accurate, but I do know that the State savings achieved by the Federal assumption of costs currently borne by the states is not reflected on that chart.

So what we have is an analysis that only stated what the new cost to the States would be as a result of this program and failed to include the new savings to the States as a result of this program.

Even the most junior budget analyst would not make the mistake of forgetting that States will save dollars as a result of the Graham-Smith amendment from the Federal assumption of many costs.

This is more than an oversight; it is a deliberate omission intended—unfortunately, in some instances it apparently had this effect—to scare off potential supporters of a responsible prescription drug benefit for older Americans.

This analysis is but one of several politically motivated analyses which have come out of the White House that conveniently support their policy positions.

Let me just review a few of those positions. On July 18, 2002, the Office of Management and Budget wrote:

However, the administration opposes S. 812, [the underlying generic drug bill that the Senate, by an overwhelming majority, passed yesterday] in its current form because it will not provide lower drug prices.

No analysis by the Office of the Actuary supports that claim, and the Congressional Budget Office estimated that the bill will save \$60 billion to American prescription drug consumers over the next 10 years.

The Senate, by its overwhelming vote, obviously decided with the Congressional Budget Office and not with the White House Office of Management and Budget.

Second, the White House produced an analysis claiming that the original Graham-Miller-Kennedy bill would "bankrupt" the Medicare trust fund—when this drug benefit, like the drug benefits in the Republican plan, is funded through a distinct fund that has nothing whatsoever to do with Medicare's Part A.

Third, just this month, OMB made its mid-session review look substantially more rosy by including only \$190 billion for prescription drugs, despite the fact that the Secretary of Health and Human Services, former Gov. Tommy Thompson, stated before Congress in April:

Congress has seen fit to raise the funding for prescription drugs to \$350 billion, and I came here today to indicate to you that the administration wants to work with that latter number.

This administration has not demonstrated in actions or words that it prioritizes State fiscal relief. As such, its concern for States, as expressed on this distorted chart, is a new revelation, only emerging when it is seeking an excuse to oppose an amendment to provide significant prescription drug assistance to America's seniors.

Less than a week ago the Administrator of Medicare, Mr. Tom Scully, stated the administration opposed increasing the Medicaid matching rate even temporarily, an amendment which has been aggressively sought by the States in order to receive some relief from rapidly escalating Medicaid costs. The administration opposed that amendment. The Senate, by an overwhelming vote last week, adopted it.

I might say that during the consideration of the tax bill, I was concerned that the proposal of the White House was to accelerate the repeal of the State's portion of the estate tax at a substantially faster rate than the repeal of the Federal estate tax. In fact, the State's portion of the estate tax will evaporate in approximately 3 to 4 years, while the Federal Government's share of the estate tax continues until the year 2010.

The effect of that early acceleration of the repeal of the State component of the estate tax will have a significant adverse financial effect on the States beginning this fiscal year.

The 47 percent of Medicare beneficiaries with incomes below 200 percent of poverty would have gained comprehensive drug coverage had the Graham-Smith amendment been adopted. Seniors in all States would have been helped. Seniors in all States would have been given the peace of mind that if they suffered a debilitating illness or disease or accident that they would have been helped with their catastrophic drug costs, and the States would have been helped by getting relief through the Federal assumption of costs that they are currently bearing.

I conclude by saying that I hope in future debates on the Medicare prescription drug benefit that we will all rely on the facts, not on incomplete and distorted analysis. Our seniors deserve better than what we have done to date, because what we have done is talk about, talk about, talk about, the need for a prescription drug benefit. We have not yet delivered, delivered, delivered a responsible prescription drug benefit.

It is going to be our challenge over the next few weeks, working with the facts and with honest analysis of those facts, to arrive at a prescription drug plan that will meet the needs of our seniors, will provide us with the basis of integrating a prescription drug benefit into a comprehensive health care program for older Americans, and to find the political will to act this year.

That will be our challenge and that quest will be advanced if we all agree that we are going to differ in our opinions, yes, but that we will all agree that we would use the same set of legitimate facts.

I thank the Chair, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. NELSON of Florida. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. NELSON of Florida. Madam President, I wish to speak on a matter of great importance to this country, keeping the soundness of Social Security—and I say to my colleague from Florida how much I appreciate the great leadership that he has given to the Nation in the last several weeks as he has led the effort to try to honor the senior citizens of this country with a prescription drug benefit that would modernize Medicare to provide for what senior citizens ought to have in the year 2002.

It has been my privilege and pleasure to support him in his efforts. It is beyond me why we could not get the 60 votes. Some of the misinformation that was distributed, as the senior Senator from Florida has explained, is part of the reason. Part of the reason I happen to think has something to do with partisan politics as well, unfortunately, during an election year.

I want him to know my profound appreciation for him as a colleague, as a friend, and as a leader for this Nation in offering a needed change to Medicare for a prescription drug benefit.

#### SOUNDNESS OF SOCIAL SECURITY

Mr. NELSON of Florida. Mr. President, tonight I want to discuss another subject which is near and dear to our hearts, particularly the two of us coming from Florida, on the attempts to privatize Social Security. In fact, it

even comes down to the fact that in the State of Florida, the pension program for Florida retirees was changed within the last 2 years by the legislature of Florida to basically allow a privatized element, other than a defined benefit element for all Florida's 600,000 retirees.

It sounded awfully good while the stock market was doing so well, but now in the last few months, the stock market has not been doing well. Lo and behold, would you believe that out of 600,000 retirees in Florida on the Florida retirement system, the State pension, only 3,000 retirees out of 600,000 have signed up for the privatized retirement plan. That should give us a clue as to why we should not be privatizing Social Security.

I do not want to hold my colleague on the floor, but before he left the floor, I wanted to share that with him as I get into my comments on Social Security.

Mr. GRAHAM. Will the Senator yield?

Mr. NELSON of Florida. With pleasure.

Mr. GRAHAM. The Florida retirement plan, prior to its modification, was in what would be called a defined benefit plan that gave security assurance to Florida's retirees as to what they would have in retirement, what they could count on, what they could sleep comfortably at night knowing was going to be available to them.

Mr. NELSON of Florida. That is exactly right. It was a defined benefit. Every retiree did not have to worry about the vicissitudes of the stock market and part of their retirement suddenly disappearing overnight.

Mr. GRAHAM. Is that not the same basic structure that we have had from the very beginning with Social Security, that it also provides the same level of security and peace of mind to its beneficiaries because it also is a defined-benefit program?

Mr. NELSON of Florida. It certainly is—the same system that has been in place in Florida for years, the system over which the senior Senator from Florida presided as Governor, and therefore the chairman of the State Board of Administration that oversaw the State retirement system, and when I had the pleasure years later, as the elected State treasurer, of being one of the three trustees of the State pension fund.

Mr. GRAHAM. Finally, does not the Senator think there are ample opportunities available for a person who wishes to take the risk and assume the chance that they may be buying into a stock market which is not always going up, they might be buying into a stock market such as in recent months it seems that goes down more than up, that they have plenty of opportunities with their savings, and if they have an individual retirement account or a 401(k) to take some risk, but with the core of