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FAMILIES USA MEDICARE REPORT

Mr. DURBIN. Mr. President, today a report was released showing the median difference between the lowest Medicare discount card price and the best available price for the Veterans' Administration. The difference was 58 percent.

Most people realize we are about to start this Medicare prescription drug plan. This plan was created to give seniors a discount on prescription drugs, which is something we need. Prescription drugs keep seniors healthy, and the healthier they are the better their lives and the less costs to taxpayers.

But many of us objected to the original Medicare prescription drug plan because it was drawn up, frankly, by the pharmaceutical companies. They were unwilling to give up any of their profits to a Medicare plan, and that is how the law was written. As a result of that, many of us voted no, saying there is a model we should follow. Currently, the Veterans' Administration provides prescription drugs to hundreds of thousands of veterans across America. To provide the drugs, the Veterans' Administration bargains with the pharmaceutical companies for the lowest possible price. We said, Why wouldn't the Medicare system, which is much larger—embracing, I think, some 40 million Americans—why wouldn't the Medicare system be in a strong bargaining position to get the same discounted drug prices and therefore help the seniors to lower costs and reduce the burden on taxpayers that have to subsidize this program? It makes sense for the VA, why wouldn't it make sense for Medicare? The pharmaceutical companies ended up winning that debate. They ended up creating a system under Medicare which does not allow the Medicare system to bargain for lower drug prices.

A group called Families USA took a look at the Medicare drug discount cards being used by seniors today and compared the best prices—not the worst, but the best prices being paid by seniors with those discount cards with the amount being paid by the Veterans Administration for identical drugs. Now we took a look at the most prescribed drugs for seniors, Families USA did, and here is what they found:

For Norvasc, the lowest price per year for treatment under Medicare-approved discount, \$467; VA pricing, \$301; percentage difference, 54 percent.

Protonix, \$827 to Medicare; \$253 is what the VA pays; a difference of 226 percent. And Zocor, \$793 under Medicare prescription drug cards; \$167 a year at the VA. That means we will pay, under the Medicare prescription drug plan, the President has signed and is about to go into effect, almost four times as much for the same drugs that are being dispensed at the Veterans Administration.

That tells a story. It tells us if we use the same bargaining power as the VA, we could save seniors and taxpayers dollars.

When the Medicare prescription drug benefit was designed, it was for the pharmaceutical companies and the HMOs, not for seniors. This report from Families USA makes that point.

Medicare has 25 times the number of people covered by the program as the Veterans' Administration. Imagine, for a moment, the bargaining power of Medicare compared to VA. Unfortunately, instead of simply offering a drug benefit through Medicare and negotiating these bulk discount prices, this Congress and the President handed the drug benefit over to these private pharmaceutical companies.

The bill we passed in 2003 is almost impossible to describe. I can't understand how most seniors will get through this bureaucratic mess that we created with this bill. CMS announced last week that there will be 34 active pharmaceutical regions in the United States. Each one of these regions will have 11 to 20 organizations offering prescription drugs. Illinois, my State, will have 16. So with an average of 15 plans in each region, there will be 510 different organizations across the Nation negotiating with pharmaceutical companies.

It is easy to see we have reduced the bargaining power of these plans in each one of these regions and therefore can expect to pay even more for the basic drugs that the seniors need. Instead of the Secretary of Health and Human Services negotiating on behalf of one pool of 41 million seniors for lower drug prices, Medicare's purchasing power has been divided into 510 small fractions. Bulk purchasing by the Department of Health and Human Services would surely save Medicare significantly more money than handing the negotiation over to these private sector negotiators.

There is a lot of talk in Congress these days about reimportation of drugs from other countries as a way to lower prices. Look to the North. Canada has much lower drug prices than the United States for exactly the same drugs, made by the same companies, that are sold in the United States. However, with just 2 percent of the worldwide pharmaceutical market, Canada does not possess the market power necessary to influence prices through negotiation. They do it through regulation.

The United States, on the other hand, has 53 percent of the worldwide prescription drug market. Half of it is made up of Medicare beneficiaries. Imagine the savings we could achieve simply by giving the Medicare program the authority to negotiate on behalf of its beneficiaries. Unfortunately, in addition to dividing up the purchasing pool, the Medicare prescription drug bill Congress passed specifically forbids the Secretary of Health and Human Services to negotiate with drug companies for lower prices.

The obvious question is, What good would that do if you gave the Secretary the power to negotiate? You remember the anthrax crisis—we all do; and the fear of anthrax contamination led many to prescribe Cipro as a drug to protect those who might have been exposed. This was in October 2001. After anthrax was found on Capitol Hill, this drug Cipro made the news. The average retail price for Cipro in 2001 was \$4.67 for each tablet. That is when the anthrax crisis started. So Secretary Tommy Thompson, in President Bush's Cabinet, and the President of Bayer Corporation, announced a pricing agreement for the Government purchase of Cipro in which Bayer would provide HHS with the first 100 million of Cipro at 95 cents per tablet. Look at that, when we bargained with Bayer to reduce the price of Cipro, they cut it down to less than a fourth of what was being charged before this negotiation.

The Government reserved the right to purchase an additional 100 million tablets at 85 cents and another 100 million at 75 cents. Through negotiation, Secretary Thompson brought down the price of Cipro by 490 percent.

That same negotiating mechanism can and should be used on behalf of seniors in America to reduce the cost of prescription drugs and the cost to taxpayers. According to the Washington Times, after the deal was struck, Secretary Thompson said at a press conference:

Everybody said I wouldn't be able to reduce the price of Cipro. I'm a tough negotiator.

We should have let Secretary Thompson negotiate these prescription drug prices on behalf of all Medicare beneficiaries, but the bill specifically prohibits him from doing it.

I have introduced a bill called the Medicare Prescription Drug Savings Act, which instructs the Secretary of Health and Human Services to offer a nationwide Medicare-delivered prescription drug benefit in addition to the PDP and PPO plans available in the 10 regions and negotiate repurchasing agreements on behalf of beneficiaries who choose to receive their drugs through the Medicare-administered benefits.

Beneficiaries who choose to enroll in the Medicare-administered benefit can stay enrolled as long as they desire. Giving Medicare the authority to negotiate is the right prescription for real savings on drug prices. Not only will this bill provide seniors with lower cost drugs, it will give them a choice to enroll in a Medicare-delivered plan, cutting down on the confusion that the privately delivered system has already created.

Critics and the pharmaceutical industry would say my bill is price controls and big government. They are wrong. It is good old-fashioned free market economics. If one buys in bulk, the price goes down. It is also a benefit in the system that American seniors believe works. Let's make this process

easier and cheaper for seniors and the Federal Government as well by allowing seniors to receive their drugs through Medicare and instructing the Secretary of Health and Human Services to negotiate the best price for seniors and America's taxpayers.

ORDER OF PROCEDURE

Mr. DURBIN. Mr. President, I would like to clarify for the Record the time periods allocated on the Democratic side to make certain that the Record for tomorrow's debate reflects what the Chair understands is my understanding: That the time on the Democratic side that will be allocated will be from 11 a.m. to 12; from 1 to 2 p.m., from 5 to 6 p.m., and from 6:20 p.m. to 7:20 p.m. During the period through 4 p.m., it is anticipated this will be a period open to anyone desiring to use it. Is that the understanding of the Chair?

The PRESIDING OFFICER. Without objection, the order is so modified.

Mr. DURBIN. I thank the Chair. Mr. President, 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. SARBANES. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

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

EXECUTIVE SESSION

NOMINATION OF JOHN G. ROBERTS, JR., TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. SARBANES. Mr. President, in the complex institutional framework established by our Founding Fathers, members of all three branches of our national government take an oath to support the Constitution. However, it falls uniquely to the Supreme Court of the United States to expound and interpret the Constitution and the laws passed pursuant to it so that our governing law remains true to the basic principles upon which the Nation was founded.

The Senate's role in giving advice and consent to the nomination of the men and women who serve on the Supreme Court for a life tenure is amongst the Senate's most important constitutional responsibilities.

The argument is made by some that the President is entitled to the confirmation of his or her nominee unless that person is shown to have a serious disqualification. On the contrary, it is my view that the Senate's duty to advise and consent on nominations is an integral part of the Constitution's system of checks and balances among our institutions of government. Nomination does not constitute an entitlement to hold the office.

Although all Presidential nominations require the most careful and

independent review, judicial nominations differ from nominations to the executive branch in two important respects. Within the constitutional framework, the judiciary is a third co-equal branch of government, independent of both the executive and legislative branches. Those who sit on the Federal bench receive lifetime tenure and are to render independent judicial decisions. In contrast, appointees to the executive branch are meant to carry out the program of the President who nominates them, and they serve only at the pleasure of the President or for limited tenure. The bar must, therefore, be set very high when we consider a judicial nomination, especially when the nomination is to the Supreme Court and, as in the matter pending before the Senate, to the position of Chief Justice of the United States.

While qualifications and intellect are important criteria, obviously, in considering a nomination to the Supreme Court, the Senate must also take into consideration the judicial philosophy and constitutional vision of any nominee for appointment to the Supreme Court. As Chief Justice Rehnquist, for whom Roberts clerked, wrote in 1959, well before he went on the Court:

[U]ntil the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Inquiring into a nominee's judicial philosophy does not mean discovering how he or she would decide specific cases. Rather, it seeks to ascertain the nominee's fundamental perspective on the Constitution: how it protects our individual liberties, ensures equal protection of the law, maintains the separation of powers and checks and balances. The Constitution is a living document. Its strength lies in its extraordinary adaptability and applicability over more than 200 years to conditions that the Framers could not have anticipated or even imagined.

The confirmation process provided Judge Roberts with an opportunity to outline his general approach to the Constitution in critical areas—among them, the rights and liberties guaranteed to our citizens, the extent of Congress's power under the Commerce Clause, and the balance of power among the three branches of government. Regrettably, he declined to do so, saying that he does not have an overarching judicial philosophy and comparing the role of a Justice to that of an umpire. The New York Times put it succinctly in an editorial:

In many important areas where Senators wanted to be reassured that he would be a careful guardian of Americans' rights, he refused to give any solid indication of his legal approach.

The uncertainty arising from the hearings is compounded by the refusal of the administration to provide documents from Judge Roberts' service as

principal Deputy Solicitor General, which members of the Judiciary Committee had requested in the course of carrying out their constitutional responsibility.

As a result, we must try to infer his underlying philosophy and views from the earlier documents made available to the committee. Those documents are not reassuring. I am deeply concerned that the documents we have from John Roberts raise questions about his approach and his thinking on such basic issues as voting rights, affirmative action, privacy, racial and gender equality, limitation on executive authority, and congressional power under the commerce clause.

Given the importance of the position of Chief Justice, in deciding whether to give consent to this nomination it is essential that it be an informed consent—an informed consent.

As the New York Times editorial pointed out:

That position is too important to entrust to an enigma, which is what Mr. Roberts remains.

I will vote against confirming John Roberts to be the Chief Justice of the United States.

I yield the floor.

Ms. CANTWELL. Mr. President, I rise to share my concerns about the nomination of Judge John Roberts.

Let me say to my colleagues who have taken the floor through the last couple of days and have been eloquent I think on both sides of the aisle in their views, that I really do believe that we are at a very unique point in time at our history, that we are at the tip of the iceberg as it relates to the information age, and that this issue of personal privacy is only going to gain in importance over the lifetime of the next nominee to the Supreme Court.

And that is why this discussion and debate is so important, and that is why a diversity of voices I think should be heard on this issue.

Now, I am not a member of the Judiciary Committee but I did spend 2 years on the Judiciary Committee, and I made it clear in my time there that I had the intention to ask every nominee about their views on the rights to privacy and how they existed in the Constitution and what they thought was settled law as it relates to that and how they viewed some of the important decisions of the Courts in the past.

And I think that you have to give a context to the day and age in which we are making this decision on a Supreme Court nominee and the next nominee as it relates to these privacy rights.

We are at a time and age when individual citizens are concerned about their most personal information being obtained by businesses or health care organizations and somehow being released. They are concerned about government and government's overreaching in privacy matters and the use of technology that could be used without probable cause and warrant. We have even seen discussion by courts