

REQUESTING THE PRESIDENT AND DIRECTING THE SECRETARY OF HEALTH AND HUMAN SERVICES PROVIDE CERTAIN DOCUMENTS TO THE HOUSE OF REPRESENTATIVES RELATING TO ESTIMATES AND ANALYSES OF THE COST OF THE MEDICARE PRESCRIPTION DRUG LEGISLATION

OCTOBER 8, 2004.—Referred to the House Calendar and Ordered to be Printed

Mr. BARTON of Texas, from the Committee on Energy and Commerce, submitted the following

ADVERSE REPORT

together with

DISSENTING VIEWS

[To accompany H. Res. 776]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the resolution (H. Res. 776) of inquiry requesting the President and directing the Secretary of Health and Human Services provide certain documents to the House of Representatives relating to estimates and analyses of the cost of the Medicare prescription drug legislation, having considered the same, report unfavorably thereon without amendment and recommend that the resolution not be agreed to.

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PURPOSE AND SUMMARY

H. Res. 776 requests the President of the United States and directs the Secretary of Health and Human Services to provide certain documents to the House of Representatives relating to estimates and analysis of the cost of the Medicare prescription drug legislation.

BACKGROUND AND NEED FOR LEGISLATION

On November 20, 2003 the Congressional Budget Office (CBO) completed its cost estimate of H.R. 1, the Medicare modernization Act (MMA). The official score for this legislation was \$395 billion over ten years.

On November 22, 2003, the House agreed to the conference report on H.R. 1 by a vote of 220 to 215. H.R. 1 was subsequently signed into law (P.L. 108–173) on December 8, 2003.

On December 23, 2003 the Centers for Medicare and Medicaid Services Office of the Actuary completed its cost estimate of the MMA. The CMS Office of the Actuary scored the bill at \$534 billion over ten years.

On September 15, 2004, Mr. Rangel (for himself, Mr. Dingell, Mr. Stark, and Mr. Brown of Ohio) filed House Resolution 776, which requests the President of the United States and directs the Secretary of Health and Human Services to provide certain documents to the House of Representatives relating to estimates and analysis of the cost of the Medicare prescription drug legislation. Specifically, the information requested is as follows: (1) any estimates and any analyses made by the Department of Health and Human Services or the Office of Management and Budget relating to the cost of any version of the Medicare prescription drug legislation; (2) any communications (whether written or electronic) relating to such cost estimates or analyses or their release to Members of Congress between employees within the executive branch; (3) any communications (whether written or electronic) relating to such cost estimates or analyses or their release to Members of Congress between employees of the executive branch and Members of Congress or their staff; and, (4) any communications (whether written or electronic) relating to such cost estimates or analyses or their release to Members of Congress between employees of the executive branch and persons other than employees of the executive branch or legislative branch. For purposes of this resolution the term ‘any version of the Medicare prescription drug legislation’ refers to any version of H.R. 1 or S. 1 (108th Congress), including the conference report on H.R. 1.

House Resolution 776 seeks information regarding cost estimates on all prior iterations of the Medicare prescription drug legislation made by Administration officials. The premise of this resolution suggests that this information would somehow have been relevant to the legislative process that led to passage of H.R. 1.

The information sought by the resolution is by definition irrelevant to the legislative process that led to the passage of H.R. 1. Furthermore, the substance of the information sought, coupled with

the timing of the resolution strongly suggests the partisan nature and political motivations underlying the request.

As previously noted, CBO completed its estimate of the costs of H.R. 1 on November 20, 2003. They estimated that the total cost of the bill was \$395 billion over ten years. CBO subsequently reaffirmed their belief that the accuracy of this prior estimate correctly reflects the true costs of H.R. 1. According to House precedents and procedures, CBO estimates are the only binding analysis that can be used to determine the cost of legislation. Suggestions that the availability of higher Administration cost estimates might have been relevant to the sponsors of the resolution is undermined by their support of alternative legislative proposals that far exceeded the costs of H.R. 1, including the subsequent Administration estimates.

The differences between the November 20, 2003 CBO estimate and the subsequent analysis released by the CMS Office of the Actuary results from differing actuarial assumptions used by the two organizations. These differences have been subsequently well publicized and described in substantial detail in testimony before the Ways and Means Committee on March 24, and April 1, 2004. In the opinion of the Chief CMS Actuary, CBO's estimate was both competent and performed in good faith. Both sets of actuaries also acknowledged that either set of assumptions could be correct and that such differences are not uncommon in performing cost estimates on such complicated legislation.

HEARINGS

The Committee on Energy and Commerce has not held hearings on this legislation.

COMMITTEE CONSIDERATION

On Thursday, September 30, 2004, the Full Committee on Energy and Commerce met in open markup session and ordered H. Res. 776 adversely reported to the House, without amendment, by a roll call vote of 26 yeas and 21 nays, a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The following is the recorded vote taken on the motion by Mr. Bilirakis to order H. Res. 776 adversely reported to the House, without amendment, which was agreed to by a recorded vote of 26 yeas to 21 nays.

COMMITTEE ON ENERGY AND COMMERCE -- 108TH CONGRESS
ROLL CALL VOTE # 78

BILL: H. Res. 776, of inquiry requesting the President and directing the Secretary of Health and Human Services provide certain documents to the House of Representatives relating to estimates and analyses of the cost of the Medicare prescription drug legislation.

MOTION: Motion by Mr. Bilirakis to adversely order H. Res. 776 reported to the House.

DISPOSITION: **AGREED TO**, by a roll call vote of 26 yeas to 21 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Barton	X			Mr. Dingell		X	
Mr. Tauzin				Mr. Waxman		X	
Mr. Hall	X			Mr. Markey			
Mr. Bilirakis	X			Mr. Boucher			
Mr. Upton	X			Mr. Towns		X	
Mr. Stearns	X			Mr. Pallone		X	
Mr. Gillmor	X			Mr. Brown		X	
Mr. Greenwood	X			Mr. Gordon			
Mr. Cox				Mr. Deutsch		X	
Mr. Deal	X			Mr. Rush		X	
Mr. Burr	X			Ms. Eshoo		X	
Mr. Whitfield	X			Mr. Stupak		X	
Mr. Norwood				Mr. Engel		X	
Mrs. Cubin	X			Mr. Wynn			
Mr. Shimkus	X			Mr. Green			
Mrs. Wilson		X		Ms. McCarthy		X	
Mr. Shadegg	X			Mr. Strickland		X	
Mr. Pickering	X			Ms. DeGette		X	
Mr. Fossella				Ms. Capps		X	
Mr. Buyer	X			Mr. Doyle			
Mr. Radanovich	X			Mr. John			
Mr. Bass	X			Mr. Allen		X	
Mr. Pitts	X			Mr. Davis		X	
Ms. Bono	X			Ms. Schakowsky		X	
Mr. Walden	X			Ms. Solis		X	
Mr. Terry	X			Mr. Gonzalez		X	
Mr. Ferguson	X						
Mr. Rogers	X						
Mr. Issa	X						
Mr. Otter	X						
Mr. Sullivan	X						

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has not held oversight or legislative hearings on this legislation.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal of H. Res. 776 is to seek information from the President of the United States and the Secretary of Health and Human Services relating to the estimates and analysis of the cost of the Medicare prescription drug bill.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H. Res. 776, a resolution of inquiry requesting the President of the United States and directing the Secretary of Health and Human Services to provide certain documents to the House of Representatives relating to estimates and analysis of the cost of the Medicare prescription drug legislation, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 8, 2004.

Hon. JOE BARTON,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H. Res. 776, a resolution of inquiry requesting the President and directing the Secretary of Health and Human Services provide certain documents to the House of Representatives relating to estimates and analyses of the cost of the Medicare prescription drug legislation.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Tom Bradley.

Sincerely,

ELIZABETH ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H. Res. 776—A resolution of inquiry requesting the President and directing the Secretary of Health and Human Services provide certain documents to the House of Representatives relating to estimates and analyses of the cost of the Medicare prescription drug legislation

H. Res. 776 would request the President, and direct the Secretary of Health and Human Services, to furnish the House of Representatives all documents relating to the administration's cost estimates or analyses of any version of H.R. 1 or S. 1 (Medicare prescription drug legislation), as considered by the 108th Congress. CBO estimates that complying with that resolution would not have a significant effect on federal spending. Implementation of H. Res. 776 would not affect direct spending or revenues.

On September 28, 2004, CBO transmitted a cost estimate for H. Res. 776, as ordered reported by the Committee on Ways and Means on September 23, 2004. The two versions of the resolution are identical, as are CBO's cost estimates.

The CBO staff contact for this estimate is Tom Bradley. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the Several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

H. Res. 776 requests the President of the United States and directs the Secretary of Health and Human Services, to the extent possible, to furnish the House of Representatives, not later than 14 days after the adoption of this resolution, all documents, including telephone and electronic mail records, logs and calendars, and records of internal discussions in the possession of the Secretary of Health and Human Resources, the Director of the Office of Management and Budget, and the Director of the Office of the National Economic Council, respectively, relating to the following: (1) any estimates any analyses made by the Department of Health and

Human Services or the Office of Management and Budget relating to the cost of any version of the Medicare prescription drug legislation; (2) any communications (whether written or electronic) relating to such cost estimates or analyses or their release to Members of Congress between employees within the executive branch; (3) any communications (whether written or electronic) relating to such cost estimates or analyses or their release to Members of Congress between employees of the executive branch and Members of Congress or their staff; and, (4) any communications (whether written or electronic) relating to such cost estimates or analyses or their release to Members of Congress between employees of the executive branch and persons other than employees of the executive branch or legislative branch.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

DISSENTING VIEWS

Once again, this Committee turned its back on its obligation to get the facts for the American people. Our Republican colleagues rejected a resolution of inquiry that requested President Bush and directed the Secretary of Health and Human Services (HHS) to provide certain documents to the House of Representatives relating to estimates and analyses of the cost of the Medicare prescription drug program. The resolution was reported adversely on a near party-line basis.

This is not routine information that is at issue. The Administration, through Centers for Medicare and Medicaid Service (CMS) former Administrator Thomas Scully, hid important cost information that Congress should have seen prior to voting on the Medicare prescription bill in 2003. Mr. Scully threatened the CMS Chief Actuary with adverse consequences if he provided requested estimates to Congress, all the while making sure that the White House had the real information from the Actuary. Did the White House direct this coverup? We do not know.

Why does this matter? Most immediately, the Medicare bill that has since become law will contribute to an increase in Medicare premiums of more than 17 percent next year—the largest premium increase ever. Fifteen percent of that increase in premiums is because of multi-billion dollar overpayments to big insurance companies and health maintenance organizations (HMOs) that were included in the Medicare bill. These are the very same insurance companies that the Government Accountability Office (GAO) found receive more taxpayer dollars to treat beneficiaries than is paid under traditional Medicare. So millions of seniors are now paying billions of dollars—and getting nothing back for that money—to finance the Republican effort to draw seniors away from traditional Medicare.

Moreover, the manner in which the information was withheld was specifically forbidden by the Balanced Budget Act of 1997, in which the Chief Actuary's position was established. This provision was added because Republicans thought they needed to establish in statutory and report language the clear right of Congress to obtain the Actuary's estimates and analyses of cost of changes in Medicare. It specifically forbade the use of an "internal Administration clearance process" to keep this information from Congress. And yet, it was exactly such a "clearance process" that kept the Actuary from informing Congress before it voted to pass the Medicare bill that the estimated cost would be \$500–\$600 billion instead of the \$395 billion the Administration and its Congressional allies claimed.

Congress, and the public, should know what the White House and the Department knew when the bill was being considered. We have repeatedly asked the Administration to turn over information

on the cost estimates and have been ignored. We also asked Speaker Hastert and Senate Majority Leader Frist to investigate, and got the same treatment. So this resolution of inquiry was our last resort.

All Administrations, regardless of which party is in the White House, prefer not to give embarrassing or controversial information to the Congress. But the Committee on Energy and Commerce has a long history of obtaining the information it needs to do its work, whether it is for investigative or legislative hearings and regardless of the party affiliation of the person in the White House. This record is now sullied.

Congressional oversight is only credible if it is consistent regardless of the party in charge of the Executive Branch. Had President Clinton's Administration tried to hide the bill like this, Congressional subpoenas would have flown like confetti. But when the Bush Administration hides the ball, all we get from the Republican Majority is silence. The public deserves better.

Efforts to obtain the Medicare Actuary's estimates of cost of the Medicare prescription drug legislation

In mid-June of 2003, the Minority staff of the House Committee on Ways and Means requested that Richard Foster, the CMS Chief Actuary, provide them with the cost estimates and analyses of the Medicare prescription drug legislation that he had prepared for CMS. During that month, this legislation was being considered by the Committee on Ways and Means, the Committee on Energy and Commerce, and the full House of Representatives. For decades, such estimates and analyses had been routinely provided to Congress through an informal, but important, working relationship between the Congress and the Office of the Actuary. Thomas A. Scully, then head of CMS, took it upon himself to deny information about the Actuary's projected cost of the bill to the Minority and—ultimately—to the full Congress for what he openly admitted were political reasons.

This action by Mr. Scully was at odds with the previous working relationship between Congress and the Office of the Actuary and Mr. Foster protested. According to testimony given by Mr. Foster before the Committee on Ways and Means on March 23, 2004, he was ordered by Mr. Scully to withhold the requested information from particular Members. Mr. Foster said that he understood from Mr. Scully and Mr. Scully's assistant that he would lose his job if he provided the requested estimates and analyses. On June 24, 2003, Mr. Scully informed a Minority staff member of the Committee on Ways and Means that Mr. Foster would "be fired so fast his head would spin" if he provided this information directly to the Committee staff. According to a Washington Post article and others, Mr. Foster memorialized the situation on June 26, 2003, and "dispatched an e-mail to several senior assistants and private actuaries in which he called the situation 'nightmarish' * * * I'm perhaps no longer in grave danger of being fired, but there remains a strong likelihood that I will have to resign in protest of with-

holding of important technical information from key policy makers for political reasons.”¹

Mr. Foster’s estimates—which consistently set the cost of this legislation at \$500–\$600 billion—were critically important for consideration of this Medicare prescription drug bill. Congress had set a cost ceiling of no more than \$400 billion over the next 10 years. The Congressional Budget Office had provided an estimate of \$395 billion. Nonetheless, in the House, it took nearly an hour-long roll call vote in June of 2003 to persuade enough Republican Members to support this bill, which passed by one vote. In July 2003, a number of conservative House members wrote to the Speaker requesting his assurances that the bill not exceed \$400 billion, which the Administration gave, notwithstanding Mr. Foster’s estimates. The Senate passed it only on the Administration’s assurance that it would cost no more than \$400 billion. In November of 2003, when the conference bill returned to the House floor, there was an unprecedented three-hour call vote to allow the Republican leadership and Administration, including the Secretary of the Department of Health and Human Services Tommy G. Thompson, to change the votes of wavering colleagues leading to a virtual party-line vote at dawn after members were told once again it would cost \$395 billion. As the Wall Street Journal wrote, “[N]o one doubts that release of the higher cost estimates last fall could have killed the measure, which only passed by one vote after hours of arm-twisting in the House.”²

Then in January of this year, shortly after President Bush highlighted the Medicare legislation in his State of the Union address and just prior to the release of the Administration’s FY 2005 budget submission, the White House announced that the drug program would cost \$534 billion. On January 30, 2004, White House Press Secretary Scott McClellan said that President Bush had learned of these higher estimates only in “the last two weeks.” However, while the Administration had said their cost estimates were not “final” until after the bill was signed into law, Mr. Foster confirmed in his testimony before the Committee on Ways and Means on March 24, 2004, that he had given Mr. Scully preliminary estimates that were very close to the final estimate weeks before the final votes on the Medicare prescription drug bill. News articles reported that Mr. Foster’s estimates had been provided to the Office of Management and Budget several months before.³ More recently, the cost of this legislation has been projected at \$576 billion.⁴

Mr. Scully and Secretary Thompson have stated on several occasions that some of these estimates were conveyed to Members of Congress or their staff. Secretary Thompson said in a press conference in February that conferees and others were made “aware that we expected our final score would be higher.”⁵ With the excep-

¹Official Says He Was Told to Withhold Medicare Data, The Washington Post, March 13, 2004, A1.

²Medicare’s Chief Actuary Reveals E-Mail Warning, Wall Street Journal, March 18, 2004.

³See, Official Says He Was Told to Withhold Medicare Data, The Washington Post, March 13, 2004, A1; Democrats Demand Inquiry Into Charge by Medicare Officer, The New York Times, March 14, 2004, A1.

⁴OMB Says Medicare Drug Law Could Cost Still More,” The Washington Post, Sept. 19, 2004, A4.

⁵Remarks by: Tommy G. Thompson, Secretary of Health and Human Services,” Feb. 2, 2004, p. 4.

tion, however, of a June 26, 2003, memo to Rep. Rangel on the extent to which premiums for traditional Medicare would rise under a provision in the legislation,⁶ none of the complete requested estimates or analyses were provided to the Democratic Members of these committees, including those who were officially on the Conference Committee and responsible for negotiating this legislation prior to its passage. Subsequent testimony and media reports have made it quite clear that the projections were withheld from Congress for a political purpose—so that the Medicare Modernization Act would pass. Mr. Scully told a reporter in March of 2004 that he had denied the information to Democratic Members because they were trying to be “politically cute” on the eve of the first House vote.⁷ Mr. Scully later told an investigator from HHS’s Office of Inspector General that information was not provided because it was “sought solely to defeat the legislation.”⁸ These actions are exactly what the Conferees were trying to prevent in the Balanced Budget Act when they stated that there should not be an “internal Administration clearance process” because if Congress did not receive this information, its ability to make “informed decisions based on the best available information is compromised.”⁹ There was no exemption to full disclosure of actuarial numbers for Members deemed to be “politically cute,” or those who might be attempting to defeat legislation.

Further, Mr. Foster testified before the Committee on Ways and Means that this was not an across-the-board policy for all Members. Some responses to Congressional requests for information were approved by Mr. Scully, and others were not. Mr. Foster stated that he believed that there was “a political basis for making that decision” and said he “considered that inappropriate and, in fact, unethical.”¹⁰ Full estimates and analyses to this date still have not been shared with the Democratic Members of Congress who served on the Medicare conference, and no justification has been provided.

Attempts to obtain information

There have been numerous written requests made for the cost estimates and analyses that the Administration had as far back as June of 2003. On February 3, 2004, Ranking Members Waxman, Dingell, and Rangel requested all cost information and analyses for the Medicare Prescription Drug bill from Secretary Thompson. On February 12, 2004, Ranking Members Rangel and Stark sent a follow-up letter to Secretary Thompson requesting the estimates and analyses after Secretary Thompson made a commitment to members of the Committee on Ways and Means at a February 10, 2004, hearing that he would restore access to the Office of Chief Actuary. On March 2, 2004, Ranking Member Waxman and every Minority member of the Committee on Government Reform sent another letter to Secretary Thompson requesting the information that Representatives and others had already requested. On March 15, 2004,

⁶Memorandum from Richard S. Foster to Rep. Charles B. Rangel, “Estimated Impact of H.R. 1 on Premiums for Fee-for-Service Beneficiaries in 2010 and Later,” June 26, 2003.

⁷See Medicare Agency Withheld Bill’s Cost, St. Paul Pioneer, March 12, 2004.

⁸Letter from Dara Corrigan to Rep. John Dingell, July 20, 2004, p. 1–2.

⁹H. Rpt. 105–217, p. 838.

¹⁰*Id.*

Ranking Member Dingell sent yet another letter to Secretary Thompson requesting the information. Again, on March 17, 2004, Ranking Member Waxman sent a letter to Secretary Thompson asking for the information. On March 19, 2004, Ranking Members Waxman, Rangel, Dingell, Stark, and Brown sent a letter to the White House asking for all costs and estimates the White House had received. To date, none of these Members has received a complete response to their repeated requests and in most cases have received no response at all. In addition, Members of the “Blue Dog coalition” sent a letter on March 26, 2004, asking the President to look into the matter, noting that they were particularly troubled that such information was potentially withheld.

Similarly, on May 14, 2004, Ranking Member Stark sent a letter to Dr. Mark McClellan, the new administrator of CMS, following Dr. McClellan’s commitment to provide materials at a subcommittee hearing on May 11, 2004. Dr. McClellan has not provided the requesting Members with complete information.

Efforts to have Congress investigate

Mr. Foster testified before the Committee on Ways and Means on March 24, 2004. It was his first public appearance and discussion on these issues in which he revealed the threats he received from Mr. Scully, that his estimates were consistently higher than those put forward by the Administration, and that he was pretty close to the number released in 2004 weeks before the final vote in 2003. Democratic members of that Committee requested an additional hearing under Rule XI in order to hear from additional witnesses.

Chairman Thomas held a hearing on April 1, 2004, pursuant to the Rule XI request, to continue discussions on the estimates. Witnesses were CMS Deputy Administrator Leslie Norwalk and CMS San Francisco Regional Administrator Jeff Flick (Mr. Scully’s former special assistant). Mr. Scully declined to attend, citing fatigue. White House counsel Alberto Gonzalez declined on behalf of Presidential aide Doug Badger. At the hearing, Republicans refused to subpoena Mr. Scully and Mr. Badger.

On June 22, 2004, House and Senate Minority leaders Rep. Nancy Pelosi and Senator Thomas Daschle and numerous Ranking Members and Senators including Reps. Waxman, Dingell, Rangel, Stark, Hoyer, and Brown and Senators Kennedy, Graham, Lautenberg, Stabenow, and Clinton sent a request to House Speaker Dennis Hastert and Senate Majority Leader Bill Frist. Members not only asked for an investigation into the possible withholding of Medicare cost estimates but requested that these Congressional leaders ask the Administration to provide Members with the cost estimates and analyses they had been repeatedly asked for in other letters.

On September 8, 2004, having received no response, these Members sent a follow-up letter to Speaker Hastert and Majority Leader Frist requesting an investigation and the estimates and analyses. they also cited that by this time the Inspector General’s Office and the Government Accountability Office had concluded in independent reports that suppression of information occurred. To date, neither the Majority leaders nor the Administration have provided

Members with the cost estimates and analyses requested by Members in both houses of Congress.

On September 23, 2004, the Committee on Ways and Means held a markup on the Resolution of Inquiry. After a very short and uneventful series of statements from both the Majority and Minority, the Resolution was reported out of Committee unfavorably on a party-line vote of 19 to 12.

The violation of the right of Congress to information from the Chief Actuary

The Chief Actuary's position for the Centers for Medicare and Medicaid Services (CMS) was codified into law by Congress in 1997 as a highly independent office, specifically so that Congress and its committees could have guaranteed access to the Actuary's assessment of the "financial condition of the Medicare trust funds and in developing estimates of the financial effects of potential legislative and administrative changes in the Medicare and Medicaid programs."¹¹ Ironically, the momentum for this provision came from Republican members of the Committee on Ways and Means. The Republicans were concerned that they would not get full information from the Chief Actuary since they did not control the White House. The following statutory protections were provided: "*The Chief Actuary shall exercise such duties as are appropriate for the office of the Chief Actuary and in accordance with professional standards of actuarial independence. The Chief Actuary may be removed only for cause.*" (42 U.S.C. 1317(b)(1)) (emphasis added)

The conferees were very specific about the role and responsibilities of the Chief Actuary in working with Congress. Contrary to a statement from HHS Secretary Tommy G. Thompson in February of 2004, the conferees believed that the Chief Actuary's estimates were critical to the work of Congress.¹² There can be no misunderstanding of their legislative intent.

The office of the Actuary has a unique role within the agency in that it serves both the Administration and the Congress. While the Chief Actuary is an official within the Administration, this individual and his or her office often must work with the committees of jurisdiction in the development of legislation.

Beginning with the appointment of the first Chief Actuary for Social Security in 1936, through the enactment of Medicare and Medicaid in 1965, and through the establishment of the Health Care Financing Administration in 1977, the tradition has been for a close and confidential working relationship between the [Social Security Administration] and HCFA chief actuaries and the committees of jurisdiction in the Congress—a relationship which the Committees value highly. It is important to emphasize that the Senate Committee on Finance, the House Committee on Ways and Means, and the House Committee on

¹¹ H. Rpt. 105-217, July 30, 1997, p. 837.

¹² Secretary Thompson said in a press conference that "everyone knows that during the legislative process the only number that counts is the CBO score. There can be only one scorecard when creating legislation, and that scorecard is CBO's." "Remarks by: Tommy G. Thompson, Secretary of Health and Human Services," Feb. 2, 2004, p. 4.

Commerce all rely on their ability to seek estimates and other technical assistance from the Chief Actuary, especially when developing new legislation. Similarly, the Congressional Budget Office and the Congressional Research Service depend heavily on such assistance. *Thus, the independence of the Office of the Actuary with respect to providing assistance to the Congress is vital. The process of monitoring, updating, and reforming the Medicare and Medicaid programs is greatly enhanced by the free flow of actuarial information from the Office of the Actuary to this committee of jurisdiction in the Congress.*

* * * The Committees rely on the actuaries to provide prompt, impartial, authoritative, and confidential information with respect to the effects of legislative proposals. *When information is delayed or circumscribed by the operation of an internal Administration clearance process or the inadequacy of actuarial resources, the Committees' ability to make informed decisions based on the best available information is compromised.*¹³

And in a prescient statement, the conferees concluded that:

* * * The need for actuarial assistance will be greater than ever in the next few years as the Congress and the Administration, with advice from the bipartisan commission mandated in this legislation, address the future financial pressures facing the Medicare program as a result of the retirement of the post-World War II "baby boom" generation.¹⁴

In response to a Congressional request for an investigation, the Inspector General of HHS found that Mr. Scully threatened Mr. Foster to keep Mr. Foster from communicating with the Congress.¹⁵ The GAO determined such actions to be a violation of 2003 and 2004 appropriations acts, and that no federal monies should have been used to pay Mr. Scully's salary from the date the first threats were made until Mr. Scully left in December of 2003.¹⁶ HHS has refused to seek reimbursement.

¹³ H.Rept. 105, July 30, 1997, pp. 837–838 (emphasis added).

¹⁴ *Id.*, p. 838.

¹⁵ Office of Inspector General, Department of Health and Human Services, "Summary: Scully and Chief Actuary," undated, p. 4.

¹⁶ Government Accountability Office, "Department of Health and Human Services—Chief Actuary's Communications with Congress." Legal Opinion B-302911, September 7, 2004, p. 13.

Conclusion

This resolution posed a simple question—is Congress going to roll over when Executive Branch employees are prevented from providing Congress critical information on important and controversial legislation under consideration? Given that Republicans run both houses of Congress and the Administration, and given the rejection of this resolution of inquiry the answer is yes—politically sensitive oversight will not be allowed. That is a disservice to the people we represent, and an affront to our constitutional form of government.

JOHN D. DINGELL.
 HENRY A. WAXMAN.
 EDWARD J. MARKEY.
 RICK BOUCHER.
 EDOLPHUS TOWNS.
 FRANK PALLONE, Jr.
 SHERROD BROWN.
 BART GORDON.
 PETER DEUTSCH.
 BOBBY L. RUSH.
 ANNA G. ESHOO.
 BART STUPAK.
 ELIOT L. ENGEL.
 ALBERT R. WYNN.
 GENE GREEN.
 KAREN MCCARTHY.
 TED STRICKLAND.
 DIANA DEGETTE.
 LOIS CAPPS.
 MICHAEL F. DOYLE.
 CHRISTOPHER JOHN.
 TOM ALLEN.
 JIM DAVIS.
 JAN SCHAKOWSKY.
 HILDA L. SOLIS.
 CHARLES A. GONZALEZ.