

Congress of the United States
House of Representatives
Washington, D.C. 20515

July 15, 2004

Ms. Dara Corrigan
Acting Principal Deputy Inspector General
U.S. Department of Health and Human Services
229 Independence Avenue, SW, Room 5541
Washington, DC 20201

Dear Ms. Corrigan:

We are writing regarding the five-page written summary of your investigation of the withholding of Medicare cost estimates from Congress that you released last week. Your summary confirmed that estimates and analyses prepared by Richard Foster, Chief Actuary for the Center for Medicare and Medicaid Services (CMS), were withheld from members of Congress. It also confirmed that political officials in the Bush Administration inappropriately threatened Mr. Foster last year. However, this cursory summary provided few relevant details and failed to answer critical questions. Some of the most important issues — such as who knew about the higher cost estimates, when they knew about them, and who knew they were being withheld from Congress — were simply not addressed.

Because of the lack of details in the summary, we are asking that you and the staff who conducted the actual investigation meet with us prior to the upcoming district work period, which begins on July 24, so that we can more clearly understand how you defined the scope of your investigation, exactly what you investigated, and what you learned as a result of the investigation. During this meeting, we intend to ask you about many of the key issues that your written summary failed to address. Some of these issues were raised in a letter we sent to Tom Scully, the former Administrator of CMS, on April 28, which was copied to you so that you would know early in the process of our interest in these specific questions (copy enclosed). We would like to know whether you sought to investigate these matters as part of your inquiry and, if so, what you learned. If you did not investigate them, we would like a full explanation of why you failed to do so.

The issues we plan to ask you about include the following:

1. Who in HHS, outside of the Office of the Actuary, was aware, prior to the passage of the Medicare bill, of Mr. Foster's estimate that the Medicare legislation would cost \$500 to \$600 billion? Was HHS Secretary Thompson aware of these higher estimates on

November 20, 2003, when he said at a National Press Club briefing: “the score is going to come in under \$400 billion”?¹

2. Did HHS officials share Mr. Foster’s cost estimates (or written or oral summaries of the estimates) with White House officials, including those from the Office of Management and Budget, prior to passage of the Medicare bill? Were White House officials aware of Mr. Foster’s estimates on November 17, 2003, when President Bush promised that the legislation would cost only \$400 billion stating: “There’s 400 billion additional dollars available for our seniors in this bill”?²
3. Did HHS officials share Mr. Foster’s cost estimates (or written or oral summaries of the estimates) with any members of Congress or congressional staff prior to passage of the Medicare bill? If so, with whom did HHS officials share these estimates, what did they share, and when did they share such estimates?
4. Did HHS officials share Mr. Foster’s cost estimates (or written or oral summaries of the estimates) with representatives of the pharmaceutical industry, the private insurance industry, or other private parties prior to passage of the Medicare bill? If so, with whom did HHS officials share these estimates, what did they share, and when did they share such estimates?
5. Did Tom Scully, the former Administrator of CMS, discuss his treatment of Mr. Foster or the decision to withhold the Medicare cost estimates at any time with other HHS officials? If so, with whom and when did he discuss this matter?
6. Did Mr. Scully or any other HHS official discuss Mr. Scully’s treatment of Mr. Foster or the decision to withhold the Medicare cost estimates at any time with any White House officials? If so, with whom and when did Mr. Scully or the HHS officials discuss this matter?
7. Did Mr. Scully or any other HHS official discuss Mr. Scully’s treatment of Mr. Foster or the decision to withhold the Medicare cost estimates prior to passage of the Medicare bill with any member of Congress or congressional staff other than the minority staff of the House Ways and Means Committee? If so, with whom and when did Mr. Scully or the HHS officials discuss this matter?

¹ Secretary of HHS Tommy G. Thompson, *Remarks at National Press Club Luncheon* (Nov. 20, 2003).

² President Bush, *Media Availability after Meeting with Medicare Conferees* (Nov. 17, 2003).

8. Did Mr. Scully or any other HHS official discuss Mr. Scully's treatment of Mr. Foster or the decision to withhold the Medicare cost estimates at any time with any representative of the pharmaceutical industry or other private parties? If so, with whom did Mr. Scully or the HHS officials discuss this matter?
9. What was Mr. Scully's stated reason for his decision to withhold the cost estimates from Congress? Did he invoke any particular privilege, including executive privilege?
10. According to your summary, if Mr. Scully were still an HHS employee, you would have referred him to the Department for administrative action under the Department's Standards of Ethical Conduct. What ethics rules were potentially violated?
11. There are other HHS employees who were involved in the threats made to Mr. Foster who are current HHS employees. One example is Jeffrey Flick, a top aide to Mr. Scully, who sent e-mails to Mr. Foster telling him that there would be "severe consequences for insubordination" if he ignored Mr. Scully's directive and provided cost estimates to congressional Democrats. Have you taken any steps to refer Mr. Flick or any other employees for administrative action? If not, why not?
12. In a staff briefing, your counsel stated that the Inspector General relied on the agency to determine the application of personnel or employee law, and that Mr. Scully's actions were a matter of personnel law. In a subsequent briefing with members, you stated that your office had made its own legal conclusions about the applicability of various laws and constitutional interpretation. Please be prepared to discuss the legal research that you undertook and give other examples of the inspector general's determinations about the right of Congress to obtain documents.

As an Inspector General, one of your most important responsibilities is to investigate allegations of misconduct by senior Administration officials. In this case, your written summary does not reflect a thorough investigation. The decision of Bush Administration officials to withhold the Medicare cost estimates from Congress is an extraordinarily serious matter. It misled members of Congress about the true costs of the controversial Medicare legislation prior to the vote on the Medicare bill. And it interfered with Congress's constitutional right to receive information necessary to the execution of its legislative responsibilities. Whether the decision was legal or illegal under criminal or civil statutes, it potentially involved serious misconduct at the highest levels of government and interferes with our democratic form of government.

Yet your summary presents only a superficial recitation of limited facts — most of which were already available in hearing transcripts. The report does not indicate what, if anything, your staff learned about many important questions raised by the selective withholding of the Medicare cost estimates.

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Your full cooperation will be of great assistance to us as we seek to understand precisely what went wrong, who was responsible, and what can be done to prevent Congress from being misled in the future.

Sincerely,



Henry A. Waxman
Ranking Minority Member
Committee on Government
Reform



John D. Dingell
Ranking Minority Member
Committee on Energy
and Commerce



Charles B. Rangel
Ranking Minority Member
Committee on Ways and
Means



Pete Stark
Ranking Minority Member
Joint Economic Committee



Sherrod Brown
Ranking Minority Member
Subcommittee on Health
Committee on Energy and Commerce

Enclosure

Congress of the United States
House of Representatives
Washington, DC 20515

April 28, 2004

Mr. Thomas A. Scully
Senior Counsel
Alston & Bird LLP
601 Pennsylvania Avenue, N.W.
North Building, 10th Floor
Washington, D.C. 20004-2601

Dear Mr. Scully:

Press accounts and Congressional testimony, as described in more detail below, have documented serious allegations that in your role as administrator of the Centers for Medicaid and Medicare Services (CMS) you denied Congress critical information concerning the cost and effects of the Medicare prescription drug legislation during its consideration last year. This occurred despite numerous requests for that information from Democratic Members from the committees of jurisdiction and their staff. In addition, it appears that you directly and indirectly threatened another federal official in order to suppress the requested information. Given the importance of this matter, and your rejection of an invitation to appear before the House Committee on Ways and Means to discuss these issues, we urge you to cooperate by answering the attached questions.

Richard S. Foster, chief actuary of the Medicare program, testified before the Committee on Ways and Means on March 23, 2004, that in the summer of 2003, you ordered him -- under the threat of losing his job -- to withhold cost estimates and other analyses related to the prescription drug benefit legislation from members of that Committee. In the past, such estimates and analyses had been provided routinely to Congress as had been the custom and as codified in the Balanced Budget Act of 1997. Mr. Foster's estimates and analyses predicted that the cost of the drug benefit would be \$500 to \$600 billion through 2013, instead of the \$395 billion estimated by the Congressional Budget Office and cited by numerous Administration officials throughout last year. Mr. Foster's estimates were withheld from Congress until after the legislation had passed, although Mr. Foster testified that you provided them to the White House, the Office of Management and Budget and to other persons at the Department of Health and Human Services (HHS).

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, which was in the range of the suppressed estimates. 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." (See, "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.)

According to Mr. Foster's testimony and an e-mail that he made public, Mr. Foster was told in June that he would suffer "extremely severe" consequences for "insubordination" if he shared his estimates with the Democratic staff of the Committee on Ways and Means. (June 20, 2003, e-mail from Jeffrey Flick to Richard Foster entitled "Re: Congressional Requests," reprinted in "Medicare Actuary Reveals E-Mail Warning," *The Wall Street Journal*, March 18, 2004, A4.) According to your orders as detailed in the e-mail, the requested information was to go only to you, which Mr. Foster testified was a change in policy as it related to Congressional requests. On June 24, 2003, you even told Committee on Ways and Means Democratic staff that Mr. Foster would "be fired so fast his head would spin" if he provided his estimates and analyses directly to committee staff. ("CMS Actuary Threatened with Firing if He Provides Information on the Republican Medicare Bill," June 25, 2003, Press Release from the Office of Rep. Fortney (Pete) Stark.) Mr. Foster also testified that you "repeatedly" told him he would be fired if he complied with requests from Members of Congress to provide these estimates, although you have been quoted as stating to the press that this threat was made only once and only "in jest." ("Official Says He Was Told to Withhold Medicare Data," *The Washington Post*, March 13, 2004.)

You and HHS Secretary Thompson have stated on several occasions that some of these estimates were conveyed to Members of Congress or their staff. However, with the exception 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, none of these estimates or analyses was ever provided to the Democratic Members of these committees, including those of us who were officially on the Conference Committee responsible for negotiating this legislation. It is unclear who in the Congress may have received them, verbally or otherwise. Mr. Foster testified that it appeared that some responses to Congressional requests were approved by you, and others were not; indeed, this pattern is reflected in the June 20, 2003, e-mail. 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."

Mr. Foster's testimony has been partially corroborated by the letter you submitted to the Committee on Ways and Means on April 1, 2004, in declining to appear before that Committee to respond to these allegations in a Congressional forum. You stated that you disagreed with Mr. Foster's position that "he was free to make decisions about when or how to respond to Congressional inquiries relating to CMS cost estimates generally, and, in particular, the Medicare Reform bill," and that it was your responsibility "to determine when and how the CMS Chief

Actuary should respond to Congressional requests." You also stated that you "made it very clear to Mr. Foster, both directly and indirectly, that I, as his supervisor, would decide when he would communicate with Congress." (Letter from Thomas A. Scully to Chairman William M. Thomas, April 1, 2004.)

These threats were made despite the provision in the Balanced Budget Act of 1997 that the chief actuary is to act "in accordance with professional standards of actuarial independence" and can be removed only "for cause." The explanatory conference report language directs that "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 the committee of jurisdiction in the Congress" (42 U.S.C. 1317; HR 105-217, pp. 836-37).

You also stated in your letter that you made your position on the role of the Chief Actuary "very clear to the Republican and Democratic Leadership of the three CMS oversight committees, beginning with meetings that occurred in the spring of 2001." (Scully Letter, *supra*, April 1, 2004.) Mr. Foster testified, however, that the policy changed only in June of 2003 when the Medicare bill was under consideration. In addition, as the signatories of this letter include two of the members with whom you met during the Spring of 2001, we would like to remind you that the only change you suggested at the time was that Congress would no longer be able to make confidential requests of Mr. Foster and his staff. You asserted that you had a right to know the requests made to the Office of the Actuary, but in making this change you also reassured those present that Congress would continue to be able to request and promptly receive analyses from the Office of the Actuary.

Furthermore, Mr. Flick testified on April 1, 2004, that the June incident was the only incident of which he was aware where Congressional requests were not routinely processed and provided. And you told a Knight Ridder reporter that you denied the information because, in your view, the Democrats were trying to be "politically cute" on the eve of the first House vote. You even suggested that the request was for information no longer in the legislation. ("Medicare Agency Withheld Bill's Cost," *St. Paul Pioneer*, March 12, 2004.) It is important to note that the request to Mr. Foster was made immediately upon receiving the Chairman's Mark, and that it included an analysis of a section of the bill that indeed was voted on in the Committee and the following week by the full House of Representatives. Indeed, the law as it was enacted includes a variation on that provision. It is also important to note that this was not a one-time incident; a number of requests made by Democratic members or their staff remain unfulfilled today, including one mentioned specifically in the June 20, 2003, e-mail which was published in the *Wall Street Journal* on March 18.

The Medicare legislation passed in the Senate only after Administration officials, including you, assured the Senate that the drug program would cost less than \$400 billion -- the ceiling set by the Senate -- over the next 10 years. In the House, it took nearly an hour-long roll call vote in June to persuade enough Republican Members to support this bill, which passed by

Mr. Thomas A. Scully
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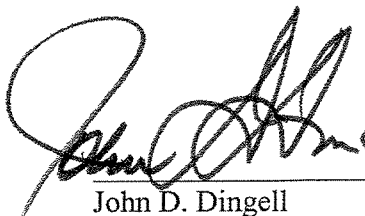

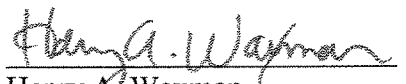
one vote. In fact, in July 2003, a number of conservative House members wrote to the Speaker requesting his assurances that the bill not exceed \$400 billion. In November, the procedural abuses were even more apparent, as we waited through an unprecedented three-hour roll-call vote for the Republican leadership and Administration to twist the arms of wavering colleagues leading to virtually a party-line vote at dawn. As the *Wall Street Journal* stated recently, "[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" (*Supra*, March 18, 2004).

These are extremely serious charges, not just because of the threat such behavior poses to the integrity and legitimacy of the legislative process, but because the \$139 billion in extra costs could hasten the imposition of the new trigger mechanism in the Medicare law. This would lead to cuts in the drug benefit and in Medicare payments to physicians and clinics if these and other general revenue-supported costs exceed 45 percent of total Medicare costs in any two-year period (Public Law 108-173, Section 801(e)). In addition, the \$139 billion includes estimates for provisions that increase payments to health maintenance organizations (HMOs) and preferred provider organizations (PPOs), thereby hastening the insolvency of Medicare by several years.

In light of these charges and your refusal to testify, please provide a response to the attached questions by Wednesday, May 20, 2004. If you have any questions, please contact Edith Holleman, Committee on Energy and Commerce minority counsel, at (202) 226-3400, Cybele Bjorklund, Committee on Ways and Means professional staff member, at (202) 225-4021, or Sarah Despres, Committee on Government Reform counsel, at (202) 225-5420.

Thank you for your prompt cooperation in this matter. We look forward to your responses.

Sincerely,

		
John D. Dingell Ranking Member Committee on Energy and Commerce	Charles B. Rangel Ranking Member Committee on Ways and Means	Henry A. Waxman Ranking Member Committee on Government Reform

Attachment

Mr. Thomas A. Scully
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cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable William M. Thomas, Chairman
Committee on Ways and Means

The Honorable Tom Davis, Chairman
Committee on Government Reform

The Honorable Tommy G. Thompson, Secretary
Department of Health and Human Services

The Honorable Dara Corrigan
Office of the Inspector General
Department of Health and Human Services