

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

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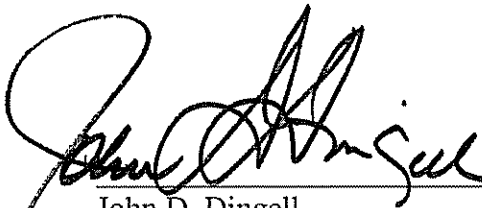

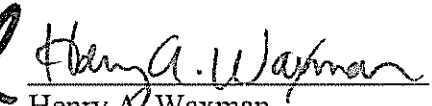
one vote. In fact, in July 2003, a number of conservative House members wrote to the Speaker requesting his assurances that the bill not exceed \$400 billion. In November, the procedural abuses were even more apparent, as we waited through an unprecedented three-hour roll-call vote for the Republican 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

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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

**Questions for Mr. Thomas A. Scully
Senior Counsel, Alston & Bird LLP**

1. Did you ever tell Mr. Foster directly or indirectly that he would be fired or suffer severe consequences -- whether "in jest" or otherwise -- if he responded directly to requests for information from Democratic Members or staff of Congressional committees of jurisdiction concerning last year's Medicare legislation? Please give an actual or estimated date of each such occurrence and the reason for conveying such information.
2. Was it your position that if Mr. Foster shared estimates and analyses of the cost of the proposed Medicare prescription drug benefit program with Democratic Members or staff of Congressional committees of jurisdiction without your approval he could be fired for cause as provided in the Balanced Budget Act of 1997? What is your understanding of a "for cause" action that could have resulted in the firing of Mr. Foster?
3. On March 12, 2004, it was reported that you told a reporter that you had "curbed" Mr. Foster on only one specific request in June, which was made by Democrats, because the Democrats were being "politically cute" and they wanted to get an estimate "so they can walk out on the House floor and cause a political crisis." (*See The St. Paul Pioneer Press, supra*, March 12, 2004.) Was this the requested cited in the June 20, 2003, e-mail from Mr. Foster to you as coming from a Democratic staffer on the Committee on Ways and Means for "Estimated change in FFS premiums in 2010 and later"?

Please describe the basis for your decision that Democratic Members should not have these figures. Had you or anyone with actuarial experience determined that Mr. Foster's figures were not credible? If yes, why?
4. Was this the only time that CMS did not share its actuarial estimates and analyses with Congress upon request? If yes, please describe why this situation was unique. If not, please describe other such incidents.
5. Was the third request in that e-mail -- referred to as the "change in beneficiary/government financing shares" -- provided to the requestor by the time you left the Administration? To your knowledge, was it ever provided? If yes, when was it provided? If not, why wasn't it provided?
6. Did anyone in the White House order you to withhold Mr. Foster's estimates and analyses from Congress? If the answer is yes, who in the White House gave you these orders, whether explicitly or implicitly?

7. Did you ever imply to Mr. Foster or anyone else that your superiors or anyone else in the Administration either supported or requested the decision to selectively withhold information from Congress? Did you ever imply to Mr. Foster or anyone else that your superiors or anyone else in the Administration supported your decision to threaten Mr. Foster if he provided the requested information?
8. In your letter of April 1, 2004, you stated that "there have been long-standing differences between CMS budget assumptions and those articulated by the Congressional Budget Office (CBO), and that you told the Senate Finance Committee on June 6, 2003, that these differences existed. A review of the transcript of that hearing reveals that while you did disclose to the Finance Committee in general terms that CBO and the Administration's actuaries had a difference of opinion with respect to the underlying assumptions, you did not disclose in concrete or even illustrative terms the effects on federal spending that resulted from those differences. If you believed that Congress had the right to know the estimates differed, on what basis did you determine that Congress should not see the CMS estimates at that time or throughout the legislative process?
9. Did you direct Mr. Flick to respond to the June 20, 2003, e-mail from Mr. Foster to you? What directions did you give to Mr. Flick? Does that e-mail reflect those directions?
10. Richard Foster testified on April 1, 2004, that he had consulted with Leslie Norwalk, an attorney who was then acting deputy administrator for CMS, concerning your legal right to prohibit Mr. Foster from sharing information with Congress. Did Ms. Norwalk discuss her advice to Mr. Foster with you prior to responding to Mr. Foster? If so, please give a detailed description of that conversation. Did she discuss it with you after responding to Mr. Foster? If so, please give a detailed description of that conversation.
11. Who provided you with the legal position, as articulated in your April 1, 2004, letter, that it was your responsibility "to determine when and how the CMS Chief Actuary should respond to Congressional requests"? Please summarize that advice. Were you aware of Section 618 of the Consolidated Appropriations bill of 2004, which provides that federal funds cannot be paid to a federal official who "prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such officer or employee or pertaining to the department or agency of such other officer or employee"?
12. Mr. Foster testified that in June of 2003 his cost estimates were shared with Doug Badger, the President's special assistant for health policy, and James C. Capretta, associate director of the Office of Management and Budget (OMB). Did you personally transmit these estimates or direct Mr. Foster to share his estimates with persons in the White House and at OMB or did someone else transmit those estimates?
13. In June of 2003, you testified before the Senate Finance Committee concerning the

differences in scoring based on the utilization of the preferred provider organization provision of the proposed Medicare legislation that the CMS actuaries did not agree with the CBO, but that you were "obviously . . . biased toward my actuaries," as opposed to those from the Congressional Budget Office (CBO), who scored differently. You also stated that those were not "political" differences, but "differences in judgment." ("Strengthening and Improving the Medicare Program," Senate Finance Committee, S. Hrg. 108-339, p. 9.) If Mr. Foster's work did not involve "political" differences, did you or anyone from your office tell anyone in the White House or the OMB that Mr. Foster's numbers were not credible or reliable? If so, on what basis was that judgment made?

14. Were Mr. Foster's estimates and analyses of the cost of the proposed Medicare legislation shared by you or anyone in your office with Secretary Tommy Thompson of the Department of Health and Human Services (HHS) or anyone else in the Secretary's office or in the Department in the summer of 2003? If the answer is yes, please list the name of each person who received this information, the actual or estimated date of that transmittal, and the name of the person who transmitted it. Did you or anyone from your office tell anyone in the Secretary's office that Mr. Foster's numbers were not credible or reliable? If so, on what basis was that judgment made?
15. Were Mr. Foster's cost estimates and other analyses of the House- and Senate-passed bills, and any pre-cursor proposals, and of the conference report and any variations under discussion during the conference shared by you, anyone in your office or anyone at HHS with any Congressional Members or Congressional staff prior to the passage of the Medicare legislation in November of 2003? If the answer is yes, please list the name of the person who received this information, the actual or estimated date of that transmittal, the nature of the information that was shared, and the name of the person who transmitted it. Did you or anyone from your office tell any Congressional Member or staff that Mr. Foster's numbers were not credible or reliable? If so, please provide the name of the person who received this information and describe the basis on which that judgment was made.
16. Did you ever discuss Mr. Foster's estimates with the President or otherwise convey the information to him? If so, please provide the specific or approximate dates. Are you aware of any instances in which anyone else communicated with the President regarding Mr. Foster's estimate? If so, please provide the specific or approximate dates.
17. Did you or anyone in your office discuss Mr. Foster's cost estimates and analyses with anyone in the White House or the Office of Management and Budget during 2003? If the answer is yes, please list the name of the person with whom it was discussed, the actual or estimated date of that discussion, and the name of the person(s) from CMS involved.

18. Given that the President's proposed budget last year also allocated only \$400 billion for the Medicare legislation, when were you and others in the Administration first aware that the legislation being considered in both chambers was likely to significantly exceed the President's budget according to the Administration's own budget office? What was done to try to reconcile the differences between the estimates of CBO and the Office of the Actuary?
19. Secretary Thompson was quoted recently as stating that lawmakers working on the Medicare bill last fall "knew that our estimates were higher" than the official \$400 billion estimate, but "not the exact amount." (See "Thompson Launches Inquiry into Medicare Drug Bill Cost," *The Los Angeles Times*, March 17, 2004, A1.) Which lawmakers knew that the cost estimates were higher than \$400 billion? When and from whom did they learn this information? Was it shared on a bipartisan basis? With whom?
20. In *The New York Times* on March 14, 2004, Trent A. Duffy, identified as a White House spokesman, said that the White House had received Mr. Foster's estimates and analyses last summer, but had relied on the Congressional Budget Office (CBO) as "the primary authority" on overall cost. Who determined that CBO's projected costs were more accurate than Mr. Foster's, and what was the basis for that decision? Did you agree with that decision? If so, are you asserting that the Administration decided last year to use the CBO as its scorekeeper? If so, when was it decided to return to the estimates from the Office of the Actuary for the President's FY 2005 budget submission?
21. Mr. Foster testified that, before the Medicare bill was passed, he had provided you with a "package estimate of \$534 billion" reflecting the final benefit formula, which was the same higher number that President Bush announced in January of 2004. Did you provide this estimate to anyone in the Congress, in the Department, at the White House, or at OMB? Please list the name of each person who received this estimate. If persons in the Administration knew that the actual cost of the prescription drug benefit program was \$534 billion or close to that amount even before Congress passed the bill, why wasn't this number shared with Congress before passage of the Medicare bill?
22. Did you ever suggest to anyone that Mr. Foster's estimates should be shared with any Members of Congress? Why or why not? If yes, with whom did you suggest the estimates be shared?