

Dissenting Views
on H. Res. 776:
Resolution of Inquiry on Medicare

We write as senior members of the Committee on Ways and Means and of the United States House of Representatives. While we happen to be Democrats, we do not believe preserving Congress' prerogative to obtain timely information about legislation is a partisan issue. Thus, we are profoundly disappointed by the majority's decision to adversely report this resolution. In doing so, the Committee has seriously undermined Congress' ability both to legislate with the best available information and to oversee programs under our jurisdiction. By voting to endorse the Bush Administration's decision to withhold important information from the Congress and the American people, the majority broke with long-standing precedent that the United States government should be accountable to Congress and the American people and not merely to the President's appointees. This contempt for Congressional prerogatives is as disturbing as the original suppression of information and its insidious effect on the outcome of last year's debate.

We are saddened that our colleagues chose to put the political agenda of the Administration above the needs of the people and their elected representatives in the Congress. Consideration of this resolution provided an opportunity to bring closure to this unfortunate chapter. Instead, the decision by the majority to adversely report this measure means that these questions remain unanswered.

If passed, H. Res. 776 would force the Bush Administration to release within two weeks of its adoption "all documents, including telephone and electronic mail records, logs, and calendars, and records of internal discussions" related to the estimates and analyses of last year's Medicare legislation (P.L. 108-173), including its predecessors (H.R. 1 and S. 1), to members of Congress and others in the executive branch. We introduced this resolution with our colleagues on the Committee on Energy and Commerce, Representatives John Dingell and Sherrod Brown.

BACKGROUND

Throughout last year's debate on the Medicare Modernization Act (MMA), the Bush Administration claimed the Medicare bill carried a price tag of \$395 billion over 10 years - the cost estimate provided by the Congressional Budget Office (CBO) - as they attempted to sell the legislation to reluctant members of Congress and the public. However, while they publicly touted the CBO estimates, they privately suppressed estimates by chief Medicare actuary Rick Foster and others in the Office of the Actuary (OACT) that consistently predicted the cost would total \$500-600 billion over the same time period. Ultimately, their final estimate showed a cost of \$534 billion - approximately \$140 billion more than CBO. Even this estimate may be low, as it does not include spending for revenue provisions, which are included in the CBO estimate.

Although Democrats asked for the actuary's estimates back in June of 2003 (and continued to do so through the rest of 2003), the Bush Administration refused to provide

Congress with the information, and even threatened to fire Foster if he revealed the information. These facts have been well documented by Foster's testimony before the Committee on March 24, 2004; additional testimony provided to the Committee on April 1, 2004; press reports (including those that published internal Administration emails detailing at least one threat); and the investigation conducted by the Health and Human Services' (HHS) Office of the Inspector General (OIG). In addition, the Congressional Research Service (CRS) found in April of this year that these actions violated numerous federal laws and the Government Accountability Office (GAO) found earlier this month that the Administration illegally spent appropriations funds to pay the salary of then-CMS Administrator Tom Scully for the duration of the period in which he suppressed the information (starting in June 2003 and ending when he left the Administration in December 2003). GAO recommended that HHS seek repayment of Scully's salary for that period, but HHS has refused to do so and Scully has been quoted in several media outlets as saying that he wouldn't repay the funds even if they asked.

This is not the first time Republican members of this Committee have gone on record in support of the Bush Administration and against the interests of Congress and the American people with respect to our effort to obtain information on the Medicare legislation and the process by which it was suppressed. Now, however, there is no doubt that the majority members on this committee are complicit in the Administration's coverup.

TIMELINE OF KEY EVENTS

While the Chairman implied at the mark-up of H. Res. 776 that he would have worked with us on this issue had he known of our continuing interest, the timeline included below makes clear that we have tried time and again to obtain these documents and that the majority has consistently blocked our efforts. This timeline highlights key events in our effort to uncover the truth with respect to who knew what and when about the Medicare analyses last year. Please note that additional efforts have been undertaken by Democrats on the Committee on Government Reform and on the Committee on Energy and Commerce, including a lawsuit to force disclosure, which was filed by Democrats on the Committee on Government Reform.

June - November 2003. Numerous requests made by Democratic Ways and Means Members and staff during this time for cost estimates and analyses (e.g., premium increases, total cost and participation, effect on solvency, subsidies for private plans versus fee-for-service, etc.) of the MMA and its precursors.

June 25, 2003 – Rep. Stark publicly announces that Foster has been threatened. On June 24, Foster tells staff that he has some of the requested information, but cannot provide it because his job has been threatened. Staff confirm this with Scully. Rep. Stark issues press release announcing Scully's threat to Foster.

June 26, 2003. Administration releases a memo to Ranking Member Rangel, while on the floor, partially responding to a request – i.e., memo projects that premiums under traditional Medicare could rise by up to 25 percent if HR 1, as being considered, were enacted. Memo does not

include any information on costs. Last official information received from the Administration until 2004 budget and Trustees documents released, in February and March, 2004, respectively.

January 30, 2004 – Secret table. Ways and Means Democratic staff receive a fax from an anonymous source of June 11, 2003 table from OACT showing an estimate of \$551.5 billion for a benefit similar to, but less generous than, S. 1 (which was scored at \$422 billion by CBO), proving that the Administration’s modeling consistently showed differences close to those found in the final scores.

February 2, 2004. President's FY 2005 budget officially discloses that Administration estimates for spending in the Medicare Modernization Act total \$534 billion. This likely understates the total cost, as it does not include revenue effects (which have never been fully disclosed).

February 3, 2004. In light of the new information, Reps. Rangel, Dingell and Waxman send a letter to Secretary Thompson asking for the specific outstanding analyses from last year, and issuing a new request for all other analyses and estimates related to H.R. 1 (as passed the House), S. 1, conference committee proposals and H.R. 1, as enacted.

February 6, 2004. Reps. Stark and Rangel send letters to Secretary Thompson and OMB Director Bolten requesting that Foster attend forthcoming budget hearings and be available to answer questions.

February 10, 2004. Secretary Thompson appears before Ways and Means Committee, without Foster, to testify on the budget. Chairman Thomas promises that Foster will be invited in the Spring to discuss the forthcoming Trustees Report. Under questioning from various Democrats, Secretary Thompson (1) asserts that Scully told him he was disseminating information last year, (2) admits that their preliminary estimates were higher than CBO’s and that individuals in the White House knew it, (3) says that he may have been “derelict” in allowing Scully to have too much control and blames him for micromanaging the actuaries, and (4) promises to restore access to “anybody or anything in the Department you want.”

February 11, 2004. OMB Director Bolten appears without Foster.

February 12, 2004. Reps. Rangel and Stark send a letter to Secretary Thompson acknowledging his commitment at February 10 hearing to restore access to Actuary; includes reminder of outstanding February 3 request.

March 12, 2004. Rep. Stark and several other House Democrats request an OIG investigation.

March 24, 2004 – Foster testifies at hearing on Trustees Report. Foster testifies before the Committee. First public appearance and discussion on these issues – reveals threats, that his numbers were consistently higher, that he had pretty close to the final number weeks before the final vote, etc. Democratic members request additional hearing under Rule 11, clause 2 (j)(1) in order to hear from additional witnesses. Requested witnesses include former CMS Administrator

Tom Scully, White House aide Doug Badger, CMS Deputy Administrator Leslie Norwalk and CMS San Francisco Regional Administrator Jeff Flick (Scully's former special assistant).

April 1, 2004– Rule 11 hearing (2nd hearing). Thomas holds a hearing, pursuant to Rule 11 (as invoked by Democratic members on the Committee), to continue discussions on the suppression of the cost estimates and analyses. Witnesses are Norwalk and Flick. Scully declines to attend, citing travel fatigue. White House counsel Alberto Gonzalez declines on behalf of Badger, citing executive privilege and precedent. Committee Republicans vote against motions to (1) subpoena Badger, (2) subpoena Scully and (3) to swear in Norwalk and Flick. However, the Chairman repeatedly states during the hearing that he would support additional actions to get the information if laws had been broken – e.g., “If there was a violation of the law, the chair stands ready to use whatever tool is necessary to get to the bottom of the violation of the law.” Accordingly, the American Law Division at CRS was asked after the hearing for an opinion with respect to whether laws had been broken (*see April 30*).

April 16, 2004 – HHS “response.” HHS sends Reps. Rangel, Waxman and others a letter to respond to the February 3 request, but which refuses to provide the requested information, instead offering a few previously released documents. Virtually no new information. Stonewalling continues.

April 30, 2004 – New CRS opinion sent to Thomas, with request for additional actions. Reps. Rangel and Stark write to the Chairman to ask for his support in subpoenaing Badger and Scully for another hearing, in light of a new CRS paper asserting that numerous laws have been broken and the Chairman's statements at the April 1 hearing. The Chairman never responded.

May 14, 2004. Rep. Stark sends letter to new CMS Administrator Mark McClellan, following his commitment at a Health Subcommittee hearing on May 11 to restore access to the Actuary, requesting the documents in question. No response ever received.

June 22, 2004. Bicameral Democratic letter to Frist and Hastert asking for a Congressional investigation.

July 6, 2004 – HHS/OIG report. OIG/HHS releases summary of internal investigation; provides first written official confirmation from the Bush Administration that information was withheld from Congress and Scully threatened Foster. While it asserts that no laws were broken, it does not address a key appropriations law that is designed to protect communications between the Executive and Legislative branches (P.L. 108-199 and 108-7 et al – *see September 7*) or whether such withholding is appropriate. [NOTE: Similar requests for investigation had been made of both GAO and OIG, thus they had agreed to divide work to avoid duplication; GAO agreed to use the OIG's facts and to review the appropriations law (P.L. 108-199 and 108-7 et al), while the OIG would conduct the investigation to determine the facts and review other laws.]

September 7, 2004 – GAO opinion. GAO issues legal opinion – based on the OIG's investigation – finding that Scully violated appropriations law by illegally gagging Foster. GAO

recommends that HHS seek repayment of Scully's salary from June-December 2003. HHS refuses to do so; Scully says he wouldn't pay even if asked.

September 8, 2004. Bicameral Democratic letter sent to Frist and Hastert, following up on June request for investigation and citing GAO opinion as renewed impetus.

September 9, 2004 – Labor - HHS amendment. To provide incentive for the Administration to seek repayment, Rep. Stark offers an amendment to the Labor-HHS appropriations bill to reduce the Secretary's budget by the amount owed by Scully. Amendment failed 216-195 (22 not voting).

September 15, 2004 – Resolution of Inquiry (H. Res. 776) introduced. Reps. Rangel, Stark, Dingell and Brown introduce the Resolution of Inquiry demanding the still-hidden Administration documents.

CONCLUSION

This committee has had a history of working on a bipartisan basis to seek data and effectively manage the Medicare program. While there have often been differences on broad programmatic issues, those differences were regularly put aside to oversee Medicare's operations and ensure careful spending of taxpayer dollars. Indeed, the steadfast refusal of both the Chairman and the Leadership to assert Congressional prerogatives to obtain relevant information known to be in the possession of the executive branch is an indication of just how far the House has fallen in the past decade.

As Francis Bacon famously observed centuries ago, *Ipsa Scientia Potestas Est* – knowledge is power. By hiding the analyses we have requested, the Republican-controlled Administration and Congress were able to enact legislation that put the profits of the pharmaceutical industry and HMOs above the needs of beneficiaries, while simultaneously laying the groundwork to privatize and undermine Medicare.

There is no question that this legislation would not be law today if the information we had requested had been provided. But this is part of a broader pattern of deceit by the Bush Administration. Whether on Medicare, Iraq, taxes, veterans benefits, Leave No Child Behind or a host of other issues, time and again the Bush Administration and the Republican leadership have withheld or manipulated information to suit their political agenda.

This pattern occurs because poor policies cannot stand on their merits. Disclosure of the documents requested in this resolution would prove that last year's withholding of information was an orchestrated effort to hide the truth. It wasn't simply over-reaching by former CMS Administrator Tom Scully. This behavior goes to the top. That's why the Bush Administration and its partners in Congress have quashed this resolution and are determined to do whatever is necessary to prevent the American people from knowing the truth.

**Dissenting Views on Medicare
Resolution of Inquiry Markup**

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