

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 7, 2004.—Ordered to be printed

Mr. THOMAS, from the Committee on Ways and Means,
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 Ways and Means, 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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I. INTRODUCTION

A. PURPOSE AND SUMMARY

House Resolution 776 requests the President and directs the Secretary of Health and Human Services to provide to the House of Representatives certain documents relating to estimates and analyses of the cost of the Medicare prescription drug legislation (P.L. 108–173).

B. BACKGROUND

House Resolution 776 is a resolution of inquiry, which pursuant to rule XIII, clause 7, of the Rules of the House of Representatives, directs the Committee to act on the resolution within 14 legislative days, or a privileged motion to discharge the Committee is in order. H. Res. 776 was introduced and referred to the Committee on Ways and Means, and in addition to the Committee on Energy and Commerce, on September 15, 2004, and was ordered reported adversely by the Committee on September 23, 2004 by a vote of 19 to 12.

Under the rules and precedents of the House, a resolution of inquiry is the means by which the House requests information from the President of the United States or the head of an executive department. According to “Deschler’s Precedents,” it is a “simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch.”

On September 15, 2004, Mr. Rangel of New York introduced H. Res. 776, requesting the President and directing the Secretary of Health and Human Services to provide certain documents to the House of Representatives relating to estimates and analyses of the cost of the Medicare prescription drug law.

The issue of Medicare cost estimates has been thoroughly investigated by the Committee. On March 24, 2004, the Committee held a hearing on the Board of Trustees 2004 Annual Reports on the Medicare and Social Security Trust Funds. Witnesses at the hearing included Richard Foster, Chief Actuary at the Centers for Medicare and Medicaid Services (CMS); Douglas Holtz-Eakin, Director of the Congressional Budget Office (CBO); and Stephen Goss, Chief Actuary of the Social Security Administration. During the hearing, the Committee heard testimony about the various cost estimates of the Medicare Modernization Act (MMA) prepared by CMS and CBO. These two entities had differing cost estimates of the legislation, and the reasons for those differences were thoroughly explored through the questioning of the witnesses.

During this hearing, the issue was raised as to whether CMS had prepared cost estimates of the MMA that were not released to Congress during its deliberations of the legislation. Specifically, the minority raised concerns that CMS cost estimates of the legislation were not made available to Congress prior to the vote on the conference report. It was noted during this hearing that CBO is the official scorekeeper of Congress, and the final CBO score for the legislation was available on November 20, 2003, in advance of the final House and Senate votes on the legislation. Furthermore, Mr. Foster testified during this hearing that the CMS Office of the Ac-

tuary did not have a final score of the entire conference report until December 23, 2003, one month after the conference report had been passed by the House and the Senate.

On April 1, 2004, the Committee held a continuation of this hearing, at the request of the minority, to further investigate questions of whether cost estimates of the MMA, prepared by CMS, were available prior to the vote on the Conference report and withheld from Congress. Witnesses at that hearing included Leslie Norwalk, Acting Deputy Administrator, CMS and Jeff Flick, San Francisco Regional Administrator, CMS.

The question of Medicare cost estimates has also been investigated by the Office of the Inspector General (OIG) within the Department of Health and Human Services. The OIG issued its report on July 7, 2004. In its report, the OIG concluded that although CMS did fail to furnish information requested on several occasions by Members of Congress and staff, no criminal statutes were violated. Furthermore, the OIG report stated that the CMS Actuary did not have the authority to release information independently to Congress without the approval of the CMS Administrator; the CMS Administrator has the final authority to determine the flow of information. However, the OIG did not investigate whether federal appropriations laws were broken; this issue was investigated by the Government Accountability Office (GAO), as outlined below.

GAO looked specifically into whether federal appropriations laws were broken and issued its report on September 7, 2004. GAO found that Former CMS Administrator Scully prohibited the CMS Chief Actuary Richard Foster from responding to Congressional requests for information and threatened sanctions should Foster respond to Congressional inquiries. GAO found that these actions were in violation of appropriations language that prohibits the use of funds to pay salaries of employees who interfere in communications between federal employees and Congress. The GAO concluded that as a result of these actions, the HHS appropriation for Mr. Scully's salary was unavailable under appropriations law. GAO recommended that HHS recover Mr. Scully's salary from the point of the prohibition of communication to the point of Mr. Scully's departure. At the time of the issuance of this report, Mr. Scully was no longer an employee of the Federal government, and HHS indicated it did not intend to pursue the matter further.

The Committee reported the resolution adversely because the question of cost estimates of the Medicare prescription drug legislation has been thoroughly investigated, as outlined above. Furthermore, the legislation in question was signed into law on December 8, 2003. The Committee did not find that any legislative purpose would be served by the release of documents outlined in the resolution.

II. HEARINGS

The Committee did not hold hearings on H. Res. 776.

III. VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statements are made con-

cerning the votes of the Committee on Ways and Means in its consideration of the Resolution of Inquiry, H. Res. 776.

MOTION TO REPORT THE RESOLUTION

The resolution, H. Res. 776, was ordered adversely reported by a rollcall vote of 19 yeas to 12 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Thomas	X	.....	.....	Mr. Rangel .....	.....	X	.....
Mr. Crane	X	.....	.....	Mr. Stark .....	.....	X	.....
Mr. Shaw .....	.....	.....	.....	Mr. Matsui .....	.....	.....	.....
Mrs. Johnson	X	.....	.....	Mr. Levin .....	.....	.....	.....
Mr. Houghton	X	.....	.....	Mr. Cardin .....	.....	X	.....
Mr. Heger	X	.....	.....	Mr. McDermott .....	.....	X	.....
Mr. McCrey	X	.....	.....	Mr. Kleczka .....	.....	.....	.....
Mr. Camp .....	.....	.....	.....	Mr. Lewis (GA) .....	.....	X	.....
Mr. Ramstad	X	.....	.....	Mr. Neal .....	.....	X	.....
Mr. Nussle .....	.....	.....	.....	Mr. McNulty .....	.....	X	.....
Mr. Johnson	X	.....	.....	Mr. Jefferson .....	.....	.....	.....
Ms. Dunn	X	.....	.....	Mr. Tanner .....	.....	X	.....
Mr. Collins .....	.....	.....	.....	Mr. Becerra .....	.....	X	.....
Mr. Portman	X	.....	.....	Mr. Doggett .....	.....	.....	.....
Mr. English	X	.....	.....	Mr. Pomeroy .....	.....	X	.....
Mr. Hayworth	X	.....	.....	Mr. Sandlin .....	.....	X	.....
Mr. Weller	X	.....	.....	Ms. Tubbs Jones .....	.....	X	.....
Mr. Hulshof .....	.....	.....	.....	
Mr. McClinnis	X	.....	.....		
Mr. Lewis (KY)	X	.....	.....		
Mr. Foley	X	.....	.....		
Mr. Brady	X	.....	.....		
Mr. Ryan	X	.....	.....		
Mr. Cantor	X	.....	.....		

IV. COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

The Committee held no oversight activities with respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives.

A. NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because H. Res. 776 does not provide new budgetary authority or increased tax expenditures.

B. PERFORMANCE GOALS AND OBJECTIVES

The rule requiring a statement of performance goals and objectives is inapplicable.

C. CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this resolution in article I, section 1 of the Constitution.

D. COST ESTIMATE PREPARED BY THE CONGRESSIONAL BUDGET OFFICE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, requiring a cost estimate prepared by

the Congressional Budget Office, the following report prepared by CBO is provided.

H. Res. 776—A resolution of inquiry requesting the President and directing the Secretary of Health and Human Services to 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 spending or revenues.

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

V. NEW ADVISORY COMMITTEES

H. Res. 776 does not establish or authorize any new advisory committees.

VI. CONGRESSIONAL ACCOUNTABILITY ACT

H. Res. 776 does not apply to the legislative branch.

VII. FEDERAL MANDATES

H. Res. 776 provides no Federal mandates.

VIII. VIEWS

DISSENTING VIEWS

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 H.R. 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.

CHARLES B. RANGEL.
PETE STARK.

