

Congress of the United States
Washington, DC 20515

June 22, 2004

The Honorable William H. Frist, M.D.
United States Senate Majority Leader
461 Dirksen Senate Office Building
Washington, DC 20510

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
235 Cannon House Office Building
Washington, DC 20515

Dear Senator Frist and Mr. Speaker:

We are writing about the failure of the House and Senate to investigate the withholding of Medicare cost estimates from Congress. The Administration's decision to withhold the cost estimates misled legislators about the costs of the controversial proposal. Given the gravity of the allegations involved, the failure to investigate is a gross abdication of Congress' constitutional oversight responsibility.

Congress' right to receive information is both essential and incontrovertible. The Supreme Court has ruled numerous times that no "separation of powers" principle or "executive interest" can justify the withholding of public policy information from Congress.¹ When this right is threatened, Congress' ability to legislate effectively is compromised, and a duty to investigate arises.

Unfortunately, Congress appears to have abandoned its oversight role. There have been serious allegations that the Administration misled Congress about the projected costs of the Medicare legislation, which created a complex but limited drug card and prescription drug benefit for seniors. These allegations include charges that the Administration violated federal law by threatening to fire Medicare's Chief Actuary if he disclosed the cost information to members of Congress. Committee Chairs have been unwilling to compel the appropriate witnesses to testify on these matters, and are largely ignoring these allegations in both the House and the Senate.

We understand why the White House would not want these charges investigated. The Administration has refused repeated requests by members of Congress, including requests under the Seven Member Rule, to release the actual cost estimates. The Administration has refused to allow knowledgeable officials to testify about the White House's role in misleading Congress

¹ Memorandum from Jack Maskell, Legislative Attorney, American Law Division, CRS, to Rep. Charles B. Rangel, Ranking Minority Member, House Committee on Ways and Means (Apr. 26, 2004).

and withholding the cost estimates. And the Administration will not provide a responsive answer even to a direct request from twelve Senators for information about the cost estimates.²

But the oath of office requires us to put our constitutional obligations ahead of partisan considerations. The possibility that Congress was misled when it passed the Medicare bill is an extraordinarily serious breach that should be immediately and thoroughly investigated.

Background

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 narrowly passed the House on November 22, 2003, and the Senate on November 25, 2003.³ A major issue in the congressional debate was the cost of the legislation. After a meeting with the House and Senate conferees on November 17, just days before final passage, the President promised that the legislation would cost only \$400 billion, stating: "There's 400 billion additional dollars available for our seniors in this bill."⁴

These assurances were repeated, without qualification, by other senior Administration officials. Days before the House and Senate voted, Thomas Scully, the Administrator of the Centers for Medicare and Medicaid Services (CMS), wrote in the *New York Times*, "We are spending \$400 billion."⁵ At a National Press Club Luncheon the same day, Health and Human Services (HHS) Secretary Tommy Thompson stated:

The president said, You are not going to spend more than \$400 billion on this over 10 years. And the score is going to come in under \$400 billion. I think that is a remarkable thing. This has been out there for well over a year. We've been in the conference committee for three months, and both Democrats and Republicans use that as the high-water marks, saying we will not go over \$400 billion. And the score on this proposal that's being introduced this afternoon will be under \$400 billion.⁶

² Letter from Sen. Ted Kennedy et al. to President Bush (May 10, 2004).

³ P.L. 108-173.

⁴ President Bush, *Media Availability after Meeting with Medicare Conferees* (Nov. 17, 2003).

⁵ Tom Scully, *The Medicare Bill: A Good Thing?* (letter to the editor), *New York Times* (Nov. 20, 2003)

⁶ Secretary of HHS Tommy G. Thompson, *Remarks at National Press Club Luncheon* (Nov. 20, 2003).

These assurances regarding the cost were critical to passage of the legislation. The Medicare legislation passed in the Senate only after the Administration assured the Senate that the cost would not exceed this ceiling over the next ten years.⁷ In the House, it took an unprecedented three hour roll-call vote to persuade enough Republican members to support the bill, which passed by one vote. As the *Wall Street Journal* stated, “no 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.”⁸ In the Senate, a point of order that the bill violated the Budget Act was only narrowly defeated, suggesting that had the CMS estimates been available, they might have changed the outcome.

On February 2, 2004 — less than three months after congressional passage of the legislation — the President submitted a new budget to Congress. This budget disclosed that the actual cost of the Medicare legislation, as estimated by the Office of the Actuary at CMS and the White House Office of Management and Budget, would be \$534 billion, more than \$130 billion over what the Administration had repeatedly claimed.

White House Press Secretary Scott McClellan claimed at the time that President Bush had learned of these higher estimates “just in the last two weeks.”⁹ But it now appears that the Administration knew of the higher cost estimates for many months and withheld this information from Congress. In testimony before the House Ways and Means Committee in March 2004, CMS Chief Actuary Richard S. Foster stated that through the summer and fall of 2003 he had consistently estimated that the legislation would cost more than \$400 billion.¹⁰ According to Mr. Foster, he prepared “dozens and dozens of analyses and estimates” of the legislation, and they were all “in the range of \$500 billion to \$600 billion.”¹¹ Mr. Foster further testified that he had shared these higher estimates with White House officials, including Doug Badger, Special Assistant to the President for Economic Policy; and James Capretta, Associate Director for Human Resource Programs at OMB.

⁷ *Democrats Demand Inquiry into Charge by Medicare Officer*, New York Times (Mar. 14, 2004).

⁸ *June 20 Directive Says ‘Work up the Numbers’ and Points to ‘Consequences for Insubordination,’* Wall Street Journal (Mar. 18, 2004).

⁹ Scott McClellan, *White House Press Briefing* (Jan. 30, 2004).

¹⁰ *Democrats Demand Inquiry into Charge by Medicare Officer*, *supra* note 7.

¹¹ *Id.*

These estimates were not shared with members of Congress, however. Mr. Foster testified that he had been expressly instructed *not* to provide his estimates to Congress. According to Mr. Foster's testimony and a copy of an email sent by Mr. Scully's aide that Mr. Foster provided to the Committee, Mr. Foster was told that he would suffer "extremely severe" consequences for "insubordination" if he shared his estimates with Congress.¹²

Unanswered Questions

There are four crucial questions related to these facts that urgently need investigation.

First, who in the Administration knew about the higher cost estimates? We know that the President asserted as late as November 17, 2003 that the legislation would cost only \$400 billion. We also know that Mr. Foster has said that the HHS cost estimates were shared with White House officials. To assess whether there was a coordinated effort within HHS and the White House to mislead Congress, we need to know who in the Administration knew about the higher cost estimates and when they knew.

Second, who in the Administration participated in the decision to withhold the cost estimates from Congress? According to the Congressional Research Service (CRS), federal employees have a statutory right to communicate with Congress, and also have certain whistleblower and employment protections.¹³ In addition, the appropriations law currently applicable to HHS prohibits the use of funds to pay the salary of anyone who prevents or attempts to prevent any executive branch employee from providing information to Congress if that information relates to relevant official matters.¹⁴ CRS found that Mr. Scully may indeed have violated these laws when he threatened Mr. Foster.¹⁵ We need to know if others above Mr. Scully's level participated in or authorized such violations.

Third, were senior leaders in Congress part of the effort to withhold the cost estimates from the rest of Congress? In a letter to Rep. Henry Waxman, the Department of Health and

¹² E-mail from Jeffrey Flick to Richard Foster (June 20, 2003).

¹³ The Lloyd-LaFollette Act gives federal employees a statutory right to communicate with, and provide information to, Congress. 5 U.S.C. §7211. The Whistleblower Protection Act protects employees from reprisal for disclosure of information to Congress. 5 U.S.C. §2302(b)(8). The Chief Actuary of CMS is expressly not an "at-will" employee and therefore can be fired only for cause. 42 U.S.C. §1317.

¹⁴ P.L. 108-199 §618(1).

¹⁵ Memorandum from Jack Maskell, *supra* note 1.

Human Services has conceded that “HHS made conferees aware that HHS expected its final scoring to be higher than CBO’s final scoring” and cited Republican conferee Rep. Nancy Johnson as one member who “knew about these numbers.”¹⁶ If the Administration shared the cost estimates with selected Republican leaders, why did these leaders not share the estimates with all conferees and with other members?

Fourth, is the Administration seeking to obstruct congressional investigations? To date, the Administration has refused to cooperate with legitimate efforts to investigate its actions. Despite publicly stating that his Department has “nothing to hide,” HHS Secretary Thompson has refused to comply with his obligations under the Seven Member Rule to provide the cost estimates of various iterations of the legislation.¹⁷ White House Counsel Alberto Gonzales has intervened to prevent Mr. Badger from testifying before the House Ways and Means Committee about White House involvement. And President Bush has refused to respond to a request for information from 12 Senators. These actions suggest that there may be a concerted effort by the Administration to block oversight of its actions.

Our Request

Congress has a constitutional duty to seek answers to these questions. Our system of checks and balances requires that we take seriously allegations that executive branch officials misled Congress about major domestic legislation. We are therefore asking that you take the following two steps.

First, Congress should ask the Administration to provide copies of relevant documents. Specifically, Congress should insist that the Administration provide:

1. Any internal Administration estimates of the costs of the Medicare legislation;
2. Any communications (whether written or electronic) relating to the cost estimates or their release to members of Congress between Administration officials;
3. Any communications (whether written or electronic) relating to the cost estimates or their release to members of Congress between Administration officials and members of Congress or their staffs; and
4. Any communications (whether written or electronic) relating to the cost estimates or their release to members of Congress between Administration officials and other persons.

¹⁶ Letter from Dennis G. Smith, Director, Center for Medicaid and State Operations, to Rep. Henry A. Waxman (Apr. 16, 2004).

¹⁷ *Thompson Launches Inquiry into Medicare Drug Bill Cost*, Los Angeles Times (Mar. 17, 2004).

The Honorable William H. Frist, M.D.
The Honorable J. Dennis Hastert
Page 6

Second, Congress should hold a hearing at which Mr. Scully, Mr. Badger, and Mr. Capretta are called to testify. Mr. Scully's relevance is self-evident; Mr. Badger and Mr. Capretta received cost estimates from Mr. Foster and are likely to have information about the White House's involvement in this matter.

These actions are essential if Congress is to fulfill its oversight responsibilities. They are simple and straightforward and will enable Congress to learn why the Medicare cost estimates were withheld and who is responsible.

We are writing separately to President Bush to urge him to clarify what he knew about the Medicare cost estimates, the Administration's attempts to suppress them, and the Administration's communications with Congress about the issue. We have enclosed a copy of our letter to the President, and we also ask you to urge the President to respond.

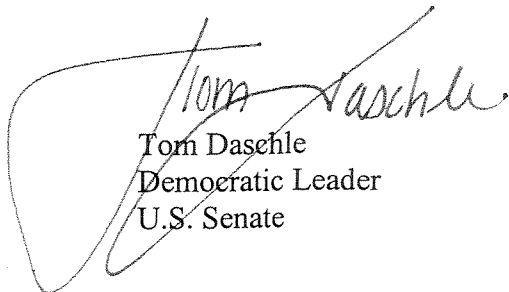
Conclusion

During the Clinton Administration, the actions of White House and other executive branch officials were repeatedly investigated by the Republican-controlled Congress. Committee chairmen issued over 1,000 subpoenas for documents related to Administration conduct, dozens of senior White House officials were called to testify or give depositions before committees, and no allegation seemed too small to pursue.

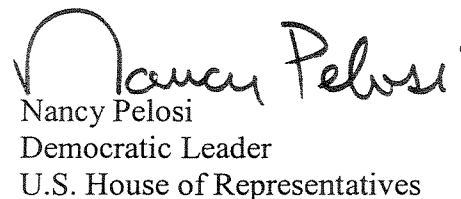
During the Bush Administration, the Republican-controlled Congress has veered to the opposite extreme. Major allegations of misconduct, such as the outing of the identity of a covert CIA agent for political gain, have been ignored.

This is fundamentally wrong. Our constitutional oversight responsibilities should not be driven by political expediency. Regardless of the party affiliation of the President, there are some matters that are too important to be ignored. The withholding of the Medicare cost estimates undermines the integrity of the legislative process. We will be derelict in our constitutional duties if we continue to overlook such a serious abuse.

Sincerely,

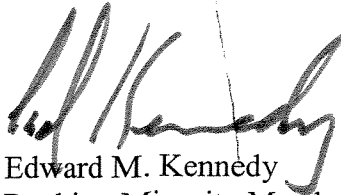


Tom Daschle
Democratic Leader
U.S. Senate



Nancy Pelosi
Democratic Leader
U.S. House of Representatives

The Honorable William H. Frist, M.D.
The Honorable J. Dennis Hastert
Page 7



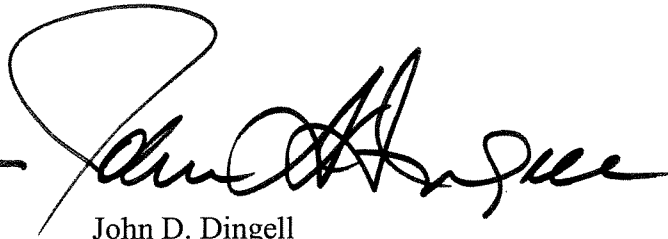
Edward M. Kennedy
Ranking Minority Member
Committee on Health, Education,
Labor, and Pensions
U.S. Senate



Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
U.S. House of Representatives



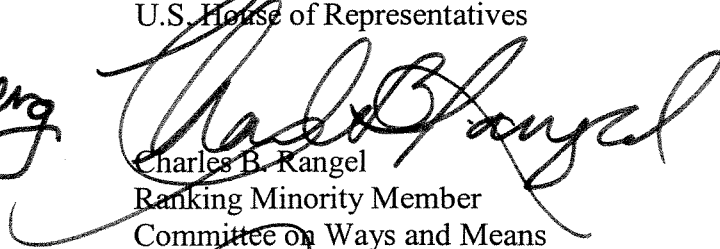
Bob Graham
Senator
U.S. Senate



John D. Dingell
Ranking Minority Member
Committee on Energy and Commerce
U.S. House of Representatives



Frank Lautenberg
Senator
U.S. Senate



Charles B. Rangel
Ranking Minority Member
Committee on Ways and Means
U.S. House of Representatives



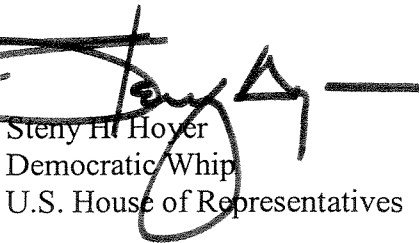
Debbie Stabenow
Senator
U.S. Senate



Portney Pete Stark
Ranking Minority Member
Subcommittee on Health
Committee on Ways and Means
U.S. House of Representatives




Hillary Rodham Clinton
Senator
U.S. Senate



Steny H. Hoyer
Democratic Whip
U.S. House of Representatives

Enclosure

The Honorable William H. Frist, M.D.
The Honorable J. Dennis Hastert
Page 8

A handwritten signature in black ink, appearing to read "Sherrod Brown". The signature is fluid and cursive, with the first name "Sherrod" written in a larger, more prominent script than the last name "Brown".

Sherrod Brown
Ranking Minority Member
Subcommittee on Health
Committee on Energy and Commerce
U.S. House of Representatives

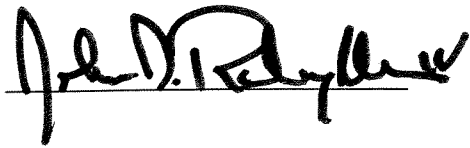
The Honorable William H. Frist, M.D.

The Honorable J. Dennis Hastert

Page 9



Dick Johnson



John D. Rhyker
