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March 17, 2004

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The Honorable Tom Davis
Chairman
Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

I am writing to request a hearing on the allegations that Administration officials threatened to fire the HHS Chief Actuary if he disclosed cost projections for the Medicare prescription drug benefit. If this is true, it is a deplorable and illegal act.

Newspapers across the country have reported that Richard S. Foster, the Chief Actuary at the Department of Health and Human Services, told colleagues that he would be fired if he revealed HHS's cost estimates for the Administration's proposed prescription drug benefit.¹ In an e-mail sent on June 26, 2003, Mr. Foster wrote: "This whole episode which has now gone on for three weeks has been pretty nightmarish. I'm perhaps no longer in grave danger of being fired, but there remains a strong likelihood I will have to resign in protest of the withholding of important technical information from key policy makers for political reasons."²

Mr. Foster has alleged that the threat was made by Thomas A. Scully, the former Administrator of the Centers for Medicare and Medicaid Services (CMS). News accounts have also reported Mr. Foster's view that Doug Badger, President Bush's senior health policy advisor, likely knew of Mr. Scully's threats and the effort to withhold information from the public.³

¹ *Democrats Demand Inquiry into Charge by Medicare Officer*, New York Times (Mar. 14, 2004); *Democratic Move To Revisit Medicare Bill Rejected*, Los Angeles Times (Mar. 14, 2004); *Official Says He Was Told To Withhold Medicare Data*, Washington Post (Mar. 13, 2004); *Bush Administration Ordered Medicare Plan Cost Estimates Withheld*, Knight Ridder Newspapers (Mar. 11, 2004).

² *E-mail from Richard S. Foster, Centers for Medicare and Medicaid Services*, Knight Ridder Washington Bureau (posted March 12, 2004).

³ *Probe Ordered into Alleged Medicare Muzzling; HHS Secretary Thompson Supported Democrats' Request To Look into Whether an Agency Chief Pressured His Actuary*, Philadelphia

While the cost estimates prepared by Mr. Foster were withheld from Democratic and many Republican members of Congress, they apparently were shared with some of the Republican leadership. According to Secretary Thompson, "Congressional staff knew our actuarial numbers."⁴

If these allegations are true, the threats to Mr. Foster and the withholding of the Medicare cost estimates are an inexcusable breach of the public trust. At the time the Medicare bill was being considered by Congress last November, Administration officials had repeatedly stated that the cost would be \$400 billion over ten years.⁵ The information that Mr. Foster sought to disclose was that the actual cost would be far higher, over \$550 billion over ten years. In effect, the Administration was asking Congress to vote on enormously significant changes to Medicare while withholding key information about what these changes would actually cost.

If Mr. Foster's claims are true, the Administration's actions also appear to be illegal. The Lloyd-LaFollette Act of 1912 (now codified at 5 U.S.C. § 7211) provides that: "The right of employees . . . to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." Similarly, section 618 of Public Law 108-199 provides that:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, 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 other officer or employee or pertaining to the department or agency of such other officer or employee in any way.

The muzzling of Mr. Foster would appear to directly violate these prohibitions. A threat to fire Mr. Foster for communicating cost estimates to members of Congress would appear on its face to be an illegal "attempt[] or threat[] to prohibit or prevent" Mr. Foster "from having any direct oral or written communication or contact with any Member, committee, or subcommittee"

Inquirer (Mar. 17, 2004); *Threats against Medicare Analyst To Be Investigated*, Knight Ridder Tribune Business News (Mar. 16, 2004).

⁴ *White House Now Says Congress Underestimated New Medicare Costs*, New York Times (Feb. 2, 2004).

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

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under Public Law 108-199. It would also appear to “interfere[] with” his “right ... to furnish information ... to a committee or Member” under the Lloyd-LaFollette Act.

I believe that we have a responsibility to investigate these serious matters. For this reason, I request that you schedule an investigative hearing as soon as possible at which Mr. Foster, Mr. Scully, and other appropriate witnesses would be called to testify.

Sincerely,

A handwritten signature in black ink that reads "Henry A. Waxman". The signature is written in a cursive, slightly slanted style.

Henry A. Waxman
Ranking Minority Member