

**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?