

DIRECTING THE SECRETARY OF HEALTH AND HUMAN SERVICES TO TRANSMIT TO THE HOUSE OF REPRESENTATIVES COPIES OF EACH PORTION OF ANY DOCUMENT, RECORD, OR COMMUNICATION IN HER POSSESSION CONSISTING OF OR RELATING TO DOCUMENTS PREPARED BY OR FOR THE CENTERS FOR MEDICARE & MEDICAID SERVICES REGARDING THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, AND FOR OTHER PURPOSES

SEPTEMBER 29, 2010.—Referred to the House Calendar and ordered to be printed

Mr. WAXMAN, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H. Res. 1561]

The Committee on Energy and Commerce, to whom was referred the resolution (H. Res. 1561) directing the Secretary of Health and Human Services to transmit to the House of Representatives copies of each portion of any document, record, or communication in her possession consisting of or relating to documents prepared by or for the Centers for Medicare & Medicaid Services regarding the Patient Protection and Affordable Care Act, and for other purposes, having considered the same, report favorably thereon without amendment and without recommendation.

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PURPOSE AND SUMMARY

H. Res. 1561, introduced by Rep. Michael C. Burgess (R-TX), directs the Secretary of Health and Human Services (HHS) to provide certain documents to the House of Representatives concerning documents prepared by or for the Centers for Medicare and Medicaid Services (CMS) Office of the Actuary regarding the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act.

H. Res. 1561 is a resolution of inquiry introduced on July 27, 2010, and referred to the Committee on Energy and Commerce. Under clause 7 of rule XIII of the Rules of the House of Representatives, the Committee must act on such a resolution within 14 legislative days or a privileged motion to discharge the Committee is in order.

Under the rules and precedents of the House, a resolution of inquiry is one of the methods used by the House to obtain information from the executive branch. According to volume 7, chapter 24, section 8 of Deschler's Procedure, 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."

BACKGROUND AND NEED FOR LEGISLATION

The Patient Protection and Affordable Care Act (Public Law 111-148), comprehensive health care reform legislation, was enacted in the 111th Congress after more than a year of discussion and deliberation on this measure. The final version of the legislation was enacted on March 21, 2010, when the House approved the Senate version of this bill. On March 21, 2010, the House also approved separate legislation, the Health Care and Education Reconciliation Act of 2010 (Public Law 111-152), making a number of health financing and revenue changes to the health reform bill as well as changes to higher education assistance provisions. The Senate approved this measure on March 25, 2010.

During the development of the health reform bill, the Office of the Actuary in the Centers for Medicare and Medicaid Services analyzed cost implications of various versions of the bill and specifically its impact on Medicare, and released these reports to Congress and the general public.¹ On April 22, 2010, the Office released letters on the impact of the final version of the bill and the specific impact on Medicare. After the release of these letters, a publication titled *The American Spectator* reported an allegation from an unnamed source that the Office of the Secretary of Health and Human Services had received this report more than a week be-

¹For example, on October 21, 2009, the Actuary released a letter estimating the impact of H.R. 3200, the version that had been considered by the relevant House Committees. On November 13, 2009, the Actuary released a letter estimating the impact of H.R. 3962, the version the full House passed on November 7, 2009. On January 8, 2010, the Actuary released a letter estimating the impact of H.R. 3590, the version passed by the Senate on December 24, 2009. See the Web site for the Centers for Medicare and Medicaid Services for copies of these letters (https://www.cms.gov/ActuarialStudies/05_HealthCareReform.asp#TopOfPage).

fore the March 2010 votes on the bill and had not released it publicly.²

The Chief Actuary in the CMS Office of the Actuary, Richard Foster, has addressed the allegation made by the *American Spectator*. On April 27, 2010, he issued a statement asserting “This article and the allegations it is based on are completely inaccurate.” He provided a timeline regarding his April 22, 2010, estimate, stating:

We received the reconciliation bill for the health reform legislation when it was publicly issued on March 18, which was three days before the House vote took place on March 21. Because of the complexity of the legislation, it wasn’t possible to estimate the bill’s financial and other impacts before either the House or Senate votes. We began work on the estimates right away, but were not able to finalize them until the afternoon of April 22. We finished our memorandum on the health reform act later that same day and immediately sent it to those individuals and organizations that had requested it, including Congressional staff, HHS staff, and media representatives.

Mr. Foster further stated, “Consistent with the Office of the Actuary’s longstanding independent role on behalf of both Congress and the Administration, we did not seek approval or clearance from HHS (or anyone else) before issuing our analysis,” and noted that neither Secretary Sebelius nor her staff “have made any attempt to influence our results or prevent us from responding to Congressional requests for our analysis.”³

These circumstances stand in contrast to a situation during the Bush Administration involving the Office of Actuary and this same Chief Actuary when Congress was considering the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108–173). In June 2003, minority members of Congress requested that Mr. Foster provide them with cost estimates and analyses of that legislation, which was ultimately considered that month by the House Committee on Ways and Means and the House Committee Energy and Commerce, and the full House. Thomas Scully, then the head of CMS, denied this information to these members of Congress. Mr. Foster testified in March 2004 that Mr. Scully had ordered him to withhold this information and threatened him with the loss of his job if he did not comply with this directive.⁴

An investigation at the Office of the Inspector General at HHS confirmed Mr. Foster’s account that Mr. Scully had sought to prevent Mr. Foster from communicating with Congress in 2003.⁵ The nonpartisan Government Accountability Office found that Mr. Scully’s actions violated 2003 and 2004 appropriations acts and

² *What Lies Beneath: Office Politics*, American Spectator (Apr. 26, 2010) (online at <http://spectator.org/archives/2010/04/26/what-lies-beneath/print>).

³ Centers for Medicare and Medicaid Services, Office of the Actuary, Statement of Richard S. Foster Regarding The American Spectator Article on the Office of the Actuary’s Analysis of the Patient Protection and Affordable Care Act, as Amended (April 27, 2010).

⁴ See discussion in House Committee on Energy and Commerce, *Adverse Report to Accompany H. Res. 776, Dissenting Views*, pp. 8–15 (H. Rept. 108–754, part 2) (Oct. 8, 2004).

⁵ HHS Office of Inspector General, Statement of Dara Corrigan, Acting Principal Deputy Inspector General, Department of Health and Human Services, on Thomas Scully and Richard Foster Investigation (July 6, 2004).

that no federal monies should have been used to pay Mr. Scully's salary from the date of the threats until Mr. Scully's departure in December 2003.⁶ When members of Congress in 2004 sought information regarding this incident through H. Res. 776, a resolution of inquiry, the Republicans on the Committee on Energy and Commerce and the Committee on Ways and Means voted to report this resolution unfavorably on virtually a party-line vote.⁷

H. Res. 1561 is premised on the allegation that the Office of Secretary Sebelius withheld from Congress cost analysis of this legislation by the Office of Actuary.⁸ It is not an appropriate course of action at this point in time for several reasons. First, Mr. Foster thoroughly addressed this allegation, including in a letter to Rep. Burgess, and he has stated the allegation is not true.⁹ Mr. Foster is a credible source who has been willing to say in the past when he believed the Administration was denying Congress access to the analyses of the Office of the Actuary.

Second, the resolution is overly broad. For example, it requests any document, telephone or electronic communication, presentation, or briefing, of any HHS employee "referring to or relating to" any documents prepared by or for the Office of the Actuary on the Patient Protection and Affordable Care Act or the Health Care and Education Reconciliation Act of 2010. It also requests documents relating to any contacts with the Congressional Budget Office (CBO) on these bills. CBO has argued that such a request could undermine the ability of CBO in the future to provide estimates in a timely manner by having a chilling effect on communications between CBO and the parties relevant to providing information for such estimates.

Before the Committee considered the resolution of inquiry, the Chairman of the Committee offered to join Mr. Burgess on a letter to the Secretary of Health and Human Services that would have made an information request that had a reasonable scope and at the same time would have assisted an assessment of Mr. Foster's statements that there was no inappropriate conduct relating to the release of the cost estimates on the final health care reform bill and reconciliation measure. Mr. Burgess, however, declined that offer.

Given these facts, the Committee ordered reported H. Res. 1561 without recommendation.

COMMITTEE CONSIDERATION

H. Res. 1561, a resolution of inquiry directing the Secretary of Health and Human Services to provide the House of Representa-

⁶ Government Accountability Office, Department of Health and Human Services—Chief Actuary's Communications with Congress (Sept. 7, 2004) (Legal Opinion B-302911).

⁷ Committee on Energy and Commerce, *Adverse Report to Accompany H. Res. 776* (H. Rept. 108-754, part 2) (Oct. 8, 2004); Committee on Ways and Means, *Adverse Report to Accompany H. Res. 776* (H. Rept. 108-754, part 1) (Oct. 7, 2004).

⁸ See Press Release of Congressman Michael C. Burgess, M.D., *Resolution of Inquiry Requests Internal Documents Related to Report Predicting Health Costs Will Go UP Because of Health Law* (July 28, 2010) (online at <http://burgess.house.gov/News/DocumentSingle.aspx?DocumentID=201038>) (describing H. Res. 1561 and the April 22, 2010, report of the Office of the Actuary and stating "I am very concerned that the information in this report was deliberately kept secret before final passage of health care reform, thereby preventing Congress and the public from knowing the truth about the costs of implementation of the legislation. . . . Were Secretary Sebelius and others at HHS aware of this report while saying publicly that health care costs would go down because of the bill?").

⁹ See, e.g., Letter from Richard Foster to Rep. Michael C. Burgess (Aug. 3, 2010).

tives with CMS documents relating to health care reform bills, was introduced in the House by Mr. Burgess of Texas on July 27, 2010, and referred to the Committee on Energy and Commerce. H. Res. 1561 was referred to the Subcommittee on Health on July 28, 2010. There were no hearings held on the resolution. On September 23, 2010, the Committee on Energy and Commerce discharged H. Res. 1561 from the Subcommittee on Health and considered the resolution in open markup session. Subsequently, the Committee ordered H. Res. 1561 reported to the House without recommendation by a roll call vote of 26 yeas and 17 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list each record vote on the motion to report legislation and amendments thereto. A motion by Mr. Waxman ordering H. Res. 1561 reported to the House without recommendation was approved by a record vote of 26 yeas and 17 nays. The following is the record vote taken during Committee consideration, including the names of those members voting for and against:

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 182**

BILL: **H. Res. 1561**, A resolution of inquiry directing the Secretary of Health and Human Services to transmit to the House of Representatives copies of each portion of any document, record, or communication in her possession consisting of or relating to documents prepared by or for the Centers for Medicare and Medicaid Services regarding the Patient Protection and Affordable Care Act, and for other purposes.

MOTION: A motion by Mr. Waxman to order H. Res. 1561 reported to the House without recommendation.

DISPOSITION: **AGREED TO** by a roll call vote of 26 yeas to 17 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman	X			Mr. Barton		X	
Mr. Dingell				Mr. Hall			
Mr. Markey				Mr. Upton		X	
Mr. Boucher				Mr. Stearns			
Mr. Pallone	X			Mr. Whitfield			
Mr. Gordon	X			Mr. Shimkus		X	
Mr. Rush				Mr. Shadegg		X	
Ms. Eshoo	X			Mr. Blunt			
Mr. Stupak	X			Mr. Buyer		X	
Mr. Engel	X			Mr. Radanovich			
Mr. Green	X			Mr. Pitts			
Ms. DeGette	X			Ms. Bono Mack			
Mrs. Capps	X			Mr. Terry		X	
Mr. Doyle	X			Mr. Rogers		X	
Ms. Harman	X			Mrs. Myrick		X	
Ms. Schakowsky	X			Mr. Sullivan			
Mr. Gonzalez	X			Mr. Murphy of PA		X	
Mr. Inslee	X			Mr. Burgess		X	
Ms. Baldwin	X			Ms. Blackburn			
Mr. Ross	X			Mr. Gingrey		X	
Mr. Weiner				Mr. Sealise		X	
Mr. Matheson	X			Mr. Griffith		X	
Mr. Butterfield	X			Mr. Latta		X	
Mr. Melancon		X					
Mr. Barrow	X						
Mr. Hill	X						
Ms. Matsui	X						
Mrs. Christensen	X						
Ms. Castor	X						
Mr. Sarbanes	X						
Mr. Murphy of CT	X						
Mr. Space		X					
Mr. McNerney		X					
Ms. Sutton	X						
Mr. Braley							
Mr. Welch							

09/23/2010

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee are reflected in the descriptive portions of this report.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H. Res. 1561 would result in no new budget authority, entitlement authority, or tax expenditures or revenues.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

H. Res. 1561 is intended to direct the Secretary of Health and Human Services to furnish certain documents relating to the cost estimates prepared by the Centers for Medicare and Medicaid Services Office of the Actuary regarding the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act.

CONSTITUTIONAL AUTHORITY STATEMENT

The Committee finds that the clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, requiring a statement of constitutional authority for laws proposed by bills or joint resolutions, does not apply because H. Res. 1561 is not a bill or joint resolution that may be enacted into law.

EARMARKS AND TAX AND TARIFF BENEFITS

H. Res. 1561 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

FEDERAL ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by H. Res. 1561.

APPLICABILITY OF LAW TO THE LEGISLATIVE BRANCH

The Committee finds that H. Res. 1561 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

FEDERAL MANDATES STATEMENT

H. Res. 1561 contains no unfunded mandates.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d) of rule XIII of the Rules of the House of Representatives, the committee estimates the costs of implementing the resolution would be minimal. The Congressional Budget Office did not provide a cost estimate for the resolution.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

H. Res. 1561, introduced by Mr. Burgess of Texas, directs the Secretary of Health and Human Services to provide certain documents to the House of Representatives concerning documents prepared by or for the Centers for Medicare and Medicaid Services regarding the Patient Protection and Affordable Care Act. Specifically, the resolution states that it seeks documents relating to:

“(1) Documents prepared by or for the Centers for Medicare & Medicaid Services Office of the Actuary regarding the Patient Protection and Affordable Care Act (Public Law 111–148) or the Health Care and Education Reconciliation Act of 2010 (Public Law 111–152).

“(2) Communications between any officer or employee of the Centers for Medicare & Medicaid Services Office of the Actuary and any person not an officer or employee of such Office regarding data sources, assumptions, or methodologies used for purposes of any document described in paragraph (1).

“(3) Communications to or from any officer or employee of the Congressional Budget Office relating to any document described in paragraph (1).

“(4) Communications to or from any officer or employee of the Department of Health and Human Services relating to—

“(A) the April 22, 2010, report of the Chief Actuary Richard S. Foster entitled Estimated Financial Effects of the Patient Protection and Affordable Care Act, as Amended’;

“(B) the report’s impact on passage of the Patient Protection and Affordable Care Act or the Health Care and Education Reconciliation Act of 2010; or

“(C) the timing of the release of the report.”

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This resolution does not change any existing federal statute.

DISSENTING VIEWS ON H. RES. 1561

We, the undersigned Members of the Committee on Energy and Commerce (Committee), oppose the determination with which H. Res. 1561 was passed out of Committee, and submit the following comments to express our concerns and advocate for why it should have been passed out of Committee with a favorable recommendation.

On June 14, 2010, Ranking Member Joe Barton and Rep. Michael Burgess, the Ranking Member of the Subcommittee on Oversight and Investigations, sent a letter to the Secretary of the Health and Human Services requesting production of the following:

1. All records of communications relating to analysis prepared or being prepared by or for the CMS Office of the Actuary regarding the Patient Protection and Affordable Care Act, including, but not limited to, e-mail, memoranda, and notes. These records were to include records of presentations or briefings prepared by or for the CMS Office of the Actuary regarding such analysis, including preliminary presentations or briefings to any HHS agency or office.

2. All records of communications to or from the CMS Office of Actuary and the personnel and staff of CMS and any HHS agency and office regarding data sources, assumptions, and methodologies utilized in analysis prepared or being prepared by or for the CMS Office of the Actuary regarding the Patient Protection and Affordable Care Act, including, but not limited to, e-mail, memoranda, and notes.

3. All records of communications to or from the CMS Office of Actuary and persons outside of CMS and HHS regarding data sources, assumptions, and methodologies utilized in analysis prepared or being prepared by or for the CMS Office of the Actuary regarding the Patient Protection and Affordable Care Act, including, but not limited to, e-mail, memoranda, and notes.

4. All records of communications to or from personnel and staff of the Congressional Budget Office relating to any analysis prepared or being prepared by or for the CMS Office of the Actuary regarding the Patient Protection and Affordable Care Act, including, but not limited to, e-mail, memoranda, and notes.

5. All records of communications between any personnel or staff of any HHS agency or office relating to the April 22, 2010, report by Chief Actuary Richard Foster, including, but not limited to, e-mail, memoranda, and notes.

Ranking Member Barton and Subcommittee Ranking Member Burgess requested that the information be provided within two weeks of the date of the letter. No response from the Department of Health and Human Services was received for several weeks. Mi-

nority Committee staff notified the Majority Committee staff that there had been no response to the June 14, 2010, letter and requested the Majority's assistance in getting a response to the letter. By late July 2010, there had still been no progress in getting a response from the Department. On July 27, 2010, Subcommittee Ranking Member Burgess introduced H. Res. 1561 to obtain the requested information from the Department of Health and Human Services.¹

On August 3, 2010, the Secretary of Health and Human Services sent a letter to Ranking Member Barton and Subcommittee Ranking Member Burgess enclosing an August 2, 2010, memorandum from CMS Chief Actuary Richard Foster to CMS Administrator Donald Berwick about the timing and process for the Office of the Actuary's preparation of financial, coverage and national health expenditure estimates for the Affordable Care Act. No other documents or information were provided.

The day before and on the day of the Committee's consideration of H. Res. 1561, Committee Chairman Waxman offered to co-sign and send a request letter to the Secretary for information related to the timing and process of the CMS Chief Actuary April 22, 2010, report. However, Subcommittee Ranking Member Burgess declined the offer because such a letter would not have addressed the requests in the June 14, 2010, letter and H. Res. 1561 relating to communications regarding the data sources, assumptions, and methodologies utilized in analysis prepared or being prepared by or for the CMS Office of the Actuary regarding the Patient Protection and Affordable Care Act.

At the markup of H. Res 1561, Subcommittee Ranking Member Burgess presented four reasons why the resolution should be reported favorably. First, the Resolution of Inquiry was needed to ensure that a letter from any Member of Congress to the Administration is treated with respect and a resolution appeared to be the only means that has produced responses in previous instances. Second, the Secretary's August 3, 2010, letter did not produce any pre-existing documents or fully answer to the Committee's June 14, 2010, letter. The Secretary's letter stated "it addresses many of the questions and concerns you raised," but not all. Third, the substance of the resolution remained unanswered. While Subcommittee Ranking Member Burgess accepted that the Chief Actuary did not feel improperly threatened or influenced, the Chief Actuary would not have known the Secretary's state of knowledge concerning cost concerns related to the healthcare legislation in question or her actions. Only a release of the requested documents would allow the Congress to know that the Secretary did not attempt to withhold information from the Actuary or coordinate with others in the White House regarding the release of his report. Finally, the Chief Actuary's August 2, 2010, memorandum strength-

¹ H. Res. 1561 is a resolution of inquiry referred to the Committee. Under clause 7 of rule XIII of the Rules of the House of Representatives, the Committee must act on such a resolution within 14 legislative days or a privileged motion to discharge the Committee is in order. Under the rules and precedents of the House, a resolution of inquiry is one of the methods used by the House to obtain information from the executive branch. According to volume 7, chapter 24, section 8 of Deschler's Procedure, 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."

ens the need for the resolution because he confirmed that the Congress did not have cost estimates of the legislation at the time of final passage. Mr. Foster wrote that on the eve of the bill's passage due to the "very tight time frame" he could not fully analyze the costs and efficacy of the bill before the House voted. In the August 2, 2010, memo Mr. Foster stated: "We received the reconciliation bill . . . when it was publicly issued on March 18, which was three days before the House vote took place. Because of the complexity of the legislation, it wasn't possible to estimate the bill's financial and other impacts before either the House or Senate votes." Because the cost estimates were unknown at that time, the resolution is needed to get all the facts about how the new healthcare law would impact costs.

By a roll call vote of 26–17, the Committee ordered reported H. Res. 1561 without recommendation. For the aforementioned reasons, the undersigned maintain that the resolution of inquiry should have been passed with a favorable recommendation.

JOE BARTON.
 FRED UPTON.
 ROY BLUNT.
 CLIFF STEARNS.
 RALPH M. HALL.
 PARKER GRIFFITH.
 STEVE SCALISE.
 JOHN SULLIVAN.
 TIM MURPHY.
 SUE MYRICK.
 MIKE ROGERS (MI).
 ROBERT E. LATTA.
 STEVE BUYER.
 LEE TERRY.
 GEORGE RADANOVICH.
 ED WHITFIELD.
 MICHAEL C. BURGESS.
 JOHN SHADEGG.
 JOSEPH PITTS.
 MARSHA BLACKBURN.
 PHIL GINGREY.
 MARY BONO MACK.
 JOHN SHIMKUS.