EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

March 20, 2000

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for the consideration of the Congress is the Administration's draft bill entitled the "Medicare Modernization Act of 2000". This legislation contains reform elements of the detailed specifications released by the Administration last June.

The proposal is the centerpiece of the Administration's efforts to modernize and strengthen the Medicare program to prepare it for the health, demographic, and financing challenges it faces in the 21st century. This proposal will: (1) make Medicare more competitive and efficient; (2) modernize and reform Medicare's benefits, including the provision of a long-overdue prescription drug benefit and the elimination of cost sharing for preventive benefits; and (3) make an unprecedented long-term financing commitment to the program that would extend the life of the Medicare Trust Fund.

First, the proposed legislation makes Medicare more competitive and efficient, building upon recent administrative and legislative improvements, as well as demonstration projects conducted by the Department of Health and Human Services' Health Care Financing Administration (HCFA). The bill gives traditional Medicare new private sector purchasing power and quality improvement tools. It injects price competition into Medicare by establishing a "Competitive Defined Benefit" that lets beneficiaries reduce their premiums by choosing efficient health plans while maintaining a viable traditional program.

Second, the bill ensures that Medicare beneficiaries have access to affordable prescription drugs and preventive services that have become essential elements of high-quality medicine. The plan establishes a voluntary Medicare "Part D" prescription drug benefit that is affordable and available to all beneficiaries, while providing incentives to add or retain employer-sponsored retiree drug benefits. It gives beneficiaries a choice of coverage through managed care or competitively selected benefit managers who negotiate price discounts. It also provides a $35 billion reserve fund for new protections against catastrophic drug costs. The Administration will work with the Congress to enact these protections. The bill eliminates all cost sharing for all preventive benefits in Medicare to encourage beneficiaries to utilize these important services, and it updates Medicare cost sharing and Medigap policies.

Third, the bill strengthens the program's financing for the 21st century by dedicating a portion of the budget surplus to Medicare. Together with the rest of the President's proposal, this not only contributes toward extending the financial health of the Hospital Insurance Trust Fund and finances a portion of the costs of the new prescription drug benefit, but it will also lessen the need for future excessive cuts and radical restructuring that would be inevitable in the absence of the resources.

The enclosed legislative proposal incorporates all the competitive reforms, modernization initiatives, and financing dedication proposals that the President has proposed. The President's FY 2001 Budget also includes a number of other program management and program integrity initiatives that would strengthen the Medicare program. In addition, legislative proposals to implement the Administration's Medicare buy-in and cancer clinical trial initiatives have previously been shared with the Congress, and are not included in the enclosed bill.

The President looks forward to working with the Congress to modernize and strengthen the Medicare program this year. It is the Administration's hope that the transmittal of this legislative proposal will help facilitate this outcome.

Sincerely,

Jacob J. Lew
Director

Enclosures

Identical Letter Sent to the President of the Senate

The Honorable William V. Roth, Jr.
Chairman
Senate Finance Committee
United States Senate
Washington, DC 20510

Dear Senator Roth:

Thank you for your inquiry regarding our efforts to improve management of the Medicare, Medicaid, State Children's Health Insurance Program, and other Health Care Financing Administration (HCFA) initiatives. I greatly appreciate your support in these efforts and your concern for the management challenges posed by proposals to further modernize and strengthen Medicare.

Enclosed, in response to your request, is a record of accomplishments of which we are very proud. We have had solid success in meeting each of the priorities that HCFA Administrator, Nancy-Ann DeParle and I share for these programs, which she articulated at her 1997 confirmation before this Committee -- implementing the Balanced Budget Act and fighting fraud, waste, and abuse in our programs, while meeting the Year 2000 computer challenge.

We have implemented the vast majority of provisions in the Balanced Budget Act of 1997 (BBA). We have approved State Childrens' Health Insurance Program plans for all states and territories and enrolled more than 2 million children. We have launched the greatest peacetime education effort ever to help Medicare beneficiaries understand their new options under the Medicare+Choice program, as well as the important new preventive benefits included in the BBA. And we have made substantial progress in implementing new payment systems for skilled nursing facilities, outpatient hospital departments, home health care, and rehabilitation hospitals that include incentives to provide care efficiently.

We also have made substantial progress in fighting fraud, waste, and abuse. The Medicare payment error rate is about half of what it was when first measured for fiscal 1996. Congress has provided us with many new tools to prevent improper payments and keep unscrupulous providers out of our programs. And HCFA has a comprehensive program integrity plan in place that will help us meet our commitment to bringing the payment error rate down further. The Congressional Budget Office and the HCFA actuaries have credited our robust program integrity campaign for contributing to the slower growth in Medicare outlays over the past two years.

In fact, the BBA and our successes in fighting fraud, waste, and abuse, have together contributed to one of the strongest projections of Medicare Trust Fund solvency in the program's history. The Part A Hospital Insurance Trust Fund, which was projected to become insolvent in 1999 when President Clinton took office, is instead now projected to remain solvent until 2015.

At the same time, we have successfully met a daunting Year 2000 computer challenge. Despite many predictions of failure, HCFA not only met this challenge, it developed what its independent verification and validation contractor decided were "best practices." The contractor in turn recommended those best practices that HCFA developed to their other clients.

At the same time HCFA was implementing the more than 350 BBA mandates, we have also tackled other long-standing challenges with success -- improving services to beneficiaries, improving nursing home quality, improving financial and contractor management, and creating a more open Medicare coverage determination process.

We have fostered a new focus on serving the beneficiary in all the work we do. Much of the credit for this goes to the new Center for Beneficiary Services that we created in HCFA's 1997 reorganization. This Center has improved the quality of materials for beneficiaries, and its director is a leading member of the Agency's Executive Council, bringing a beneficiary-centered focus to all senior level deliberations. We are already seeing results, with the Agency winning awards for its beneficiary web site and receiving a high rating for beneficiary services in the 1999 American Customer Satisfaction Index.

We have launched a major initiative to improve nursing home care and safety. We tightened rules, clarified guidance, increased surveyor training, and required prompt action on all complaints alleging harm to residents. We also posted survey results on the internet for consumers, and have taken steps to protect residents in facilities with financial difficulties.

We also have greatly improved HCFA's internal financial management and increased oversight of the contractors who process Medicare claims. We are determined that Medicare and its contractors meet the same high standards of accounting required of major private sector corporations. This year, for the first time, the Agency obtained a "clean" audit opinion. It is aggressively addressing remaining financial management issues by developing an integrated financial management system that will make it easier to coordinate and reconcile data from our claims processing contractors.

To improve contractor oversight, HCFA has consolidated responsibility for contractor management by establishing the new position of Deputy Director for Medicare Contractor Management and creating a Medicare Contractor Oversight Board. The Agency is also determining payment error rates for every claims processing contractor and developing report cards on each contractor's performance. To further these efforts, the President's fiscal 2001 budget request includes funding for new positions at the contractors and HCFA, to tighten financial controls and ensure a swift, coordinated response to fraud, waste, and abuse.

The Honorable William V. Roth, Jr. - Page 3

Also, importantly, for the first time in the program's history, HCFA has made Medicare's coverage determination process open and accountable to the public.. It guarantees every member of the public the right to request a national coverage policy decision, and to submit new data for review. It brings in outside expertise and public scrutiny through the open meetings of the new Medicare Coverage Advisory Committee. Information on the status, evidence, and rationale for all determinations is posted on the internet. And there are timeliness standards for actions on determination requests.

Because of our record of success in meeting our goals and tackling longstanding management challenges, we are now eager focus on preparing for future management challenges. HCFA is currently conducting a comprehensive assessment of workforce needs, bringing in new employees with private sector experience, and enhancing training for current staff.

With great challenges come great opportunities. We are now consulting with experts and planning to implement the changes the President has proposed to strengthen and further modernize Medicare with a prescription drug benefit, private sector purchasing tools, a competitive health plan bidding system, and contracting reform. The objective is to be ready to implement these changes in ways that optimally serve beneficiaries, strengthen partnerships with plans and providers, and promote fiscal responsibility. We welcome improvements to strengthen Medicare and we are ready, willing, and able to work with you to meet the challenges before us.

Medicare is a complex program and its administration is complex. On any given day, someone will disagree with a decision or feel we were not responsive enough. We are proud of our record of strengthening the program for beneficiaries and management of its operations. And we want to continue to work with you to improve and build upon our record of achievement.

The attached package includes the specific materials you requested on HCFA's reorganization, workload, workforce, beneficiary complaints, health plan concerns, provider issues, education efforts and hotlines, and contractors. We look forward to discussing all these issues with you as we proceed.

Sincerely,

Donna E. Shalala
Secretary

Attachments

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable John D. Rockefeller IV
United States Senate
Washington, D. C. 20510-4802

Dear Senator Rockefeller:

This correspondence is in response to your letter to the Department of Justice dated February 18, 2000. We have reviewed S. 1895, the "Medicare Preservation and Improvement Act of 1999," as you requested, and offer our preliminary views regarding the separation of powers issues raised by the bill. As set forth below, we believe that the provision concerning the removal of officers of the new Medicare Board raises serious separation of powers concerns under the Supreme Court's decisions and would create a significant risk that a court might declare the provision unconstitutional. Moreover, even if a court were to uphold this provision against a constitutional challenge, we are convinced that it would constitute an unwarranted and unwise erosion of the President's authority to oversee the functioning of the executive branch. As currently drafted, S.1895 poses a serious threat to the core constitutional values of political accountability and coordinated executive branch policy-making. We also believe that the provision requiring the Director of the Division of HCFA-Sponsored Plans to submit legislative recommendations to Congress and precluding executive branch oversight of such recommendations likely violates the Recommendations Clause.

S. 1895 would establish as an "independent agency" a Medicare Board ("Board") that would administer a new competitive premium Medicare system and would assume from the Secretary of the Department of Health and Human Services general oversight authority over Medicare plans. Specifically, the Board will "coordinate determinations of beneficiary eligibility and enrollment" with the Commissioner of Social Security; "enter into, and enforce, contracts with entities for the offering of Medicare plans"; and "disseminate to Medicare beneficiaries information with respect to benefits [and] limitations on payment[] under Medicare plans." § 2242(a). The President may remove members of the Board "only for neglect of duty or malfeasance in office." <u>See</u> § 2244(a)(3). The bill would also reorganize the Health Care Financing ~~Authority~~ Administration ("HCFA"), which is within the Department of Health and Human Services, into two new divisions, the Division of HCFA-Sponsored Plans and the Division of Health Programs.

To the extent the bill would limit presidential oversight of the Board's statutory duties and responsibilities, by restricting the President's removal authority, it raises a significant constitutional question. As the Supreme Court has explained, legislation that places restrictions on the power of the President to remove executive branch officers passes constitutional muster if it does not "impede the President's ability to perform his constitutional duty." Morrison v. Olson, 487 U.S. 654, 691 (1988); see also Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977) ("Nixon II") (legislation that affects the power of the President is unconstitutional if it "prevents the Executive Branch from accomplishing its constitutionally assigned functions"). In evaluating whether a restriction on the President's removal authority impedes the ability of the President to carry out his constitutional duties, we must look to the functions that the Board performs. See Morrison, 487 U.S. at 691.

Although the bill does not provide a detailed description of the Board's powers, two characteristics of its functions stand out. First, the Board may exercise broad policy-making authority over the Medicare Program, a wide-reaching program that is undeniably of great significance to the American public. The Board is authorized to make fundamental policy decisions such as what benefits or services, beyond a statutorily prescribed minimum, will be offered to beneficiaries; which private entities will provide services or benefits; the amount of money the federal government will pay to those entities; and the amount that Medicare beneficiaries must pay for various levels of benefit coverage. In light of the President's constitutional role as Chief Executive and his responsibilities to ensure proper execution of the laws, we believe a strong argument can be advanced that the President must be able to supervise executive branch officers who are charged with making such policy determinations. Indeed, the Supreme Court has concluded that Congress may delegate policy-making responsibilities to agencies because, "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices . . . which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1983). Consistent with that view, the Court upheld the removal restriction for the independent counsel in Morrison, in part, because this inferior officer lacked any policy-making authority. See 487 U.S. at 691.[1]

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[1] To be sure, in Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Court stated that the Federal Trade Commission (FTC), in "carry[ing] into effect legislative policies embodied in [a] statute in accordance with the legislative standard therein prescribed . . . . acts in part quasi-legislatively and in part quasi-judicially." Id. at 628. The Court's more recent pronouncements, however, cast considerable doubt on its earlier characterization of FTC functions as "quasi-legislative." In Morrison itself, the Court noted the "difficulty of defining such categories of 'executive' or 'quasi-legislative' officials," and stated that "it is hard to dispute that the powers of the FTC at the time of Humphrey's Executor would at the present time be considered 'executive,' at least to some degree." Morrison, 487 U.S. at 689-90 n.28. Accordingly, we do not believe that the Court would view delegated policy-making of the sort contemplated by this legislation as a "quasi-legislative" function for separation of powers purposes.

Second, it does not appear that the Board will possess any significant "quasi-judicial" functions that might otherwise constitutionally warrant a restriction on the President's removal authority. Although the determination whether the Constitution allows Congress to impose a "for cause" restriction on the President's power to remove an officer does not turn entirely on whether the officer performs quasi-judicial functions, Morrison, 487 U.S. at 689, to the extent that such functions would be absent here, one of the key arguments advanced to defend removal restrictions would be unavailable. See Humphrey's Executor, 295 U.S. at 628-30 (relying on FTC's "quasi-judicial" functions as evidence that restrictions on President's authority to remove members of the Commission did not interfere with President's ability to discharge his constitutionally-assigned functions); see also Morrison, 487 U.S. at 691 n.30 (noting that freedom from executive or political control may be desirable in circumstances in which an official is performing "quasi-judicial" functions).

Finally, the findings accompanying the legislation fail to identify the type of "overriding need" for independence necessary to justify limitations on presidential oversight of the Board. In its more modern jurisprudence, the Court has adopted a balancing approach to evaluate "disruptions of the proper balance between coordinate branches." Nixon II, 433 U.S. at 443 (citing United States v. Nixon, 418 U.S. 683, 711-12 ("Nixon I") (1974)). Where Congress seeks to limit the President's ability to supervise an executive entity that exercises broad policy-making authority and that lacks significant adjudicative functions, such a disruption in the normal powers of the Executive Branch must be "justified by an overriding need to promote objectives within the constitutional authority of Congress." Nixon II, 433 U.S. at 443 (citing Nixon I, 418 U.S. at 711-12). In Morrison, for example, the Court explained that Congress "was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking advisers." Morrison, 487 U.S. at 677. The removal restriction on the independent counsel, the Court noted, "was essential, in the view of Congress, to establish the necessary independence of the office." Id. at 693. Here, by contrast, the legislation cites only a need "to reduce Government micromanagement of the Medicare Program." Sec. 2(a)(7). We do not believe this justification is a sufficiently substantial or overriding reason for insulating the Board from executive oversight.

In light of the Board's broad policy-making authority and apparent lack of significant adjudicatory authority – and because this legislation has failed to identify a substantial need for the independent status of the Medicare Board -- we believe that, to the extent Congress intends to insulate the Board from presidential direction,[2] the proposed legislation raises serious

[2] The extent to which a statutory removal restriction, like that in the proposed legislation, precludes the President from determining the policy direction of the tenure-protected office is unsettled. As a result of practice in our system of government as it has developed over time, it is commonly assumed that policy differences do not give the President "cause" to remove an officer. There is some support for that assumption in Humphrey's Executor, where the Court, in upholding a "for cause" removal restriction on the President's ability to remove members of the

constitutional concerns. Nonetheless, even if the courts were to sustain the legislation in the face of a constitutional challenge, we would strongly oppose the bill's restrictions. As the bill seeks to remove from the President's oversight functions of an agency that are already under his supervision, it appears to constitute a serious, and unnecessary, erosion of the President's authority to oversee activities within the executive branch, and to compromise the core constitutional commitments to political accountability and coordinated policy-making.

Section 2284, which concerns communications with, inter alia, Congress by the Director of the Division of HCFA-Sponsored Plans, also raises serious constitutional concerns. This provision provides, in relevant part, "No officer or agency of the United States may require the Director to submit [a business plan that includes a legislative proposal to implement the plan] to any officer or agency of the United States for approval, comments, or review, prior to the submission of the plan to Congress and such individual." In addition, this provision affirmatively requires the Director to submit annually a business plan that includes legislative recommendations to both Houses of Congress. See § 2284(a). We believe this provision is invalid under the Recommendations Clause, which provides that the President "shall from time to time . . . recommend to [Congress] . . . such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. The Recommendations Clause protects the President's constitutional prerogative to formulate and present his own recommendations and proposals, and to control the policy agenda of the executive branch. By requiring the President's subordinates to provide the Congress with legislative recommendations, the legislation infringes on the President's authority to decline to offer any legislative recommendation if, in the President's judgment, no such recommendation is necessary or expedient. The invalidity of such a congressionally-compelled legislative recommendation is heightened to the extent that the

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FTC, stated that the FTC's "duties are performed without executive leave and, in contemplation of the statute, must be free from executive control." 295 U.S. at 628; see also Wiener v. United States, 357 U.S. 349 (1958) (emphasizing that removal limitations prevent officials from being "subject in the discharge of their duties to the control of the Executive"). Similarly, in Mistretta v. United States, 488 U.S. 361 (1989), in discussing the "for cause" removal limitation for members of the United States Sentencing Commission, the Court stated that the restriction "is specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies." Id. at 411 (citing Morrison, 487 U.S. at 688). In contrast, the Supreme Court suggested in Bowsher v. Synar, 478 U.S. 714, 729-30 (1986), that a provision permitting removal for "inefficiency," "neglect of duty," and "malfeasance" conferred a "very broad" removal power, "could sustain removal . . . for any number of" reasons, and would ensure that an officer subject to removal under such standards "will be subservient" to any person or entity that could exercise such power. It is thus possible that, in order to avoid the difficult constitutional question of whether Congress may preclude the President from removing a principal officer of an independent agency for policy differences – an issue that neither Humphrey's Executor and Morrison squarely addressed – courts would construe the removal provision in the Medicare legislation not to so limit the President's authority.

provision attempts to prohibit the President,[3] or his subordinates, from reviewing, analyzing, or approving the legislative recommendation before it is sent to Congress.[4]

Thank you for requesting our views. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

Robert Raben
Assistant Attorney General

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[3] There is substantial doubt that the statutory classification "officer or agency of the United States" in sections 2284 and 2245(b), see infra note 4, includes the President himself. As the Supreme Court explained in Gregory v. Ashcroft, 501 U.S. 452 (1991), when Congress intends to alter the constitutional balance of powers, it must be "'unmistakably clear in the language of the statute.'" Id. at 458 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)) (interpreting statute narrowly to avoid altering usual constitutional balance of federal and state powers). Consistent with this reasoning, the Court in Franklin v. Massachusetts, 505 U.S. 788 (1992) stated that, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," it would require an "express statement by Congress" before interpreting the Administrative Procedure Act to authorize review for abuse of discretion of the President's performance of his statutory duties. Id. at 800-01. Even if the terms "officer" or "agency" are construed so as not to include the President himself, however, we do not believe Congress can preclude the President from relying on subordinate officers in the discharge of his constitutional duty to supervise legislative recommendations.

[4] For similar reasons, because we believe the Board must be subject to presidential control, we also believe that section 2245(b), which precludes executive branch oversight of certain types of Board communications with Congress, raises serious constitutional concerns. Section 2245(b) provides, in relevant part, "The Board may directly submit to Congress reports, legislative recommendations, testimony, or comments on legislation. No officer or agency of the United States may require the Board to submit to any officer or agency of the United States for approval, comments, or review, prior to submission to Congress of such report, recommendations, testimony, or comments." To the extent that this provision applies to legislative recommendations and other policy proposals, we believe it raises serious constitutional concerns under the Recommendations Clause. See U.S. Const. Art. II, § 3.