Republican Arguments Against Modernizing Medicare In 1999 Echo Their Arguments Against Creating Medicare In 1965

Thirty-four years ago, on July 30, 1965, President Lyndon Johnson signed Medicare into law. Arguments that Republicans opposed to the creation of Medicare used were very similar to those used by Republicans today opposed to strengthening and modernizing Medicare.

1965 **Arguments Against Medicare** **Hospital and Physician Coverage**	**1999** **Arguments Against Medicare** **Prescription Drug Coverage**
Sen. Milward Simpson (R-WY) "Presently, over 60 percent of our older citizens purchase hospital and medical insurance without Government assistance. This private effort would cease if Government benefits were given to all our older citizens." [Sen. Congressional Record (#15874), 7/8/65]	**Senate Majority Leader Trent Lott (R-MS)** "Why would you want to make it available to people, many of whom already have it now? In fact, 68 percent of people on Medicare have prescription drugs in one way or another." [Federal News Service, 6/29/99]
Sen. John Williams (R-DE) "Such a program of complete coverage without regard to need is socialized medicine and it has failed in practically every country which has thus far tried it. In every instance it has resulted in a deterioration of doctors' services." [Senate Congressional Record (#16147), 7/9/65]	**House Majority Leader Dick Armey (R-TX)** "It's been the tradition in the president's party to do one size fits all. If you have 31 percent of people with a problem, you ought to put together a 31 percent solution, not a 100 percent solution." [Associated Press, 6/29/99]
Rep. John Anderson (R-IL): "It will needlessly force duplication of coverage for those over 65 who are already adequately covered at no cost to themselves under adequate programs of group health insurance, provided by their employers, their unions or by other organization. These people have no need for a government program." [House Congressional Record (#7376), 4/8/65]	**Sen. Phil Gramm (R-TX)** "It isn't a matter of whether there ought to be a prescription drug benefit offered by Medicare, but whether we're going to help those who need it most or launch a "universal" program we don't need and can't afford.... New drug benefits should go to those who need them – roughly a third of retirees – not to the two-thirds who are already covered," [Op-Ed by Sen. Phil Gramm, USAToday, 6/30/99]
Rep. Tim Carter (R-KY) "We are now embarking on a new adventure in medical practice, one in which the rich will enjoy the same free medical care we have always given the poor. I would ask if the expenditure of these vast sums of money is necessary to help the rich instead of the poor who really need the help." [House Congressional Record (#7410), 4/8/65]	**Sen. Rick Santorum (R-PA)** "What we need to do is focus our resources toward lower income people and really narrow the benefits, particularly to those who have higher prescription drug bills." [Morning Call (Allentown), 6/30/99]

8/5/99

DRAFT: REPUBLICAN PRESCRIPTION DRUG PROPOSAL FOR MEDICARE BENEFICIARES

The Republican tax bill includes a provision intended to help Medicare beneficiaries purchase prescription drug coverage. It would allow premium payments for supplemental coverage of prescription drugs to count towards the medical deduction in current law. This tax subsidy would be triggered only if (1) a new prescription drug-only Medigap plan is created; (2) beneficiaries with income below 150 percent of poverty get assistance in purchasing drug coverage; and (3) Medicare is restructured so that all plans offer prescription drugs and all plans compete on the same basis.

CONCERNS

- **Does not help at least 15 million beneficiaries.**

  - Only about 45 percent of the elderly have any tax liability. People without tax liability do not benefit from tax deductions.

  - There is no funding in the tax bill for low-income protections and no apparent savings from Medicare reform. Thus, either this provision would never take effect – so that all 39 million Medicare beneficiaries would be left without help – or the tax provision would be implemented without the low-income protections.

  - The tax deduction would increase the subsidy with income – the highest income beneficiary would receive more in tax subsidies than middle income people would. Even then, it seems extremely unlikely that this proposal will encourage a single Medicare beneficiary who lacks prescription drug coverage to purchase Medigap insurance.

- **Does not make insurance more affordable**. Today, many beneficiaries have trouble affording Medigap. Premiums are typically high, unstable, and increase dramatically with age. This is why only about 8 percent of beneficiaries have drug coverage through Medigap. This proposal does not make the Medigap market more efficient – and might actually result in premium increases since the drug-only plan would likely be popular with sicker beneficiaries, driving up premiums.

- **Does not make insurance more accessible**. Beneficiaries in certain parts of the country – or beneficiaries with a history of illness – do not have Medigap options today. Under this proposal, since plans are not required to offer the new prescription drug-only coverage, it is not guaranteed that any plan will offer it.

- **Does not reduce prices of prescription drugs for Medicare beneficiaries.** This proposal does nothing to make the cost of prescriptions more affordable, since (a) it only provides assistance for premiums and not out-of-pocket spending; and (b) it subsidizes Medigap plans which do not negotiate price discounts for beneficiaries

American Health Line
A Daily Briefing on Health Care Politics and Policy

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02-18-2000

POLITICS & POLICY - MEDICARE DRUG BENEFIT: INCOME LIMIT WILL NOT SAVE MONEY

White House budget chief Jack Lew yesterday said that including a moderate income-level restriction to the president's proposed Medicare prescription drug benefit plan would "save little money" and exclude people who most need coverage, the AP/Richmond Times-Dispatch reports. Lew said that "the vast majority of people who would not benefit ... are not rich people. They're not the Bill Gateses." Under President Clinton's plan, all Medicare recipients would receive the prescription drug benefit. The plan would cost an estimated $195 billion over the next 10 years, including $35 billion for extra coverage for seriously ill beneficiaries. Most of the costs would be offset by the predicted budget surpluses. "Having an income cutoff at a very moderate income level is the only way to save substantial amounts of money," Lew said. He argued that with the economy booming, now is the time to add the benefit, rather than use some of the surplus for a tax cut, as proposed by the GOP. "It's a false choice to say we ought to provide prescription drug benefits to some but not all the elderly. The real debate is, is there room for a tax cut much larger than we proposed?" However, Republicans indicated that they will propose their own prescription benefit package this year. House Speaker Dennis Hastert (R-Ill.) said that the GOP will focus on those seniors who lack access to or cannot afford private prescription coverage (2/18).

HAVE WE GOT SOMETHING HERE?

One plan gaining interest among some Republicans is a proposal offered by insurance magnate Patrick Rooney, which would allow the federal government to pay for prescription drugs by restructuring Medicare, the Washington Post reports. Under the plan, the government would pay for half of a senior's prescription medications, up to $2,500 a year, but seniors would not pay a premium to receive the benefit. Currently, Medicare is divided into two parts; one requires a $776 annual deductible for hospital costs; the other requires a $100 deductible for physician office visits. Neither include the cost of prescription drugs. Rooney's proposal includes one $675 annual deductible for all health care costs, including prescription drugs. Rooney's plan also would prohibit insurance companies from covering any of the deductible through Medigap policies -- policies that some believe encourage excess use of health care services. Rooney already has marketed his plan to key GOP leaders including House Ways and Means Committee Chair Bill Archer (R-Texas) and Sen. Robert Smith (R-N.H.), who said he is using Rooney's plan to draft a proposal. Archer said, "This would be for anybody, anybody who is a Medicare recipient. ... I'm excited because I think it can work." But not everyone is

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01-27-2000

POLITICS & POLICY - MEDICARE RX: REPUBLICANS WILL UNVEIL COVERAGE PLAN BILL

House Republican leaders announced yesterday they will create a committee to draft legislation providing Medicare prescription drug coverage, the New York Times reports. Internal documents of the plan noted, "If a prescription drug benefit is added to Medicare, it should be delivered through the private sector" (Pear, 1/27). The proposals include providing block grants to states for coverage; giving tax credits to the poor; allowing low and middle-income seniors to buy insurance as a group, thereby creating greater purchasing power when dealing with drug companies; and creating tax-free retirement savings accounts (Eilperin, Washington Post, 1/27). Chip Kahn, president of the Health Insurance Association of American, said that "few insurance companies would want to offer free-standing contracts to cover drug costs," adding, "It would be like providing insurance for haircuts," because so many of the elderly need prescription drugs (New York Times, 1/27). House Minority Leader Richard Gephardt (D-Mo.) said, "It sounds to me like another sidetrack approach, where [the Republicans] realize this is popular in the polls and people want it on the [House] floor" but instead they "set up task forces and try to come up with derivative ideas that don't solve problems" (Washington Post, 1/27).

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

April 28, 2000

The Honorable John D. Rockefeller IV
United States Senate
Washington, DC 20510

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 Health Care Financing Administration ("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." See § 2244(a)(3). The bill would also reorganize 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

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 Congress 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

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contemplated by this legislation as a "quasi-legislative" function for separation of powers purposes.

[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

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

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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 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.

judgment, no such recommendation is necessary or expedient. The invalidity of such a congressionally-compelled legislative recommendation is heightened to the extent that the 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

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.

Total Pages: 7

LRM ID: RJP251

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

URGENT

Wednesday, March 8, 2000

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Constance J. Bowers (for) Assistant Director for Legislative Reference

R Pellicci

OMB CONTACT: Robert J. Pellicci
E-Mail: Robert_J._Pellicci@omb.eop.gov
PHONE: (202)395-4871 FAX: (202)395-6148

SUBJECT: **JUSTICE Report on S1895 Medicare Preservation and Improvement Act**

DEADLINE: **10:00 a.m Friday, March 10, 2000**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: Justice draft letter to Sen. Rockefeller citing Constitutional concerns with certain provisions of S. 1895 - Medicare Preservation and Improvement Act of 1999 (Breaux/Frist).

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LRM ID: RJP251 **SUBJECT:** JUSTICE Report on S1895 Medicare Preservation and Improvement Act

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: **Robert J. Pellicci Phone: 395-4871 Fax: 395-6148**
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: ______________________ **(Date)**

______________________ **(Name)**

______________________ **(Agency)**

______________________ **(Telephone)**

The following is the response of our agency to your request for views on the above-captioned subject:

______ **Concur**

______ **No Objection**

______ **No Comment**

______ **See proposed edits on pages** ________

______ **Other:** ______________________

______ **FAX RETURN of _____ pages, attached to this response sheet**

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." See § 2244(a)(3). The bill would also reorganize the Health Care Financing Authority ("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

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DATE:______________

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
ROOM 416G, HUMPHREY BUILDING
200 INDEPENDENCE AVENUE, SW
WASHINGTON, D.C. 20201

PHONE: (202) 690-7627 *FAX: (202) 690-7380*

OFFICE OF THE ASSISTANT SECRETARY FOR LEGISLATION
ROOM 416-G HUMPHREY BUILDING

TO:	Chris J. / Jeannel	[X] RICHARD J. TARPLIN
OFFICE:		[ ] KEVIN BURKE
ROOM:		[ ] HAZEL FARMER
PHONE:		[ ] ROSE CLEMENT LUSI
FAX:		[ ] ALICE ARTIS
TOTAL PAGES (INCLUDING COVER):	2	[ ] FRANKIE MELTON

REMARKS: FYI

Deb will call DOT. to nudge on timing but anything you could do would help.

Rich

JOHN D. ROCKEFELLER IV
WEST VIRGINIA

Copies to Jane, Paul, Nancy Ann, Bonnie

United States Senate

WASHINGTON, DC 20510-4802

February 18, 2000

Dear Attorney General Reno:

Enclosed is a copy of S. 1895, the Breaux-Frist Medicare reform proposal. This bill is currently under consideration by the Senate Finance Committee and may be reported out of Committee by the end of May.

I would appreciate your analysis of the bill for any constitutional problems.

In particular, I am concerned that sections 2245 and 2284(b) and the effort to exempt the administration of Medicare and its budget from the Executive Branch may be a violation of the principle of separation of powers. I also question the delegations of power in the proposed law. For example, after 2007 the Medicare board can apparently make any payment (and other) changes it wants without Congressional approval or any established due process procedures.

Time is of the essence. The Senate Finance Committee will hold its first hearing on S. 1895 on February 24, 2000 and I believe it is vitally important that the Committee is fully aware of any constitutional concerns which would directly affect our ability to proceed with such reforms.

Thank you for your prompt assistance in this request. I look forward to hearing from you.

Sincerely,

Jay Rockefeller

John D. Rockefeller IV

The Honorable Janet Reno
Department of Justice
Tenth Street and Constitution Ave, NW
Room 5111

Chris —
Draft of OLC's views on Medicare Reform bill — Paul D.
6-6297

U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

February 25, 2000

DRAFT

MEMORANDUM FOR ROBERT RABEN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

From: Joseph R. Guerra
Deputy Assistant Attorney General

Re: Separation of Powers Issues in Medicare Reform Bill, S. 1895

This memorandum provides our preliminary views regarding the separation of powers issues raised by the bill to amend the Social Security Act to preserve and improve the Medicare Program, S. 1895. The bill 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." See § 2244(a)(3). The bill would also reorganize the Health Care Financing Authority ("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. As set forth below, we believe that the provision concerning the removal of officers of the new Medicare Board raises a serious constitutional question and would inappropriately erode the President's authority to oversee the activities of the executive branch. 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. In light of the time constraints, we note that our comments here are necessarily preliminary.

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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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.

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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' 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 I irector of the Division of HCFA-Sponsored Plans, also raises serious constitutional concerns. T iis provision provides, in relevant part, "No officer or agency of the United States may requ re the Director to submit [a business plan that includes a legislative proposal to implement the ɪ lan] to any officer or agency of the United States for approval, comments, or review, prior to th submission of the plan to Congress and such individual." In addition, this provision affir ıatively requires the Director to submit annually a business plan that includes legislative recomme ıdations to both Houses of Congress. See § 2284(a). We believe this provision is invalid under t e 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 co ıtrol the policy agenda of the executive branch. By requiring the President's subordinates to prov de the Congress with legislative recommendations, the legislation infringes on the President's aı thority to decline to offer any legislative recommendation if, in the President's judgment, no sucl recommendation is necessary or expedient. The invalidity of such a congressionally-com ıelled legislative recommendation is heightened to the extent that the provision attempts to prol ibit the

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FTC, stated that the FTC's "duties are performed without executive leave and, in contem ɔlation 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 ɔeing "subject in the discharge of their duties to the control of the Executive"). Similarly, in M stretta v. United States, 488 U.S. 361 (1989), in discussing the "for cause" removal limitation fc r members of the United States Sentencing Commission, the Court stated that the restrictic n "is specifically crafted to prevent the President from exercising 'coercive influence' over ind pendent agencies." Id. at 411 (citing Morrison, 487 U.S. at 688). In contrast, the Supreme Cour 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" remova power, "could sustain removal . . . for any number of" reasons, and would ensure that an officer ubject to removal under such standards "will be subservient" to any person or entity that could xercise 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 ind pendent agency for policy differences – an issue that neither Humphrey's Executor and Morrison quarely addressed – courts would construe the removal provision in the Medicare legislation not o so limit the President's authority.

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

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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; see also Memorandum for Jack Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General Office of Legal Counsel, Re: Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges 2 (December 18, 1995) (noting the "well-settled principle that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives"). 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.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Press Office
Washington, DC 20201

MEDICARE NEWS

FOR IMMEDIATE RELEASE
March 6, 2000

CONTACT: HCFA Press Office
(202) 690 6145

UNIVERSAL PRESCRIPTION DRUG BENEFIT NECESSARY TO ENSURE AFFORDABLE COVERAGE FOR ALL MEDICARE BENEFICIARIES

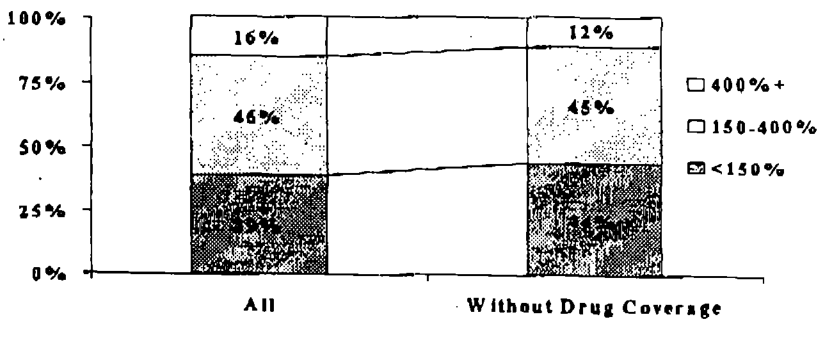
Medicare beneficiaries who do not have prescription drug coverage fill fewer prescriptions and have higher out-of-pocket drug expenditures than beneficiaries with coverage, according to an annual study by the Health Care Financing Administration. These findings are consistent without regard to age, gender, race, or income.

The results, published in the March/April edition of *Health Affairs*, are based on data from the 1996 Medicare Current Beneficiary Survey, the most current survey of Medicare beneficiaries. More than 11,000 Medicare beneficiaries were interviewed for this survey.

The analysis shows that almost one third of seniors have no drug coverage at all, contributing to low medication use and high out of pocket spending. Although this proportion decreased by four percent between 1995 and 1996, recent month-by-month analysis of coverage suggests that it may have reached a high-water mark in mid 1996.

"Every Medicare beneficiary, whether they are covered by original fee-for-service Medicare or enrolled in a Medicare managed care plan, must be able to get the medications they need," said HCFA Administrator Nancy Ann DeParle. "Sixty percent of Medicare beneficiaries lack dependable coverage, only 50 percent have year-round coverage, and 31 percent have no drug coverage at all. Many beneficiaries must pay for essential medicines fully out of their own pockets and are forced to pay full retail prices because they do not get the generous discounts offered to insurers and other large purchasers. The result is that many go without the medicines they need to keep them healthy and out of the hospital."

Income Distribution of Medicare Beneficiaries



Source: Exhibit 3. Poisal JA; Chulis GS. (2000). "Medicare Beneficiaries and Drug Coverage." *Health Affairs* 19(2): 1-9.

-- More --

According to the HCFA report, the differences between those with drug coverage and those without continues to grow: In 1995, beneficiaries without drug coverage spent $259 less for drugs than those with coverage. In 1996, the difference increased to $306.

Non-covered beneficiaries see out-of-pocket costs that are almost twice as high as those with coverage. In 1996, non-covered beneficiaries spent $463 on prescriptions while covered beneficiaries spent only $253 out-of-pocket.

HCFA also found that beneficiaries without coverage are still receiving 25 percent fewer prescriptions less than their covered peers.

"Every Medicare beneficiary must have access to prescription drugs," said DeParle. "We must not limit a benefit to those with low incomes or in certain geographical areas. Adding a meaningful voluntary drug benefit to Medicare is not an option – it is an obligation."

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

April 28, 2000

The Honorable John D. Rockefeller IV
United States Senate
Washington, DC 20510

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 Health Care Financing Administration ("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." See § 2244(a)(3). The bill would also reorganize 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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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 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.

judgment, no such recommendation is necessary or expedient. The invalidity of such a congressionally-compelled legislative recommendation is heightened to the extent that the 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
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.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 28, 2000

The Honorable John D. Rockefeller IV
United States Senate
Washington, DC 20510

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 Health Care Financing Administration ("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." See § 2244(a)(3). The bill would also reorganize 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

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 Congress 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

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contemplated by this legislation as a "quasi-legislative" function for separation of powers purposes.

[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

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

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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.

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