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September 7, 2004

The Honorable Frank R. Lautenberg
The Honorable Tom Daschle
The Honorable Edward M. Kennedy
The Honorable Jack Reed
The Honorable Jon S. Corzine
The Honorable John F. Kerry
The Honorable Patrick J. Leahy
The Honorable Debbie Stabenow
The Honorable Tim Johnson
The Honorable Mark Pryor
The Honorable Maria Cantwell
The Honorable Joseph I. Lieberman
The Honorable Carl Levin
The Honorable Paul Sarbanes
The Honorable Barbara A. Mikulski
The Honorable Charles Schumer
The Honorable John Edwards
The Honorable Hillary Rodham Clinton
United States Senate

Subject: *Department of Health and Human Services—Chief Actuary's Communications with Congress*

By letter dated March 18, 2004, you asked for our legal opinion regarding a potential violation of the prohibitions in the Consolidated Appropriations Act of 2004 and the Consolidated Appropriations Resolution of 2003 on the use of appropriated funds to pay the salary of a federal official who prohibits another federal employee from communicating with Congress. Pub. L. No. 108-199, Div. F, tit. VI, § 618, 188 Stat. 3, 354 (Jan. 23, 2004); Pub. L. No. 108-7, Div. J, tit. V, § 620, 117 Stat. 11, 468 (Feb. 20, 2003). Specifically, you ask whether alleged threats made by Thomas A. Scully, the former Administrator of the Centers for Medicare & Medicaid Services (CMS), to CMS Chief Actuary Richard S. Foster to terminate his employment if Mr. Foster provided various cost estimates of the then-pending prescription drug legislation to members of Congress and their staff made CMS's appropriation unavailable for the payment of Mr. Scully's salary.

As agreed, this opinion relies on the factual findings of the Office of Inspector General (OIG) for the Department of Health and Human Services (HHS), who conducted an independent investigation into whether Mr. Foster was prohibited from communicating with congressional offices and whether he was threatened with dismissal if he did so.[1] *Tom Scully and Chief Actuary - Information*, Report of the Office of Inspector General, Department of Health and Human Services, July 1, 2004 (OIG Report). The OIG concluded that CMS did not provide information requested by members of Congress and their staff, that Mr. Scully ordered Mr. Foster not to provide information to members and staff, and that Mr. Scully threatened to sanction Mr. Foster if he made any unauthorized disclosures. OIG Report, at 4.

As we explain below, in our opinion, HHS's appropriation, which was otherwise available for payment of Mr. Scully's salary, was unavailable for such purpose because section 618 of the Consolidated Appropriations Act of 2004 and section 620 of the Consolidated Appropriations Resolution of 2003 prohibit the use of appropriated funds to pay the salary of a federal official who prevents another employee from communicating with Congress.[2] While the HHS Office of General Counsel and the Office of Legal Counsel for the Department of Justice raised constitutional separation of powers concerns regarding the application of section 618, in our view, absent an opinion from a federal court concluding that section 618 is unconstitutional, we will apply it to the facts of this case.

**Background**

In December 2003, Congress passed and the President signed into law the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, which added a prescription drug benefit to the Medicare program. Pub. L. No. 108-173, 117 Stat. 2066 (Dec. 8, 2003). During the previous summer and fall as Congress debated various proposals, several members of Congress and committee staff asked Mr. Foster, a career civil servant and the Chief Actuary for CMS, to provide estimates of the cost of various provisions of the Medicare bills under debate.[3] OIG Report, at 2-3.

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[1] We advised your staff that we would, as appropriate, rely on the factual findings of the OIG. Letters to Senator Frank R. Lautenberg and additional requestors from Gary L. Kepplinger, Deputy General Counsel, GAO, April 15, 2004. In addition, the Office of the Inspector General agreed to allow us access to their investigative workpapers. This opinion is based on the factual findings contained in the OIG Report and the supporting workpapers. While this opinion relies on the factual findings of the OIG, it does not adopt or rely upon any legal conclusions reached by the OIG, HHS, or OLC.

[2] For ease of reference, we will refer to the identical prohibitions in the Consolidated Appropriations Act of 2004 and the Consolidated Appropriations Resolution of 2003 as "section 618."

[3] Congress established the position of Chief Actuary in statute in 1997. Balanced Budget Act, Pub. L. No. 105-33, tit. IV, subtitle G, ch. 4, § 4643, 111 Stat. 487 (Aug. 5, 1997) (codified at 42 U.S.C. § 1317). The statute directs the Chief Actuary to carry out his duties "in accordance with the professional standards of actuarial independence." 42 U.S.C. § 1317(b)(1). The Act also directs that the Chief Actuary is to be appointed based on "education, experience [and] superior expertise in the actuarial sciences" and could be removed "only for cause." *Id.* The Balanced Budget Act conference report cites the long history and tradition of a "close and confidential working relationship" between the Social Security and Medicare actuaries and the congressional committees of jurisdiction. H.R. Conf. Rep. No. 105-217, at 837 (1997). The report then states that the "independence of the Office of the

Members and staff also made requests for technical assistance, including requests that Mr. Foster perform analyses of various provisions of the Medicare legislation. *Id.*

Mr. Foster did not respond to several of these requests because Thomas Scully, CMS Administrator and Mr. Foster's supervisor, stated that there would be adverse consequences if he released any information to Congress without Mr. Scully's approval.[4] OIG Report, at 3. Mr. Foster stated that the first time he felt his job was threatened was in May 2003 when he provided information on private insurance plan enrollment rates to the Majority Staff Director of the House Ways and Means Committee and Mr. Scully rebuked him for doing so. *Id.* Later, on June 4, 2003, at Mr. Scully's request, Mr. Scully's special assistant instructed Mr. Foster not to respond to any requests for information from the House Ways and Means Committee and warned him that "the consequences of insubordination are extremely severe." *Id.* Mr. Foster interpreted this statement to mean that Mr. Scully would terminate his employment at CMS if he released any information to Congress without Mr. Scully's approval.[5] *Id.* at 4.

The OIG Report concluded that, because of Mr. Scully's prohibition, Mr. Foster did not respond to several congressional requests for cost estimates and technical assistance, including requests from the minority staff of the House Ways and Means Committee for the total estimated cost of the legislation and for analyses of premium support provisions in the bill, and requests from Senators Mark Dayton and Edward Kennedy for premium estimates.[6] *Id.* at 2-3.

There is no indication in the OIG Report that Mr. Scully objected to Mr. Foster's methodology or to the validity of his estimates. Rather, Mr. Foster testified before the House Ways and Means Committee that Mr. Scully determined which information to release to Congress on a "political basis." *Board of Trustees 2004 Annual Reports: Hearing Before the House Comm. on Ways and Means*, Federal News Service, Mar. 24, 2004. Furthermore, Mr. Scully never objected to Mr. Foster and his staff performing the analyses required to respond to congressional requests; he simply objected to certain analyses being released to Congress. During the same time period, Mr. Foster provided similar analyses to the Office of Management and Budget.

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Actuary with respect to providing assistance to the Congress is vital," and that "reforming the Medicare and Medicaid programs is greatly enhanced by the free flow of actuarial information from the Office of the Actuary to the committees of jurisdiction in the Congress." *Id.* at 837-8.

[4] HHS paid Mr. Scully's salary during this time period from its "Program Management" appropriations account. Pub. L. No. 108-199, Div. E, tit. II, 188 Stat. 3, 244 (Jan. 23, 2004); Pub. L. No. 108-7, Div. G, tit. II, 117 Stat. 11, 316 (Feb. 20, 2003).

[5] Third parties also confirmed Mr. Scully's threats. For example, Mr. Scully told the Minority Staff Director for the Ways and Means Subcommittee on Health that he would "fire [Foster] so fast his head would spin" if he released certain information to Congress. OIG Report, at 3.

[6] Senator Max Baucus made a similar request for premium estimates. Mr. Foster stated that Mr. Scully directed him to brief Senator Baucus's staff, but he never received approval to respond to Senators Dayton and Kennedy. OIG Report, at 2-3.

## Discussion

At issue here is the prohibition on using appropriated funds to pay the salary of a federal official who prohibits or prevents another federal employee from communicating with Congress. Specifically, this prohibition states:

> "No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee."

Pub. L. No. 108-199, Div. F, tit. VI, § 618, 188 Stat. 3, 354 (Jan. 23, 2004); Pub. L. No. 108-7, Div. J, tit. V, § 620, 117 Stat. 11, 468 (Feb. 20, 2003).

Legislative History of Section 618

The governmentwide prohibition on the use of appropriated funds to pay the salary of any federal official who prohibits or prevents or threatens to prohibit or prevent a federal employee from contacting Congress first appeared in the Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 640, 111 Stat. 1272, 1318 (1997). In 1997, the Senate passed a prohibition that applied only to the Postal Service, while the House of Representatives passed a governmentwide prohibition.[7] The conference report adopted the House version, and a governmentwide prohibition has been included in every Treasury-Postal appropriations act since fiscal year 1998. H.R. Conf. Rep. No. 105-284, at 50, 80 (1997).

This provision has its antecedents in several older pieces of legislation, including the Treasury Department Appropriation Act of 1972, the Lloyd-La Follette Act of 1912, and the Civil Service Reform Act of 1978. The legislative history of these antecedents informs our analysis of section 618 because of the similarity of wording of these provisions and the references that the sponsors of later provisions made to earlier acts.

Prior to fiscal year 1998, the Treasury-Postal appropriations acts annually contained a nearly identical prohibition applying only to the Postal Service. This provision first appeared in the fiscal year 1972 Treasury Department Appropriation Act in response

[7] *Compare* S. 1023, 105th Cong. § 506 (1997), *with* H.R. 2378, 105th Cong. § 505 (1997).

to a 1971 Postal Service directive restricting postal employees' communications with Congress. Pub. L. No. 92-49, § 608 (1971). The Postmaster General's directive, which was printed in the *Congressional Record*, stated that, "In order to avoid the possibility for incorrect information and misinterpretation, it is critical that the Postal Service speak to the Congress with only one voice. Accordingly, I am directing that the Congressional Liaison Office be the sole voice of the Postal Service in communicating with the Congress." 117 Cong. Rec. 151 (1971). The directive spelled out specific procedures to implement this order, and directed postal employees to "immediately cease [any] direct or indirect contacts with congressional officers on matters involving the Postal Service," and in the future, forward any congressional communications to the Liaison Office and coordinate any direct contacts with a congressional office with the Liaison. *Id.* The directive ended with the disclaimer that the new procedures "do not affect the right of any employee to petition, as a private citizen, his U.S. Representative or Senators on his own behalf." 117 Cong. Rec. 152 (1971).

Representative William Ford sponsored this prohibition as an amendment to the 1972 appropriations act. 117 Cong. Rec. 22443 (1971). He complained that the directive declared it a violation of the rules of the Postal Service "for any employee either individually or through his organization to contact any member or any committee" of Congress. *Id.* Representative John Saylor also objected to the directive for "cutting the ties between postal employees and their representatives" and for "abridg[ing] a fundamental right of American citizens." 117 Cong. Rec. 151 (1971). Saylor also cited two newspaper editorials about the directive, which called it a "gag rule" and noted the postal union's concern that the directive violated their constitutional rights to petition Congress. 117 Cong. Rec. 152 (1971). One of the editorials cited the conflict between the directive's order that all employees were to cease contacts with members of Congress and the disclaimer that the directive preserved employees' right to petition Congress. *Id.*

Postmaster General Blount discussed this issue at both the House and Senate Appropriations Committee hearings on the Postal Service's fiscal year 1972 budget request. At the House Appropriations Committee hearing, Representative John Myers asked Blount if it was true that postal employees were prohibited from communicating with their member of Congress under any circumstance. Blount responded that was not the case and noted that his directive simply said "that we are going to centralize our communications with Members of Congress." *Treasury, Post Office, and General Government Appropriations for Fiscal Year 1972, Hearing Before the House Comm. on Appropriations,* 92nd Cong. 63 (1971). He stated, "as a matter of operations and technique . . . we will centralize the requests and problems of Congress in our congressional liaison department and we will then be able to control our responsiveness to the Members." *Id.* Blount also mentioned that it was "very clearly spelled out . . . that all the employees have a constitutional right to petition Members of Congress . . . about their own matters but as far as the Postal Service is concerned, if I am going to be held responsible for it by the Members of Congress and by the American public, I have to have control of it." *Id.*

At the Senate Appropriations Committee hearing, Senator Joseph Montoya complained that prior to the directive, members of Congress "could call the Postal

Department on any matter involving a constituent and get a ready answer from the Department . . . [but now] if we have an inquiry to the regional office or to a local postmaster, they must refer it straight to Washington under this regulation and it causes unnecessary delay." *Treasury, Post Office, and General Government Appropriations for Fiscal Year 1972, Hearing Before the Senate Comm. on Appropriations,* 92nd Cong. 1435 (1971). Senator Montoya added, "I can call any other department in the Government and call the man in charge, the man at the wheel, and he will give me an answer. But I can't do this with the Post Office Department." *Id.* at 1438.

Blount responded to such criticisms, "It is difficult to control our responses [to members of Congress] if these responses go out from some 30,000 post offices around the country." *Id.* at 1435. He stated that the Post Office "is a vast department . . . and it is difficult to be certain that our replies always comply with the policies of the Postal Service, and that is the reason we took this action." *Id.* at 1438. Blount emphasized again that the directive "has to do with the official postal matters only . . . and has nothing to do with the employees' rights to contact Members of Congress. We so stated in the regulation itself . . . [but] it has been misinterpreted by others." *Id.* at 1435. Senator Montoya concluded his questioning about the directive by stating his intention to add language to the Postal appropriations committee report that would prohibit the Post Office from restricting its employees from communicating with members of Congress. *Id.* at 1439.

In introducing his amendment to the 1972 Treasury Department Appropriation Act, Representative Ford noted that "the law that this amendment attempts to enforce has been on the books . . . since 1912." 117 Cong. Rec. 22443 (1971). Ford was referring to a provision in the fiscal year 1913 Post Office Appropriation Bill, commonly known as the Lloyd-La Follette Act, that states, "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with." Post Office Appropriation Act, Pub. L. No. 336, ch. 389 § 6, 66 Stat. 539, 540 (Aug. 24, 1912). The committee report accompanying the House version of the bill stated that the provision was intended to "protect employees against oppression and in the right of free speech and the right to consult their Representatives." H.R. Rep. No. 62-388, at 7 (1912).

Congress enacted the Lloyd-La Follette Act in response to two executive orders issued by Presidents Theodore Roosevelt and Howard Taft. Several congressmen referred to these orders as "gag rules" and quoted the text of the orders in the *Congressional Record.*[8] Both the House and the Senate had a vigorous floor debate

[8] *See, e.g.,* 48 Cong. Rec. 4513 (1912). President Roosevelt's executive order reads as follows: "All officers and employees of the United States of every description, serving in or under any of the executive departments or independent Government establishments, and whether so serving in or out of Washington, are hereby forbidden, either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its committees, or in any way save through the heads of the departments or independent Government establishments in or under which they serve, on penalty of dismissal from the Government service." Exec. Order No. 1142 (1906). President Taft's order reads as follows: "It is hereby ordered that no bureau, office, or division chief, or subordinate in any

on this provision, as well as a related section of the bill allowing postal employees the right to unionize.[9] The majority of the debate focused on preserving the constitutional rights of federal employees.[10] Representative Thomas Reilly stated his opposition to the gag order because it prevented federal employees from "uttering any word of complaint even against the most outrageous treatment." 48 Cong. Rec. 4656 (1912). He hoped that the Act would ensure the rights of employees to discuss "conditions of employment, hours of labor, and matters affecting the working and sanitary conditions surrounding their employment" with Congress.[11] *Id.*

Members of Congress also raised concerns that the executive orders would foreclose an important source of information for Congress. As Senator James Reed stated, the executive orders instructed federal employees "not [to], even at the demand of Congress or a committee of Congress or a Member of Congress, supply information in regard to the public business." 48 Cong. Rec. 10673 (1912). Representative James Lloyd argued that the representatives of the American people "should have the right to inquire as to any of the conditions of government and the method of conducting any line of departmental business." 48 Cong. Rec. 5634 (1912).

Other members of Congress disagreed and argued that the provision would undermine discipline in the Postal Service.[12] However, after a lengthy debate Congress approved the Lloyd-La Follette Act, and the President signed it into law as part of the Post Office Appropriation Act. Pub. L. No. 336, 66 Stat. 539 (Aug. 24,

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department of the Government, and no officer of the Army or Navy or Marine Corps stationed in Washington, shall apply to either House of Congress, or to any committee of either House of Congress, or to any Member of Congress, for legislation, or for appropriations, or for congressional action of any kind, except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress, or any committee of either House of Congress, or any Member of Congress, except through, or as authorized by, the head of his department." Exec. Order No. 1514 (1909).

[9] *See* 48 Cong. Rec. 4512-3, 4656-7, 4738-9, 5223-4, 5235-6, 5633-6, 10670-7, 10728-33, 10793-804 (1912).

[10] *See, e.g.,* 48 Cong. Rec. 4513 (1912) (statement of Rep. Gregg) (stating that the provision was "intended to protect employees against oppression and in the right of free speech and the right to consult their representatives"); 48 Cong. Rec. 5635 (1912) (statement of Rep. Goldfogle) (stating that "[w]hether the citizen holds office under the Government or not, his right to petition for a redress of grievances should not, and constitutionally speaking, can not be interfered with").

[11] Several congressmen spoke about the dangerous working conditions faced by railway mail clerks and emphasized that the provision would ensure that such conditions were brought to the attention of Congress. *See, e.g.*, 48 Cong. Rec. 10671(1912) (statement of Sen. Ashurst) (quoting an article from *La Follette's Weekly*); 48 Cong. Rec. 10674 (1912) (statement of Sen. Warren).

[12] *See, e.g.*, 48 Cong. Rec. 100676 (1912) (statement of Senator Bourne) (stating that "the right of the individual employee to go over the head of his superior . . . on matters appertaining to his own particular grievances, or for his own selfish interest, would be detrimental to the service itself . . . [and] would absolutely destroy the discipline necessary for good service"). The Senate Appropriations Committee also disapproved of the provision. S. Rep. No. 62-955, at 21 (1912) (stating that "good discipline and the efficiency of the service requires that [federal employees] present their grievances through the proper administrative channels").

1912). In 1978, a nearly identical version of the Lloyd-La Follette Act was enacted as part of the Civil Service Reform Act. Pub. L. No. 94-454, 92 Stat. 1138, 1217 (Oct. 13, 1978) (codified at 5 U.S.C. § 7211).[13]

Congress expressed many of the same concerns that surrounded enactment of the Lloyd-La Follette Act during debate surrounding the whistleblower provisions in the Civil Service Reform Act, which prohibit federal agencies from taking any personnel action in response to a federal employee's disclosure of a violation of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a danger to public health or safety. 5 U.S.C. § 2302(b)(8). For example, the Senate Committee on Governmental Affairs noted:

> "Federal employees are often the source of information about agency operations suppressed by their superiors. Since they are much closer to the actual working situation than top agency officials, they have testified before Congress, spoken to reporters, and informed the public . . . Mid-level employees provide much of the information Congress needs to evaluate programs, budgets, and overall agency performance."

Senate Comm. on Governmental Affairs, 95th Cong., *The Whistleblowers*, 40 (Comm. Print 1978). These concerns led to the enactment of the first whistleblower protections and the codification of the Lloyd-La Follette Act. Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 2302, 7211, 92 Stat. 1217 (Oct. 13, 1978).

Application of the Prohibition to the Inspector General's Findings

As noted above, section 618 prohibits an agency from paying the salary of any federal officer or employee who prohibits or prevents, or threatens to prohibit or prevent, another officer or employee from communicating with members, committees or subcommittees of Congress. The OIG report concluded that Mr. Scully both prohibited and threatened to prohibit Mr. Foster from communicating with various members of Congress and congressional committees on issues that pertained to his agency and his professional responsibilities. OIG Report, at 4. In May 2003, Mr. Scully rebuked Mr. Foster for providing information requested by the Majority Staff Director for the House Ways and Means Committee. *Id.* at 3. In June 2003, Mr. Scully's special assistant, pursuant to Mr. Scully's direction, instructed Mr. Foster not to respond to any requests for information from the House Ways and Means Committee. Because of Mr. Scully's actions, we view HHS's appropriation as unavailable to pay his salary. Pub. L. No. 108-199, Div. F, tit. VI, § 618, 188 Stat. 3, 354 (Jan. 23, 2004); Pub. L. No. 108-7, Div. J, tit. V, § 620, 117 Stat. 11, 468 (Feb. 20, 2003).

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[13] Section 7211 states: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." There are no federal judicial decisions interpreting section 7211, aside from cases ruling that it does not imply a private cause of action, *Nixon v. Fitzgerald*, 457 U.S. 731 (1981), and that it does not apply to government contractors, *Bordell v. General Electric Co.*, 732 F. Supp. 327 (1990).

As the legislative history of section 618 demonstrates, Congress intended to advance two goals: to preserve the First Amendment rights of federal employees and to ensure that Congress had access to programmatic information from frontline employees. Mr. Scully's actions implicate the latter of these goals. Congressional offices had asked Mr. Foster for information and for technical and analytic assistance that concerned the cost and impact of proposed Medicare legislation under debate in both the House and the Senate. OIG Report, at 2-3. Many members considered such information critical to their consideration of the Medicare Prescription Drug, Improvement, and Modernization Act, a historic piece of legislation with significant implications for federal fiscal policy.[14] This information is a prime example of the programmatic information from frontline federal employees upon which Congress focused in enacting the Lloyd-La Follette Act and its subsequent incarnations.

According to the OIG's findings, congressional offices were interested in the total estimated cost of the legislation, premium estimates, the data underlying certain premium estimates, and a technical analysis of the premium support provisions in the Medicare legislation. OIG Report, at 2-3. This information was typical of the regular, ordinary work product of Mr. Foster and the Office of the Chief Actuary, and as the frontline employee, he was competent to provide the information to Congress. *See* H.R. Conf. Rep. No. 105-217, at 837 (1997) (stating that the actuary has an important role in "developing estimates of the financial effects of potential legislative and administrative changes in the Medicare and Medicaid programs"). Mr. Foster was more knowledgeable about the estimates than other officials within HHS and thus was able to provide information so that Congress could evaluate the Medicare program and budget. *See* Senate Comm. on Governmental Affairs, 95th Cong., *The Whistleblowers*, 40 (Comm. Print 1978).

Thus, the legislative history of section 618 and its predecessors suggest that Mr. Scully's bar on Mr. Foster responding to congressional requests is a prime example of what Congress was attempting to prohibit by those provisions. Accordingly, Mr. Scully's actions fall squarely within section 618, and HHS's appropriation was unavailable for the payment of his salary.

Constitutional Issues Raised by HHS and OLC

While the OIG Report concluded that Mr. Scully had indeed threatened Mr. Foster if he communicated with Congress, it also contained in its attachments, legal opinions by the HHS Office of General Counsel and by the Office of Legal Counsel (OLC) for the Department of Justice. Memo from Katherine M. Drews, Associate General Counsel, HHS, to Lewis Morris, Counsel, HHS OIG, May 12, 2004 (Drews Memo); Letter from Jack L. Goldsmith III, Assistant Attorney General, to Alex M. Azar II, General Counsel, HHS, May 21, 2004 (Goldsmith Letter). These legal opinions state that the application of section 618 to the present case would be unconstitutional. Drews Memo, at 3-5; Goldsmith Letter, at 2-4.

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[14] *See, e.g.,* 150 Cong. Rec. S2761 (daily ed. Mar. 12, 2004) (statement of Senator Tom Daschle); 150 Cong. Rec. S3911-2 (daily ed. Apr. 7, 2004) (statement of Senator Bob Graham).

Laws passed by Congress and signed by the President come to us with a heavy presumption in favor of their constitutionality.[15] B-300192, Nov. 13, 2002. We have long observed that it is not our role to adjudicate the constitutionality of duly enacted legislation. B-245028.2, June 4, 1992; B-215863, July 26, 1984. We apply the laws as we find them absent a controlling judicial opinion that such laws are unconstitutional. B-300192, Nov. 13, 2002. Indeed, even in such cases, we will construe a statute narrowly to avoid constitutional issues. *Id.* Here, no court has found section 618 or its predecessors unconstitutional. Likewise, the courts have never held unconstitutional the Whistleblower Protection Act, which authorizes federal employees to disclose violations of law, gross mismanagement, the gross waste of funds, abuses of authority, and threats to public health or safety. 5 U.S.C. § 2302(b)(8).

HHS and OLC first argue that section 618 is unconstitutional because it could force the disclosure of privileged, classified, or deliberative information. Drews Memo, at 4-5; Goldsmith Letter, at 2-3. Constitutional concerns could be raised if Congress were to attempt to force the disclosure of classified or national security information, given the President's role as Commander in Chief.[16] However, Mr. Foster was not asked for classified information.

Similarly, Mr. Foster was not asked for information subject to a claim of deliberative process privilege.[17] To invoke the deliberative process privilege, the material must be both pre-decisional and deliberative, requirements that stem from the privilege's purpose of granting officials the freedom "to debate alternative approaches in private." *In re: Sealed Case,* 121 F.3d 729, 737 (D.C. Cir. 1997). The deliberative process privilege does not apply to the information requested of Mr. Foster because it was neither pre-decisional nor deliberative. The Administration had already formulated its Medicare prescription drug plan and had released it to the public and to the Congress in March 2003. *See Framework to Modernize and Improve Medicare,* White House Fact Sheet, March 4, 2003. Thus, the information requested from Mr. Foster in June through November 2003, which involved cost estimates and data formulated after the Administration's release of its Medicare plan, was not part of the

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[15] The Supreme Court also begins with the presumption that a statute is constitutional. *See, e.g., United States v. Morrison,* 529 U.S. 598, 607 (2000) (holding that "due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds").

[16] *See Department of the Navy v. Egan,* 484 U.S. 518, 527 (1988) (stating that the Constitution grants the President authority to classify and control access to national security information); *National Fed'n of Fed. Employees v. United States,* 688 F. Supp. 671 (D.D.C. 1988), *vacated and remanded, American Foreign Serv. Ass'n v. Garfinkel,* 490 U.S. 153 (1989); Memorandum Opinion for the General Counsel, Central Intelligence Agency, *Access to Classified Information,* OLC Opinion (Nov. 26, 1996) (asserting that granting individual federal employees the right to disclose intelligence and other national security information would threaten the President's constitutional role as Commander in Chief).

[17] Traditionally, courts have allowed the executive branch to withhold documents from the public and in litigation that would reveal advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. *In re: Sealed Case,* 121 F.3d 729, 737 (D.C. Cir. 1997) (addressing scope of privilege in context of grand jury investigation).

deliberative process for the Administration's proposal. Furthermore, some of the information that Mr. Scully prohibited Mr. Foster from communicating to congressional offices, including the House Ways and Means Committee's request of June 13, 2003, for an analysis of the premium support provisions, was not preexisting data. Such information cannot be considered deliberative because the analysis was not preexisting nor was it tied to any decision-making process at CMS. Thus, HHS's and OLC's arguments that section 618 is unconstitutional because it could force the disclosure of classified or privileged information are inapplicable to the facts of this case.

HHS and OLC also argue that section 618 unconstitutionally limits the President's ability to supervise and control the work of subordinate officers and employees of the executive branch. Drews Memo, at 4-5; Goldsmith Letter, at 2-3. In making this argument, HHS and OLC fail to balance the President's constitutional interest in managing the official communications of the executive branch with Congress's equally important need for information in order to carry out its legislative and oversight responsibilities. As OLC itself has recognized, Congress has "important oversight responsibilities and a corollary interest in receiving information [from federal employees] that enables it to carry out those responsibilities." *Whistleblower Protections For Classified Disclosures: Hearing Before the House Permanent Select Committee on Intelligence*, 105th Cong. (May 20, 1998) (statement of Randolph Moss, Deputy Assistant Attorney General, Office of Legal Counsel). As the Attorney General has pointed out, Congress's interest in obtaining information from the executive branch is strongest when "specific legislative proposals are in question." 43 Op. Att'y Gen. 327 (Oct. 13, 1981).

HHS and OLC have overstated section 618's threat to the President's constitutional prerogatives.[18] Executive agencies have the right to designate official spokesmen for the agency and institute policies and procedures for the release of agency information and positions to Congress and the public.[19] Separation of powers concerns could be raised if Congress, by legislation, were to dictate to the executive branch who should communicate the official positions of the Administration, given the President's constitutional duty to "recommend to [Congress's] consideration such measures as he shall judge necessary and expedient."[20] U.S. Const. Art. II, § 3.

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[18] Section 618 does not prohibit agencies from requiring their employees to report on their communications with Congress and from requesting that agency congressional liaisons be included in employees' discussions with Congress, nor does it require executive branch employees to initiate congressional contacts or even to respond to congressional inquiries.

[19] For example, section 301 of Title 5, U.S. Code, commonly known as the Housekeeping Statute, delegates to the head of an agency the right to prescribe regulations for "the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." However, the Housekeeping Statute is explicit in that it does not "authorize withholding information from the public." This second sentence of § 301 was added in 1958 because Congress was concerned that the statute had been "twisted from its original purpose as a 'housekeeping statute' into a claim of authority to keep information from the public and, even, from the Congress." H.R. Rep. No. 85-1461 (1958).

[20] *See also Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. Off. Legal Counsel 30 (Feb. 22, 1984) (asserting that requiring an executive branch agency to submit legislative proposals directly to Congress without Presidential

Federal agencies and employees making separate legislative recommendations to Congress, without coordination with the President, could interfere with the President's constitutional duty, on behalf of the executive branch, to judge which proposals are "necessary and expedient" and make such recommendations to Congress. 8 Op. Off. Legal Counsel 30. Designating an official agency or executive branch spokesman would be entirely appropriate in the case of legislative recommendations or a statement of the Administration's official positions. However, Mr. Foster was not asked for a CMS policy position or legislative recommendation, but rather for specific and limited technical assistance.[21]

Thus, while certain applications of section 618 could raise constitutional concerns, application of section 618 to the facts of this case does not raise such concerns, because Mr. Foster was asked for estimates, technical assistance, and data, rather than any information which could be considered privileged.[22] Furthermore, Congress was considering extensive changes to Medicare, and members requested cost estimates and analyses to inform debate on this legislation and to carry out the legislative powers vested by the Constitution. U.S. Const. Art. I, § 1. Indeed, if some of the Chief Actuary's estimates had been disclosed in a timely matter, Congress would have had better information on the magnitude of the legislation it was considering and its possible effect on the nation's fiscal health.[23]

Mr. Scully's prohibitions, therefore, made HHS's appropriation, otherwise available for payment of his salary, unavailable for such purpose, because his actions are covered by section 618 of the Consolidated Appropriations Act of 2004 and section 620 of the Consolidated Appropriations Resolution of 2003. Because HHS was prohibited from paying Mr. Scully's salary after he barred Mr. Foster from communicating with Congress, HHS should consider such payments improper.[24]

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review would be unconstitutional); *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. Off. Legal Counsel 632 (Nov. 5, 1982) (asserting that requiring an executive branch agency to submit budget requests or legislative proposals directly to Congress without presidential review would be unconstitutional).

[21] Indeed, the two OLC opinions cited in the Goldsmith Letter (and cited in the prior footnote) deal with budget or legislative proposals and thus are inapplicable to the present case.

[22] OLC admits in its opinion that it did not review the specific information requested of Mr. Foster and thus "cannot opine on the privileged status" of the information.

[23] *See, e.g.,* GAO, *Fiscal Year 2003 U.S. Government Financial Statements: Sustained Improvement in Federal Financial Management Is Crucial to Addressing Our Nation's Future Fiscal Challenges,* GAO-04-477T (March 3, 2004) (describing the drug benefit as "one of the largest unfunded commitments ever undertaken by the federal government").

[24] Section 618 and the legislative history surrounding similar provisions provide no guidance as to what time period an agency is prohibited from paying the salary of an official who prohibits a federal employee from contacting Congress. Federal salaries are obligated when earned and are earned on a biweekly pay period basis. *See* 24 Comp. Gen. 676, 678 (1945) and 5 U.S.C. § 5504. Given the continuing nature of Mr. Scully's prohibition, we recommend that HHS treat as an improper payment Mr. Scully's salary beginning with the pay period when his initial prohibition to Mr. Foster was made until his departure from CMS.

Therefore, we recommend that HHS seek to recover these payments, as required by 31 U.S.C. § 3711.[25]

**Conclusion**

As a result of Mr. Scully's prohibition on Mr. Foster providing certain information to Congress, HHS's appropriation was unavailable to pay Mr. Scully's salary because section 618 of the Consolidated Appropriations Act of 2004 and section 620 of the Consolidated Appropriations Resolution of 2003 bar HHS from using appropriated funds to pay the salary of an official who prohibited another federal employee from communicating with Congress on an issue related to his agency. While certain applications of section 618 could raise constitutional concerns, we have applied the prohibition to the present facts, given the narrow scope of information requested and Congress's need for such information in carrying out its legislative duties, as well as the fact that no court has held section 618 unconstitutional.

Sincerely yours,

Anthony H. Gamboa
General Counsel

[25] HHS should keep the House and Senate Appropriations Committees, as well as its oversight committees, apprised of the actions it takes to recover these improper payments.