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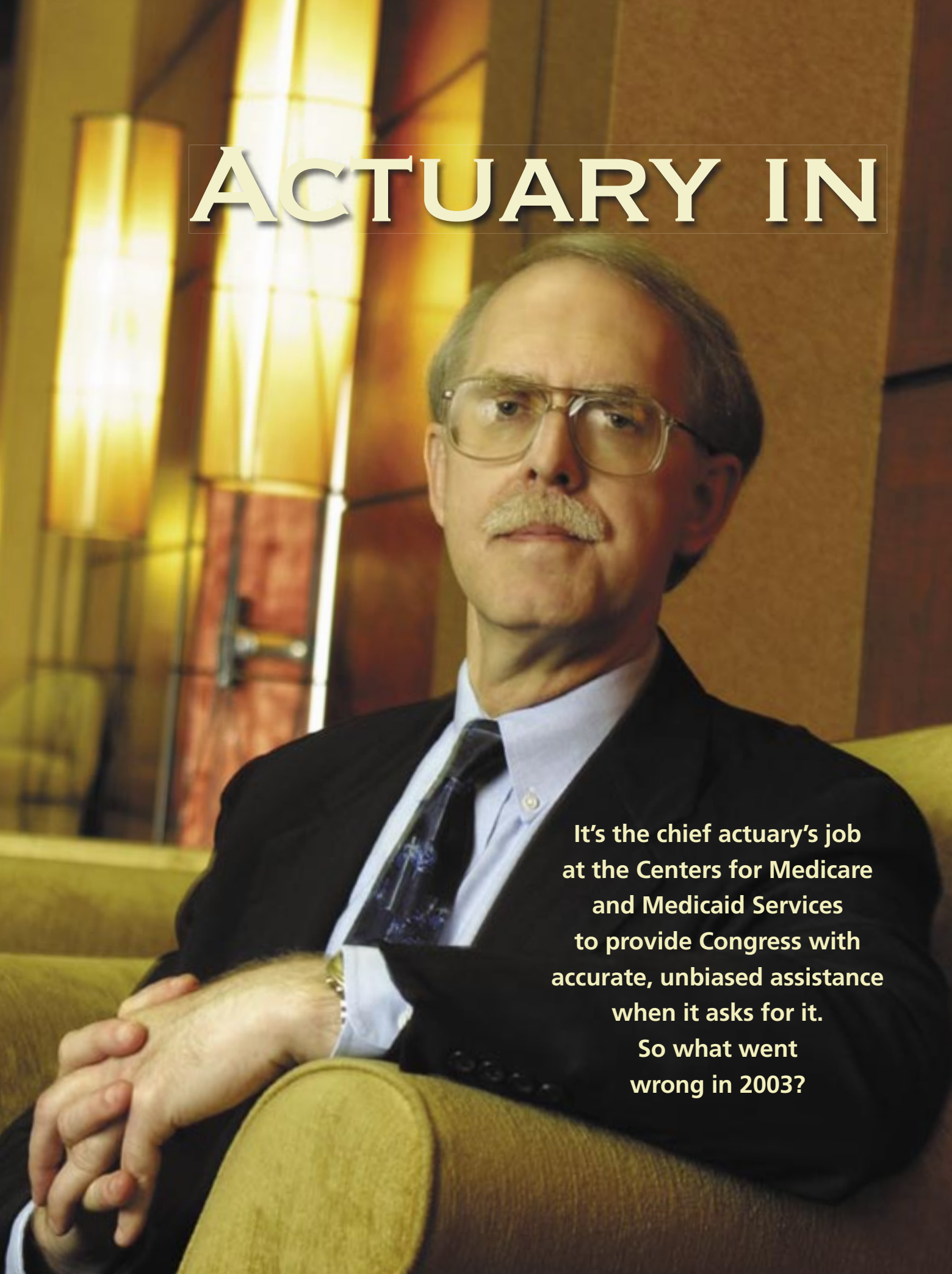

It's the chief actuary's job at the Centers for Medicare and Medicaid Services to provide Congress with accurate, unbiased assistance when it asks for it. So what went wrong in 2003?

THE HOT SEAT

By Richard S. Foster

IT WAS FRONT-PAGE NEWS LAST SPRING:

The estimated cost of the newly enacted Medicare prescription drug benefit was now substantially greater than the $400 billion limit set by the congressional appropriations committees.

Many articles claimed that the Bush administration's own cost estimates had been purposely withheld from Congress. And, without exception, all of these stories mentioned me (sometimes favorably, sometimes not).

This article summarizes what happened in 2003 when Congress requested actuarial assistance from the Centers for Medicare and Medicaid Services (CMS) during development of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. It describes the dilemma I faced and how I responded. Here I will also try to place this sequence of events in the context of a broader and fundamentally more important issue.

Actuarial Assistance to Congress

From the very beginning of Medicare, the Office of the Actuary at CMS has provided technical assistance to Congress. This assistance has always been independent and nonpartisan, not favoring one policy or party over another. I've been proud to be part of this tradition throughout my 31-year career at CMS and the Social Security Administration (SSA).

As Robert J. Myers (chief actuary for Social Security from 1947 to 1970) can attest, this practice dates back even further, to the mid-1930s. I and every other chief actuary for Medicare and Social Security have strongly supported our role of providing technical assistance to Congress, and we're all grateful to Bob Myers for having helped to establish this practice and for protecting the Office of the Actuary's independence for so many years.

While, by law, Congress relies on the legislative cost estimates prepared by the Congressional Budget Office, in practice members and their staffs have frequently sought technical assistance from the CMS and SSA actuaries. Over the years, Congress has relied heavily on this support. As the members of the Conference Committee on the Balanced Budget Act of 1997 wrote:

Beginning with the appointment of the first Chief Actuary for Social Security in 1936, through the enactment of Medicare and Medicaid in 1965 ... the tradition has been for a close and confidential working relationship between the SSA and [CMS] chief actuaries and the committees of jurisdiction in the Congress—a relationship which the Committees value highly.

The process of monitoring, updating, and 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.

The conferees recognize the important role of the Office of the Actuary and expect that ... the office will be permitted to function with a high degree of independence and professionalism.

Most past CMS administrators and SSA commissioners have understood and supported this unique role of the Office of the Actuary. Former administrator Nancy-Ann Min DeParle has said: "The integrity of the office rests on its independence." Similarly, former administrator Bruce Vladeck characterized the chief actuary position as "similar to that of a Supreme Court justice in its need to be independent of political pressure."

What Went Wrong in 2003?

Congressional activity on the legislation that became the Medicare modernization act got underway in May of 2003. In June, the then-administrator of CMS ordered me to cease responding directly to congressional requests for actuarial assistance. Instead, I was directed to provide the responses to him for his review, approval, and ultimate disposition. Following several vigorous discussions, the administrator made it clear that this was a direct order and that if I failed to follow it, "the consequences of insubordination are extremely severe." I understood this statement to mean that I would be fired if I provided the requested information to Congress.

Consultation with a CMS attorney convinced me that the administrator had the legal right to direct our activities in this way, despite the decades-long precedent of our responding directly to congressional requests. Her reasoning was that, since I was a member of the executive branch of government, members of Congress had no legal basis to direct me to provide technical assistance to them, under the separation of powers provisions of the United States Constitution.

The attorney further argued that I, as an employee within the executive branch and in direct line of authority to the administrator by law, had to accept his orders regarding assistance to Congress. Finally, she noted that the Medicare statute itself does not give my office any direct responsibility to Congress, and she stated that the conference report language referring to the Office of the Actuary's responsibilities to both the administration and Congress had no legal bearing.

When the administrator took over the release of actuarial information to Congress, he didn't try to influence the amount of any estimate or the outcome of our analyses. It quickly became apparent, however, that while he would release to Congress those studies that could be used to support the Medicare legislation, other reports that could be used to argue against the legislation would not be released (or would be released only after negative publicity and/or the aggressive intervention by key members of Congress).

I was extremely concerned by this situation for two reasons: First, because important technical information was being withheld from Congress for political reasons—an inappropriate and highly unethical practice. And second, because the Office of the Actuary's objectivity would be called into question if only products supporting the legislation were made available.

Fighting Back

I attempted on several occasions to convince the administrator that this practice was not in the best interest of the public, but I was unsuccessful. Thus, his orders left me in a very bad position. Personally and professionally, I felt compelled to provide the assistance requested by Congress. I've always believed strongly that our nation's top policy-makers should have ready access to the best technical information and advice possible when they consider changes to important and complex programs such as Medicare and Social Security. Moreover, such information should be equally available to Republicans and Democrats alike and without regard to whether it would tend to support one political position over another.

I considered the articles to be old news—until the point that the now former administrator of CMS denied withholding information from Congress and that he'd threatened me. Such egregiously inaccurate statements were too much, and I decided to set the record straight. This time, there was a lot of interest.

Some years earlier, in anticipation of the possibility that an administration might want to restrict our assistance to Congress, I had sought guidance from the Actuarial Board for Counseling and Discipline (ABCD), an organization established by the American Academy of Actuaries to facilitate compliance with the Academy's Code of Professional Conduct. After careful consideration, the ABCD issued a formal opinion that our *duty to the public* is just as important as duty to either the administration or the Congress. The board concluded that:

The Chief Actuary must be free to provide information that, in his or her professional judgment, responds to a request clearly and completely.

As a result, I was caught between two opposing forces. The law, as I understood it, gave the administrator the legal right to restrict the release of our estimates to Congress. But from a professional, actuarial standpoint, Congress should have access to the information it needed to modify the Medicare program. Between "what's right" and "what's legal," what should one do?

In this instance, the Code of Professional Conduct provided an answer:

Laws and regulations may impose obligations upon the actuary. Where the requirements of law or regulation conflict with this Code, the requirements of law or regulation take precedence.

Consequently, I felt it was necessary to comply with the administrator's orders, even though I considered them inappropriate and unethical. But could I tackle the problem in some other way? After a lot of thought and soul-searching, I concluded that I should resign my position as chief actuary in protest of the administration's actions in withholding information from Congress. My intent was to do so in a very public and outspoken way, in the hope that the resulting furor would force the situation to be changed for the better.

When I notified the other managers in the Office of the Actuary of my intent, however, they felt that the impact would

be short-lived and ineffective. Moreover, they were concerned that my departure would leave the door wide open for further and more severe abuses. They felt that the probability of restoring congressional access to actuarial assistance would be maximized if I stayed on and worked within the system to this end. Some key congressional staff members felt the same way.

After much further deliberation, I decided to follow the advice of my fellow managers in the Office of the Actuary. Working within the system, I took a number of steps to try to address the situation.

First and foremost, I worked with others in an effort to change or override the administrator's orders. These individuals included other CMS officials as well as a number of people outside the agency, including Ways and Means Committee Chairman Bill Thomas, the chief of staff for the Department of Health and Human Services (HHS), and the deputy director of the HHS Office of the General Counsel. All of these individuals agreed with the principle that we should respond to congressional requests for technical assistance, and several of them took active steps to help restore our ability to do so. Surprisingly, they were largely unable to resolve the problem in practice.

I also suggested to key congressional staff that their bosses should speak up and reaffirm their need for actuarial assistance, preferably in a bipartisan way. An effort was undertaken to have a bipartisan, joint appeal to the secretary of HHS by the chairmen and ranking minority members of each of the three congressional committees of jurisdiction (the Senate Finance Committee and the House Committees on Ways and Means and Energy and Commerce). Unfortunately, this effort failed, in large part due to the very partisan atmosphere that prevailed at the time.

In practice, my staff and I were able to provide a substantial amount of valuable technical information to Congress; probably 90 percent or more of the information requested was ultimately supplied. In particular, we worked to inform the congressional staff responsible for drafting the actual legislative language of a number of technical problems that we discovered. This effort led to many changes and corrections in the legislation by the time it was enacted. So, in the end, much important actuarial information got to the conferees and their staffs—but not all of our information got out, and what did get out did not get to everyone.

Interestingly, the issues of withholding cost estimates and their higher amount (compared to the estimates by the Congressional Budget Office) were reported fairly widely at the time by the *Associated Press* and the *Wall Street Journal*. These articles, however, seemed to receive relatively little attention. Eventually, the Medicare modernization act was passed by the House and Senate and signed into law on Dec. 8, 2003.

Were the Orders Legal?

In February 2004, the administration publicly acknowledged our estimates of the cost of the Medicare modernization act as part of the president's fiscal year 2005 budget. This action prompted a new round of news articles, mostly focusing on the significantly higher level of our cost estimate ($534 billion through 2013) compared with the Congressional Budget Office's estimate ($395 billion). Many of these articles also incorrectly characterized our estimates as "new" and "correct," versus the "old" and "incorrect" CBO figures.

In reality, we had been estimating the cost of the legislation as far back as June 2003, as it was being developed. In addition, there is no way to conclude that our estimates are right and CBO's are wrong; the uncertainty is so great that either set could prove more accurate than the other, and, for that matter, both sets of estimates could prove to be well wide of the mark.

I considered these articles to be old news—until the point that the now former administrator of CMS denied withholding information from Congress and that he'd threatened me. Such egregiously inaccurate statements were too much, and I decided to set the record straight. This time, there was *a lot* of interest.

By the time it was all done, there were hundreds of newspaper and TV news stories across the country, hours of testimony at a public Ways and Means Committee hearing and a closed-door Senate Finance Committee meeting, efforts to subpoena the former administrator and another administration official, legal opinions by the HHS Office of the General Counsel, the Department of Justice, the constitutional scholars at the Congressional Research Service, and the Government Accountability Office (GAO), and a major investigation by the HHS Office of the Inspector General.

The inspector general's (IG) report confirmed that there were a number of instances in which the former administrator had withheld information from Congress. (The IG chose not to comment on the importance of the information or the appropriateness of its withholding.) The IG further confirmed that the administrator had threatened me on several occasions, both directly and to third parties. Based on the opinions of the HHS Office of the General Counsel and the Department of Justice, the IG concluded that the administrator had the legal right to direct me not to provide information to Congress.

The IG added, however, that if the former administrator were still employed in HHS, "we would have referred this matter to the Department [of HHS] for appropriate administrative action associated with the department's standards of ethical conduct." Finally, the IG concluded that "the CMS actuary had no authority to disclose information independently to Congress" but did not comment on the decades-long precedent for such activity.

In contrast, the Congressional Research Service concluded that "Congress' right to receive truthful information from federal agencies to assist in its legislative functions is clear and unassailable." The Congressional Research Service stated that the former administrator's actions "would appear to violate a specific and express prohibition of federal law."

Similarly, the Government Accountability Office (GAO) concluded that the Consolidated Appropriations Acts of 2003 and 2004 "prohibit the use of appropriated funds to pay the salary of a Federal official who prevents another employee from communicating with Congress." They further noted that these laws were intended to protect Congress' right to receive information in exactly such situations, that no court had found these provisions unconstitutional, and that the provisions should therefore be applied. Accordingly, GAO stated that HHS should recover much of the salary paid to the former administrator during 2003. HHS, however, countered that they believed the laws in question to be unconstitutional and that they were not going to seek recovery.

These differences in legal opinions between the executive branch and the legislative branch of the federal government may not be resolved in the immediate future. Regardless of the ultimate outcome on these legal questions, it seems to me that the major point the Congressional Research Service study made should be beyond argument:

Clearly, as stated by the Supreme Court, "[a] legislative body cannot legislate wisely or effectively in the absence of information regarding conditions which the legislation is intended to affect or change," and thus political gamesmanship must yield to the clear public interest of providing elected representatives in the Congress with accurate and truthful information upon which to effectively fashion the laws for the Nation.

In my view and, I would think, from the viewpoint of any nonpartisan, objective observer, the Supreme Court, the Congressional Research Service, and the GAO are certainly right. When the nation's policy-makers consider important changes to the Medicare program, they should have the best technical information and advice possible to help inform their decisions. Withholding such information (for political purposes, or any other reason short of national security)—even if it turns out that such a practice is legal—cannot possibly be right.

I personally don't know what approach would have been best. I may not be able to answer that question for many years to come, if ever.

The Office of the Actuary has performed a valuable service through the years by providing objective technical assistance to the administration and to Congress. I'm pleased to report that HHS Secretary Tommy Thompson and new CMS administrator Dr. Mark McClellan have both gone on record stating that actuarial assistance should be provided to Congress on an open, nonpartisan basis. Moreover, I'm hopeful that future cabinet secretaries and agency administrators, looking back on the events in 2003 and their consequences, would choose their actions very carefully. Finally, I believe a strong case can be made, based on the GAO legal opinion in particular, that an order to restrict actuarial assistance to Congress is improper and violates Federal law. Consequently, the "any law or regulation" provision in the Code of Professional Conduct would not apply, and Federal actuaries would no longer be caught between "what's legal versus what's right."

As for the threats, political pressures, headaches, and heartaches associated with this episode: If the end result is reaffirmation of the long-standing policy of providing reliable actuarial assistance to Congress in the future, it will all have been worthwhile. Otherwise, it would remind me of Mark Twain's story of the fellow who was tarred, feathered, and run out of town on a rail. "If it wasn't fer the honor of the thing," he's reputed to have said, "I'd ruther have walked!"

Symptom of a Bigger Problem

It's presumptuous of me to talk about political issues, especially as government actuaries try our best to stay well away from them, lest politics cloud our efforts to provide objective technical information. But on this one occasion, I'll comment anyway on an important concern that I believe faces us all.

First, it hardly needs to be mentioned that Congress is deeply divided. The level of partisanship and outright bitterness between the parties appears to be at its highest level in decades. Moreover, the differences seen within Congress seem to reflect all-too-similar views and strong opinions from a deeply divided nation.

In this atmosphere, overzealous advocates—convinced of the correctness of their view—tend to use almost any means to achieve their end. Some will go far beyond reasonable arguments and actions. There are plenty of examples of such excesses, and by both major parties in recent years. The former CMS administrator's efforts to withhold information from Con-

gress represent only one such example. Regarding this situation, I'd like to suggest two important points:

- *It doesn't have to be this way.* Our political leaders can, and often have, worked far more cooperatively and harmoniously to tackle critical challenges facing the United States. Through 1982, for example, the National Commission on Social Security Reform was stalemated over how to address the imminent depletion of the Old-Age and Survivors Insurance trust fund. After months of analysis, proposals, and debate, and despite the best efforts of its executive director, Robert Myers, the commission's deadline was fast approaching and it was unable to reach consensus on recommendations.

When its last scheduled meeting ended, still without any resolution, the late Democratic Sen. Daniel Patrick Moynihan and Republican Sen. Bob Dole met privately, each having concluded that the Social Security issue was too important to let the commission's efforts fail.

Despite their different political philosophies, they met regularly to determine possible solutions and persuaded other key commission members to join in this effort. Before long, the group had reached consensus on a package of legislative reforms and subsequently persuaded the remaining members of the commission to buy in to this compromise.

This example of leadership by Sens. Moynihan and Dole resulted in a powerful commission report and led directly to the Social Security Amendments of 1983, which have helped successfully guide the OASDI program for more than 20 years.

- *It can't continue to be this way.* Despite the Social Security Commission's efforts, of course, the long-range financial problems facing Medicare and Social Security have not gone away. Our society continues to face very critical challenges as the post-World War II "baby boom" generation reaches retirement and continues to age thereafter. A. Haeworth Robertson has forcefully warned of these concerns for 30 years; Bob Myers, Dwight K. Bartlett, and many other actuaries have joined in this message. Only recently, however, has the severity of this situation been widely acknowledged among policy-makers. (Robertson, Myers, and Bartlett are all former chief actuaries for Medicare and Social Security.)

To address these concerns in the time remaining, the nation needs the sort of wisdom, determination, and leadership shown by Sens. Moynihan and Dole in 1982. We simply cannot afford to have further divisiveness and extreme partisanship at this critical time.

Conclusion

Without question, the problems I encountered in 2003 represented the worst crisis of my professional career. Most individuals and press articles have concluded that my actions in speaking out on this subject were "heroic." Some others have criticized me for not taking earlier and more forceful action.

I personally don't know what approach would have been best. I may not be able to answer that question for many years to come, if ever. In the meantime, I've appreciated the many messages, calls, and letters I've received from actuaries and others across the country. I've also appreciated the stalwart support from my co-workers in the Office of the Actuary, especially my special assistants Sally Burner and Gregory Savord, and my colleagues on the management team. Everyone's support has meant more to me than I can adequately express.

What can we do to address the bigger problem? Actuaries aren't generally known or sought for our political insight. We can act, however, to encourage our elected officials to address financial problems and to do so in a responsible, nonpartisan way—putting the public good first—and to support open, honest debate, rather than suppress it.

Most important, we, the actuarial profession, can collectively strive to provide the best technical information possible to policy-makers, so they can make informed decisions in their struggle with these challenging financial problems that face our social insurance programs.

I probably have at least a few more years in me of fighting to achieve this goal. I look forward to our continuing collaboration in this most important endeavor. ●

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