

# Withdrawal/Redaction Sheet

## Clinton Library

| DOCUMENT NO.<br>AND TYPE | SUBJECT/TITLE   | DATE   | RESTRICTION |
|--------------------------|---|--------|-------------|
| 001. memo                | Interested Parties [Westmoorland Memo] re: Grijalva and Medicaid<br>(2 pages) | 2/8/99 | P5          |
| 002. memo                | Seth Waxman to Dan Marcus re: [Grijalva] (1 page)                             | 2/9/99 | P5          |
| 003. brief               | [Ninth Circuit ruling re: Medicare & HMOs] (7 pages)                          | 2/99   | P5          |
| 004. memo                | Reed et al. to POTUS re: Grijalva v. Shalala (4 pages)                        | 2/4/99 | P5          |

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**COLLECTION:**

Clinton Presidential Records  
 Domestic Policy Council  
 Bruce Reed (Subject File)  
 OA/Box Number: 21204

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**FOLDER TITLE:**

Health Care-Grijalva

rs4 |

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**RESTRICTION CODES**

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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UNITED STATES DEPARTMENT OF JUSTICE  
 OFFICE OF THE SOLICITOR GENERAL  
 10th & Constitution Avenue, N.W.  
 Washington, DC 20530

HC  
 Grjewich

FAX TO:

RECIPIENT'S NAME:

DAN MARCUS

AGENCY/FIRM:

ADDRESS:

TELEPHONE NUMBER: ( )

FAX NUMBER:

( ) 456-1647

NUMBER OF PAGES SENT (INCLUDING COVER PAGE):

7

IF YOU DO NOT RECEIVE THIS NUMBER OF PAGES, PLEASE CALL THE NUMBER BELOW.

FAX FROM:

SENDER'S NAME:

Seth Waxman

ROOM NUMBER:

TELEPHONE NUMBER: (202)

FAX NUMBERS: (202)

COMMENTS:

To whom this is. Seth's take. I'm also attaching FAX II from a prior draft, which he notes in his cover memo is the still more truncated way of making this argument.

Elenorcc: Bruce/Chris

- OFFICIAL INFORMATION ENCLOSED -

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## Rulings on Medicare Rights Split White House

By ROBERT PEAR

WASHINGTON, Jan. 21 — A bitter dispute has broken out within the Clinton Administration over the legal rights of Medicare beneficiaries, with some officials trying to limit those rights as far as President Clinton urges Congress to establish new protections for millions of other patients with private health insurance.

At issue are Federal court rulings that uphold the rights of six million Medicare beneficiaries in health maintenance organizations.

A Federal district judge in Tucson, Ariz., and the United States Court of Appeals for the Ninth Circuit, in San Francisco, said such patients have a constitutional right to receive written notices and hearings on any denial of medical services, because the H.M.O.'s were acting on behalf of the Government.

Medicare officials are urging Donna E. Shalala, the Secretary of Health and Human Services, to appeal the decision to the Supreme Court. But other Administration officials, who work on legislative affairs and domestic policy, strenuously oppose any appeal, saying the Administration will look ridiculous and will outrage consumer groups and Democrats in Congress.

The arguments are set forth in confidential memorandums that provide a rare insight into the legal and political considerations that shape the Government's decision on litigation before the High Court. They seem to parallel the arguments made for and against a "patient's bill of rights" like the one proposed by Mr. Clinton.

Medicare officials argue that the lower-court orders intrude on their ability to set Medicare policy, and go much further than necessary to protect elderly patients. "The appeals process required by the district court could impose significant administrative and financial burdens on health plans," raising costs by \$470 a person per month, or a total of \$342 million a year, said a memorandum to Medicare officials.

Under the lower-court orders, H.M.O.'s must provide a written notice whenever a service requested by a patient or a doctor is denied, or a course of treatment is reduced or eliminated.

"Under this standard, beneficiaries could be inundated with written notices whenever a perceived reduction occurs," the Medicare officials said. "Such a situation would be confusing and even stressful to beneficiaries."

In short, Medicare officials do not like being second-guessed by the courts, and they resent judicial supervision just as much as H.M.O. executives resent regulation.

But a memorandum written by other officials of the Department of Health and Human Services emphasizes the political risks of an appeal.

### *A rare insight into the considerations that shape decisions on litigation.*

to the Supreme Court:

"The department's position could be seen as inconsistent with the Administration's stated policy of expanding consumer protections for health plan enrollees." It says, "As a result, a petition could weaken the department's and the Administration's ability to pass legislation that creates additional protections, such as in the patient's bill of rights."

Nancy-Ann Min DeParle, the administrator of the Health Care Financing Administration, which runs Medicare, came down against the lower-court decisions. She told Dr. Shalala that the Administration "should seek relief from the Supreme Court," even though Ms. DeParle acknowledged that there were legal and political risks in this approach.

By contrast, other Administration officials said the rights of Medicare H.M.O. patients should meet constitutional standards for "due process of law" because the stakes were so high: if an H.M.O. denies coverage of a service, the patient may suffer irreparable harm or die.

Further, these officials said in confidential memorandums, if the Ad-

ministration succeeds in its effort to overturn the court decisions won by Medicare beneficiaries, it could undermine the rights of poor people in Medicaid, who have increasingly been required to get their care through H.M.O.'s.

Moreover, these officials said, "health plans may be exaggerating the financial and administrative burdens" imposed by the lower-court orders.

The case, a nationwide class action, was filed in 1993 by elderly people who said they had been denied medically necessary services. The plaintiffs won a ruling from the Federal District Court in Tucson in October 1996. Dr. Shalala appealed, saying the judge, Alfonso C. Marquez, had usurped her authority.

Last August the appellate court in San Francisco rejected the Administration's argument. Judge Charles E. Wiggins, a former Republican Congressman from California, said Medicare beneficiaries are entitled to due process because the H.M.O. decisions amount to "Government action."

H.M.O.'s are private corporations, but when they deny services to Medicare beneficiaries they are acting on behalf of the Government, the court said.

The Administration has issued rules for Medicare H.M.O.'s, but the order by Judge Marquez provides greater protection to beneficiaries. The judge's order sets tighter deadlines for H.M.O.'s to rule on appeals, and it guarantees that patients can receive urgently needed services while they pursue appeals.

Vicki Gottlich, a lawyer at the National Senior Citizens Law Center, said the court order also "goes much further than current Federal rules in requiring H.M.O.'s to explain what additional evidence you need to support your claim, and how to get that evidence."

A report on the case by Government lawyers says "the worst possible scenario" is that Dr. Shalala will appeal to the Supreme Court and the Justices will decline to accept the case for review.

Lower courts would probably view such action as "a judgment by the Supreme Court that our arguments are unpersuasive," the report said.

**The New York Times**

FRIDAY, JANUARY 22, 1999

Sally Kunkle