DEMOCRACY ON DRUGS

The Medicare/Prescription Drug Bill:
A Study in How Government Shouldn't Work

First in the Holding Power Accountable series

The HOLDING POWER ACCOUNTABLE series

A series of reports by Common Cause that chronicle efforts to bypass or undermine the rules and laws that are in place to ensure that our government works in an open and accountable manner and that all voices are heard on critical public policy issues.

COMMON CAUSE
Holding Power Accountable

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Introduction

Our Constitution reflects the over-arching concern of the Founding Fathers that the rights of the minority be jealously preserved and protected, even in the presence of a strong majority. From start to finish, the $535 billion Medicare bill passed by Congress and signed by President Bush late last year has been a study in shutting out opposing voices and suppressing the flow of vital information.

This Common Cause report chronicles a series of incidents, large and small, that add up to a consistent effort by the Administration and Congressional leadership to bypass or undermine the rules and laws that are in place to ensure that our government works in an open and accountable manner and that all voices are heard on critical public policy issues.

The Medicare bill (see appendix) is the product of a process that included:

- Charges of **bribery, delayed votes, inappropriate cabinet member lobbying and censoring of C-SPAN cameras**.
- **The Administration misleading Congress** by withholding its own cost estimates for the prescription drug legislation — estimates that greatly exceeded what the President was telling the public. A career civil servant being threatened with his job if he told Congress the truth.
- **Congressional Members excluded** from the House-Senate conference committee that finalized the bill. Only a "**coalition of the willing**" was invited to participate.
- **A principal author of the bill was forced to step down** as head of a powerful House committee after it was reported that he was **negotiating a $2 million a year lobbying job with the drug industry while he was moving the proposal through his committee**. And a key Administration official involved in pushing the legislation was also offered lucrative private sector healthcare jobs.
- The **drug industry showered Congress with campaign contributions** and spent millions of dollars on highly paid lobbyists who swarmed Capitol Hill while the bill was being considered.
- A **propaganda campaign waged** by the Department of Health and Human Services. The **Administration paid people to pose as journalists** in television segments that praised the benefits of the new Medicare law, and **spent tens of millions of dollars on a campaign promoting the new program.**

Charges of Bribery on the House Floor

> *"directly or indirectly, corruptly gives, offers or promises anything of value to any public official ... with intent to influence any official act"*
>
> — U.S. Code, Title 18, Sec. 201: "Bribery of public officials"

At the break of dawn on Nov. 22, 2003, Representative Nick Smith (R-MI) was about to cast his vote against a Medicare/prescription drug bill so flawed and controversial that the Republican House leadership held the vote open for three hours while they pressured their own Republican colleagues to vote for the bill. Votes in the House typically are open for 15 minutes.

Strong-arming Members of the House to vote with the leadership is routine business, but what went on in those early morning hours appears to have slid over the line from political pressure to outright bribery.

A Nov. 23, 2003 column written by Rep. Smith appearing on his website reads:

> *"I was targeted by lobbyists and the congressional leadership to change my vote, being a fiscal conservative and being on record as a no vote. Secretary of Health and Human Services Tommy Thompson and Speaker of the House Dennis Hastert talked to me for a long time about the bill and about why I should vote yes. Other members and groups made offers of extensive financial campaign support and endorsements for my son Brad who is running for my seat. They also made threats of working against Brad if I voted no."*

On Dec. 1, 2003, in a radio interview with Kevin Vandenbroek of WKZO in Kalamazoo, Mich., Rep. Smith said:

> *"They started out by offering the carrot, and they know what's important to every member, and what's important to me is my family and my kids. And I've term-limited myself, and so Bradley my son is running for [my congressional seat] and so the first offer was to give him $100,000-plus for his campaign and endorsement by national leadership. And I said No, I'm gonna stick to my guns on what I think is right for the constituents in my district."*

Since Rep. Smith went public with his allegations, he has made several attempts to modify his original statement. Speaking to David Frownfelder of the *Daily Telegram* in Adrian, Mich. Rep. Smith said:

> *"I was told there would be aggressive, substantial support for my son, Brad [in his race for Congress] if I could vote yes on the bill. There were offers of endorsements and so* maybe *a member [of Congress] sitting close by said, 'Boy that really could be big money.' Tens of thousands or hundreds of thousands. But never was I offered any exact amount of money in exchange for my vote. Technically, in the legal description that I later reviewed on what a bribe is, probably it didn't meet the legal description of a bribe."*

Censoring C-SPAN

C-SPAN cameras perched above the House floor have for 25 years allowed the public to see for themselves how their representatives are carrying on the public's business. But the night of the vote on the prescription drug bill, the House leadership censored the public's view of the chamber.

In an interview on the 25th anniversary of C-SPAN's television coverage of Congress, the head of C-SPAN, Brian Lamb, noted that the congressional leadership has always controlled the cameras in the House and Senate chambers, generally focused on whoever is speaking, but also panning across the chamber to show activity on the floor. Lamb pointed out how the leadership's control of the cameras can subvert C-SPAN's studiously nonpartisan, objective coverage of Congress. Lamb said:

> *"You saw what happened in the middle of the night over the vote on Medicare on the floor of the House of Representatives, when they controlled the cameras. And I noticed that the camera wasn't moving from — it usually moves constantly from side to side. For almost the entire two or three hours that they had it open, the camera was showing the Democratic side. And that's where people don't get a fair shot."*

In other words, the Republican leadership of the House intentionally diverted the C-SPAN cameras away from the Republican side of the House floor. Consequently, there is no visual record of who was talking to who that night while votes were sought by the leadership.

HHS Secretary on the House Floor

Rep. Smith said he was pressured during the three-hour vote by his own House leadership, but also, to his surprise, by the Department of Health and Human Services (HHS) Secretary Tommy Thompson, who made an unusual appearance on the House floor that night.

While House rules allow federal department heads to be in the House chamber, it is rare for such an official to be lobbying for legislation being considered by the House. According to *National Journal's CongressDaily*, Secretary Thompson defended the fact that he had broken House customs by lobbying members on the House floor during the final, three-hour roll call vote on the Medicare reform bill. "I spent five months working on this bill. I think it was only proper my being on the floor," Thompson said. But it appears Thompson's activities that night were a sharp departure from House customs.

Misleading Congress and Withholding Pivotal Information

> *"No government official should ever be muzzled from providing critical information to Congress."*
>
> — Senator Chuck Grassley (R-IA)
> Senate Finance Committee Chairman

In 1997, Rep. Bill Thomas (R-CA) added language to the Balanced Budget Act conference report citing the importance of access by Congress to the estimates of HHS chief actuary (then, as now, Richard Foster). Some of that language in the conference report reads as follows:

> *"It is important to emphasize that the Senate Committee on Finance, the House Committee on Ways and Means, and the House Committee on Commerce all rely on their ability to seek estimates and other technical assistance from the Chief Actuary, especially when developing new legislation. ... 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. ...*
>
> *When information is delayed or circumscribed by the operation of an internal Administration clearance process or the inadequacy of actuarial resources, the Committees' ability to make informed decisions based on the best available information is compromised."*

Flying in the face of this statement, Foster, who has been the chief auditor in HHS for several years, said that he was threatened with dismissal if he released his official estimate of the cost of the prescription drug bill. His estimate added $156.5 billion to the estimated cost and likely would have led to several conservative Republicans voting against the bill.

In a public statement, Foster said:

> *"For many years my office has provided technical assistance to the administration and Congress on a nonpartisan basis. But in June 2003, the Medicare administrator, Tom Scully, decided to restrict the practice of our responding directly to Congressional requests and ordered us to provide responses to him so he could decide what to do with them. There was a pattern of withholding information for what I perceived to be political purposes, which I thought was inappropriate."*

Foster has said that he gave analyses in June 2003 to the White House and the Office of Management and Budget – which were not shared with Congress – predicting that prescription drug benefits being drafted on Capitol Hill would cost about $156 billion more than President Bush said he wanted to spend. Since Congress passed the Medicare bill, the Administration has revised its estimated 10-year cost of the program to $534 billion. Its original estimate was $395 billion.

Foster, the government's chief analyst of Medicare costs, says that he was warned repeatedly by his former boss, Thomas A. Scully, the Medicare administrator for three years, that he would be dismissed if he replied directly to legislative requests for information about prescription drug bills pending in Congress. In an email released by Foster, Scully's assistant, Jeffrey Flick, instructed the actuary to answer Republican queries regarding provisions in the Medicare bill but was warned – in bold font – not to provide information for Democratic requests “with anyone else until Tom Scully explicitly talks with you – authorizing release of information. The consequences for insubordination are extremely severe,” Flick wrote in bold type. Interviews with federal officials, including Foster and Scully, make clear that the actuary’s numbers were circulating within the Administration, and possibly among some Republican supporters of the bill on Capitol Hill, throughout the second half of last year, as Congress voted on the prescription drug bill, first in June and again in November.

At a hearing on Feb. 10, Secretary Thompson told lawmakers as much. Thompson said, “we knew all along” that the administration’s cost estimates would be higher, but said he did not have a final figure until Dec. 24, 2003, after the bill was already signed into law.

On April 26, the Congressional Research Service issued a letter on the legality of Scully’s decision to withhold information from Congress. Its conclusions read in part as follows:

> *“...actions which purposefully result in the transmission of knowingly false information to the United States Congress, and actions that involving the intentional and active prevention of the communication of accurate information to Congress in derogation of Federal law or responsibilities, might in certain circumstances involve activities which constitute violations of federal criminal provisions... The issuance by an officer or employee in a department or agency of the Federal Government of a “gag order” on subordinate employees, to expressly prevent and prohibit those employees from communicating directly with Members or committees of Congress, would appear to violate a specific and express prohibition of federal law.”*

Conference Committee Lockout

> *“This meeting is only open to the coalition of the willing.”*
>
> — Rep. Bill Thomas (R-CA)
> Chairman of the House Ways and Means Committee

When the House and Senate each passed their own version of the Medicare bill, the Republican leadership at first followed routine procedure by appointing a 17-member conference committee to work out the differences between the two pieces of legislation. Seven Democrats were appointed to the committee. However, only two of those Democrats, Senators Max Baucus (MT) and John Breaux (LA), were included in the closed-door meetings that had actually produced the final legislation. Why? Because they were among the few Democrats who would not raise significant objections to the bill. According to conference members from both parties, when the bill was made available to the rest of the committee, they were given just one hour to review the 678-page document before they voted.

The ranking Democrat on the Ways and Means Committee, Rep. Charles Rangel (NY), was among the members of the original conference committee. However, he was excluded from the closed-door meetings. He arrived uninvited to one meeting, and Rep. Thomas, the conference chairman, stopped substantive discussion of the legislation until Rep. Rangel left.

Democrats and others have complained the tactics like those employed during the conference on the Medicare bill are becoming more common. Similar lockouts were staged during crucial conference committee meetings on huge energy and transportation bills. More and more the role of the full conference committee is perfunctory while the details of the legislation are hammered out in closed meetings that include only a small coterie handpicked by the party leadership.

Scully Cashes In

In December 2003, as the ink of the President’s signature was drying on the Medicare bill, Thomas A. Scully, the government official responsible for Medicare, announced that he was leaving the government for lucrative healthcare jobs in the private sector. He joined Alston & Bird, a law firm that represents hospitals, drug manufacturers and other companies in the health care industry. Scully also accepted a job with Welsh, Carson, Anderson & Stowe, a New York investment firm specializing in telecommunications and health care.

Surprisingly, even though federal law generally bars presidential appointees such as Scully from discussing possible employment with firms involved in matters handled by those officials, Scully obtained a waiver from the HHS ethics officer so that he could negotiate with potential employers while he helped write the Medicare law. These jobs did not just drop into his lap in December. He had apparently been negotiating with healthcare-related firms at the same time he was helping the Administration push the controversial prescription drug legislation through Congress, which directly affected those industries.

Apparently in response to criticism of Scully's waiver, the White house ordered federal agencies to cease issuing ethics waivers for senior Administration appointees that would allow them to pursue jobs with private companies while influencing federal policies that could affect those companies. A memo issued on Jan. 6, 2004 by the White House Chief of Staff stated that, effective immediately, such waivers could only be approved by the White House.

Tauzin Negotiates PhRMA Job While Negotiating Prescription Drug Bill

As Medicare chief Scully was job searching while also helping pass the drug legislation, a powerful Member of Congress was also looking for a new job.

The Pharmaceutical Research and Manufacturers Association (PhRMA), the trade group for name-brand drug producers, reportedly offered Representative Billy Tauzin (R-LA) the top position at PhRMA and a compensation package that "would be the biggest deal given to anyone at a trade association," around $2 million a year, according to *The Washington Post*. The offer came just two months after Rep. Tauzin helped negotiate a $534 billion Medicare prescription drug bill widely viewed as a boon to pharmaceutical companies, which stand to make billions in profits while avoiding government price restrictions.

In February 2004, Common Cause called on Tauzin to resign his chairmanship of the powerful House Energy and Commerce Committee, saying "Even if your job negotiations with PhRMA began after your work on the Medicare bill was over, as you have reportedly said, it leaves one wondering whether you were trying to please PhRMA and what PhRMA may have promised you in return."

Tauzin denied there were any dealings with industry in exchange for his work on the bill, but he stepped down from the chairmanship of the House Energy and Commerce Committee in early February, while negotiations over the PhRMA lobbying post continued. The job remains open and Tauzin may still be eligible if it remains open at the end of his term.

Drug Industry Money Undermined the Process

As the Congressional fight on prescription drugs loomed, the drug industry drew up plans for raising millions of dollars to defeat efforts to reduce drug prices. The financial stakes were huge and the industry began to spend enormous amounts of money on campaign spending, lobbying, and advertising to influence the outcome of the legislation.

No group epitomized this more than PhRMA. PhRMA not only had a tremendous stake in the bill, but also turned out to be a major winner. The law prohibits the federal government from negotiating for lower drug prices and prohibits the reimportation of prescription drugs that are produced in the U.S. but sold for significantly less in other countries, which would also bring down the price of drugs.

PhRMA increased its yearly budget 23 percent to $150 million in anticipation of the upcoming Medicare fight. While PhRMA's interests range from international policy to local initiatives, industry protection in the Medicare reform bill was its top priority. According to published reports, PhRMA planned to spend $1 million for an "intellectual echo chamber of economists – a standing network of economists and thought leaders to speak against federal price control regulations through articles and testimony, and to serve as a rapid response team." Says one PhRMA document, "Unless we achieve enactment this year of market-based Medicare drug coverage for seniors, the industry's vulnerability will increase in the remainder of 2003 and in the 2004 election year."

PhRMA is well known as one of Washington's most powerful lobbying forces. The trade group alone spent $16 million on lobbying in 2003, according to federal lobby disclosure reports filed with the Senate Office of Public Records. Including lobbying spent by all of PhRMA's companies, the group spent at least $72.6 million lobbying in 2003 – or roughly $135,701 per member of Congress.

PhRMA has capitalized on hiring former Members of Congress and their staffs as part of its lobbying army. According to reports, PhRMA lobbyists include former Reps. Vic Fazio (D-CA), Vin Weber (D-MN) and Bill Paxon (D-NY). Other drug industry lobbyists include David W. Beier, former domestic policy advisor for Vice President Al Gore; Dave Larson, former health policy advisor to Senator Bill Frist (R-TN); and Edwin A Buckham, former chief of staff to Rep. Tom DeLay.

The industry maintains a constant presence among policymakers. For example, in the weeks following the House and Senate's passage of their respective Medicare bills in June, pharmaceutical companies organized parties for congressional staffers that worked on the legislation. According to *The Washington Post,* the drug company Johnson & Johnson planned a cocktail party near the Capitol. The invitations read, "In recognition of your part in the historic passage of Medicare drug bills by both houses of Congress..." After Common Cause sent letters to Senate conferees and House leaders stating that attendance by staff members to the party could violate congressional ethics rules, the leadership discouraged their staff from going and the party was later cancelled. Congressional staff still had the opportunity, however, to attend a "Rooftop Rendezvous" thrown by PhRMA and hospital trade groups.

HHS Propaganda Campaign

Once legislation passes Congress and is signed into law by the President, it is the job of the executive branch to implement the new law, including informing the public of the effect or the benefits of the new law. HHS, charged with implementing the new prescription drug law, immediately launched a multi-million dollar campaign promoting the new prescription drug benefit under the guise of public service advertising.

Early this year, HHS created a TV ad designed to educate the public on the new drug benefits, but many criticized the ads as being political advertisements for the Administration that mislead the public about the facts of the new program. Adding to the concern about politicization of the prescription drug program was a contract for $9.5 million for producing and distributing the ads that went to a partisan media company, National Media, Inc.

HHS has also produced videos that were sent to broadcasters around the country touting the new program. The videos feature hired "reporters" who appear to be delivering straight news stories, but do not identify the government as the producer. Two videos end with the voice of a woman who says, "In Washington, I'm Karen Ryan reporting." The "reporter" in the commercial is reading from a script written by HHS.

The General Accounting Office (GAO) is now investigating these 'fake video news' clips. The GAO will determine if they constitute illegal "covert propaganda." Federal law prohibits the use of federal money for "publicity or propaganda purposes" not authorized by Congress.

Conclusion

Posted on Congressional websites is a document called "How Our Laws Are Made." [http://thomas.loc.gov/home/lawsmade.toc.html]. No one really believes the process meticulously detailed in the document is followed exactly – legislating is a messy process. But the laws, rules and procedures cited in the document are there to ensure that democratic principles are not empty words in the Constitution, but inform the way our government operates on a daily basis.

This report has told a tale of the rush to pass a thinly supported prescription drug bill that was a prime political goal of the Administration. In that rush, supporters showed disregard for the law, congressional rules, and other procedures and customs. We must reform and strengthen some of those laws and rules and, perhaps more importantly, those public officials must be held accountable. Americans must be assured that democracy is not just another word, but an integral part of how our government operates.

Appendix

Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA)

The legislation was passed by the House on November 22, 2003, by the Senate on November 25, and signed by President Bush December 8.

The new law authorizes the government to spend $400 billion over 10 years, beginning Jan. 1, 2006, for a voluntary prescription drug program under Medicare. Under the new system, private insurers will compete to provide drug coverage to Medicare recipients through preferred provider organizations (PPOs), health maintenance organizations (HMOs) or insurance policies. Seniors may opt into one of the private plans or retain their traditional Medicare coverage and receive an additional drug-only insurance policy.

The MMA also makes changes to the medical coverage offered to Medicare's 40 million beneficiaries. It requires private insurers to compete with Medicare to insure the elderly against hospital and doctor's bills. Like the new drug benefit, beneficiaries may choose to keep their traditional fee-for-service coverage or switch to one of the private plans.

According to the *Center for Budget and Policy Priorities*, "The legislation provides inordinately complicated drug coverage that comes replete with rather gaping holes. At the same time, under the guise of promoting competition, it provides billions of dollars in unwarranted subsidies to HMOs and other managed care plans, paying them substantially more than it cost regular Medicare to provide the same services.... The legislation fails to include common-sense provisions to moderate the spiraling cost of drugs ... and provides drug coverage that is considerably more limited than advertised."