ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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February 14, 2006

The Honorable Nancy Pelosi
Democratic Leader
U.S. House of Representatives
H204 Capitol
Washington, DC 20515-6537

Dear Leader Pelosi:

I am writing to advise you that leading legal scholars believe that the bill known as S. 1932, the Deficit Reduction Omnibus Reconciliation Act of 2005, is not valid law because the version of the legislation signed by the President on February 8, 2006, is substantively different from the version voted on by the House on February 1, 2006. In the view of these legal experts, this legislation violates the Bicameral Clause of the Constitution, which requires that before a bill may become law, both houses of Congress must pass it in precisely identical form.

One of the experts I consulted, Professor Michael Gerhardt of the University of North Carolina School of Law, informed me that "the bill signed by President Bush was not constitutionally permissible." A second expert, Professor Michael Dorf of Columbia University Law School, similarly advised:

> the Constitution specifies that a bill becomes law when passed by both houses of Congress and signed by the President. S. 1932 was not passed by the House of Representatives. Thus, it is not law.

Professor Jamin Raskin of the American University Washington College of Law reached the same conclusion, stating: "the Deficit Reduction Omnibus Reconciliation Act of 2005 may be something but it is not law within the meaning of the Constitution."

The Republican leadership has tried to minimize this issue by characterizing the error as a "technical problem." Indeed, it may have begun as such, but the Republican leadership chose not to correct the error through any of the established means that have been employed for over 200 years. Instead, the leadership ignored the House rules and precedents and even the Constitution itself. This is a fundamental abuse of power without precedent in the history of the Congress.

Background

Last fall, the House and Senate passed different versions of the budget bill, which was officially known as S. 1932, the Deficit Reduction Omnibus Reconciliation Act of 2005. In order to reconcile the many differences between the chambers, the legislation was committed to a House-Senate conference committee.

A significant last-minute issue arose in the conference involving how long Medicare should pay for "Durable Medical Equipment" (DME), such as wheelchairs or oxygen equipment, before the equipment becomes the property of beneficiaries. Existing Medicare law provided for payments for DME by Medicare under a fee schedule for an unlimited period of time. In an effort to reduce Medicare spending, the conferees tentatively agreed to reduce the duration of Medicare payment to just 13 months. This proposal, however, generated objections from Senator George Voinovich and Rep. David Hobson, both of whom are from Ohio, where a major manufacturer of oxygen equipment is located.[1] To accommodate their concerns, the conference report reduced the duration of Medicare payments for most DME to 13 months, but directed Medicare to continue to pay for oxygen equipment for 36 months. The final conference report was filed on December 19, 2005.

The House passed the conference report on S. 1932 on December 19, 2005, by a vote of 212-206.

The Senate considered the conference report on December 19, 20, and 21. During that consideration, several points of order were raised against the report and sustained as violating the congressional budget process. A motion was made to waive these points of order but that motion was defeated. The effect was to defeat the conference report in the Senate.[2]

On December 21, the Senate passed S. 1932 with an amendment that reflected the contents of the conference report, minus the items that generated the points of order. The vote in the Senate was a tie, and Vice President Cheney cast the tie-breaking vote for the bill as amended. This bill, as amended, was then sent back to the House for its concurrence.

In the process of transmitting the bill, as amended, back to the House, the Senate clerk made a significant substantive change to the legislation. This change extended the duration of Medicare payments for all DME to 36 months, the same time period provided in the Senate amendment for oxygen equipment. The Senate clerk realized the mistake, and the Republican House leadership was informed of the error in January, several weeks before final House floor action was scheduled to occur.

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[1] *Small Typo, Big Headache*, The Hill (Feb. 9, 2006).
[2] *See* Congressional Record, H13178. (Dec. 22, 2005).

Such errors in formal messages between the houses are not unprecedented. They are recorded in the House precedents as having occurred as long ago as March 13, 1800, and as recently as July 12, 2005. They are typically handled by sending the legislation back to the Senate for the mistake to be corrected.[3]

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[3] Cf. 109th Congress House Rules Manual , Sec. 565 (296-297)(House Document No. 108-241):
"Sec. 565. Correction and return of messages. If messengers commit an error in delivering their message, they may be admitted or called in to correct their message. 4 Grey, 41. Accordingly, March 13, 1800, the Senate having made two amendments to a bill from the House, their Secretary, by mistake, delivered one only, which being inadmissible by itself, that House disagreed, and notified the Senate of their disagreement. This produced a discovery of the mistake. The Secretary was sent to the other House to correct his mistake, the correction was received, and the two amendments acted on de novo. A request of one House for the return of a bill messaged to the other, or the request of one House to correct an error in its message to the other, may qualify as privileged in the House or may be disposed of by unanimous consent (III, 2613; V, 6605; Deschler, ch. 32, Sec. 2; Oct. 1, 1982, p. 27172; May 20, 1996, p. 11809). For example: (1) the House by unanimous consent agreed to a request from the Senate for the return of a Senate bill, to the end that the Senate effect a specified (substantive) change in its text (May 7, 1998, p. 8386) or to the end that the bill be recommitted to committee (July 15, 2004, p. ----); (2) the House by unanimous consent directed its Clerk to correct an error in a message to the Senate (V, 6607); (3) the House, upon receipt of a request by the Senate to return a bill during consideration of the conference report accompanying that bill, laid the conference report aside and agreed to the Senate request (V, 6609); (4) the House requested the return of a message indicating passage of a Senate joint resolution after learning that both Houses had previously passed an identical House Joint Resolution, so that it could indefinitely postpone action thereon (Nov. 16, 1989, p. 29587); (5) the Speaker laid before the House as privileged a message from the Senate requesting the return of a message where it had erroneously appointed conferees to a bill after the papers had been messaged to the House, so that the message could be changed to reflect the appointment of Senate conferees (May 20, 1996, p. 11809); (6) the Speaker laid before the House as privileged a message from the Senate requesting the return of a Senate bill that included provisions intruding on the constitutional prerogative of the House to originate revenue measures (Oct. 19, 1999, p. 25901; Sept. 28, 2004, p. ----; Sept. 30, 2004, p. ----); (7) where the engrossment failed to depict certain action of the House, the House considered and agreed to a privileged resolution requesting the Senate to return the engrossment of a House bill (July 15, 2004, p. ----) and a House-passed Senate bill (Oct. 8, 2004, p. ----); (8) the Speaker laid before the House as privileged a message from the Senate requesting the return of Senate amendments to a House bill where the engrossment failed to properly depict the action of the Senate (July 12, 2005, p. ---." See also *Deschler's Precedents*, "House-Senate Relations" on "Messages Relating to Bills", 17-31.

The response by the Republican leadership to the error in S. 1932, however, was without precedent. It constitutes a violation of the House Rules and of the Constitution itself.

Apparently concerned that any additional vote in the Senate could endanger passage of the legislation, the Republican leadership did not seek to correct the problem. Instead, the Republican leadership brought the legislation to the House floor on February 1 without revealing to the Democratic leadership or the body of the House that the 36-month period in the legislation before the House did not represent the legislation passed by the Senate.

On February 1, the House voted on the version of the bill, as amended, that contained the DME mistake. The vote was extremely close, 216 to 214. As a result of this vote, the House and Senate had voted for different bills, the House having adopted a version that provided for 36 months for DME and the Senate having adopted a version that provided for 13 months.

Because the budget legislation originated in the Senate, the official version was returned to the Senate before being transmitted to the President for his signature. At this point, a Senate clerk made a second substantive change in the legislation, revising the House-passed text to reflect the original Senate-passed amendment. This change restored the 13-month period for coverage of DME other than oxygen equipment.

As part of the transmittal to the President, House Speaker Dennis Hastert and President pro tem of the Senate Ted Stevens signed a statement attesting that the legislation had been passed by both the Senate and the House. These leaders signed this statement despite the fact that the Republican leadership in both bodies knew that this was not true.

On February 8, the President signed the bill. The version the President signed is the version that reflected the Senate-passed amendment, not the House-passed text.

Views of Constitutional Experts

These facts raise serious constitutional issues. The Bicameral Clause in Article I, Section 7 of the U.S. Constitution describes how legislation may become law. It provides that before a bill is signed into law by the President, it must be passed in precisely identical form by both the House and the Senate. Independent experts in constitutional law whom I have contacted have advised that the budget legislation is not valid law because it violates this clause.

According to Michael Gerhardt, Samuel Ashe Distinguished Professor of Constitutional Law and Director of Center on Law and Government at the University of North Carolina School of Law:

> This legislation in question does not satisfy the requirements of the Bicameral Clause of the Constitution. The President needs to have confidence that the bill he is signing has in

> fact been approved in precisely the same, identical fashion by both houses of Congress. In this case, the two houses formally passed two different bills. Any difference between them means that they do not meet the requirements of bicameralism as explained by the Supreme Court in INS v. Chadha and City of New York v. Clinton. Consequently, the bill signed by President Bush was not constitutionally permissible.

According to Michael C. Dorf, Michael I. Sovern Professor of Law, Columbia University Law School:

> The question of whether S. 1932 became law when enrolled answers itself. Article I, Section 7 of the Constitution specifies that a bill becomes a law when passed by *both* houses of Congress and signed by the President. S. 1932 was not passed by the House of Representatives. Thus, it is not a law.
>
> Nothing in the enrolled bill doctrine set out in *Field v. Clark*, 143 U.S. 649 (1892), alters that conclusion. *Field* stands only for the proposition that *courts* will accept a bill's enrollment as proof of its authenticity. As the Supreme Court explained, "The respect due to coequal and independent departments requires the judicial department to act upon [the] assurance" provided by the President and the respective leadership of the House and Senate. *Id.* at 672. *Field* is, in other words, a doctrine of justiciability, not of substantive constitutional law.
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> Indeed, in light of more recent cases such as *United States v. Munoz-Flores*, 495 U.S. 385 (1990), it is not even clear that *Field* should be read to treat enrollment as irrebuttable evidence of a bill's having been properly enacted. *See* Matthew D. Adler and Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105, 1172-81 (2003).
>
> Fortunately, Congress can readily cure this problem by enacting new legislation in the conventional constitutional manner. However, proposed remedies such as a post hoc resolution about the sense of the Senate or House will not cut it.
>
> On some matters, the Constitution speaks in majestic generalities. The question of how a bill becomes a law is not one of them.

According to Jamin Raskin, Professor of Constitutional Law and Director, Program on Law and Government, American University Washington College of Law:

> The "Deficit Reduction Omnibus Reconciliation Act of 2005" may be something but it is not law within the meaning of the Constitution. In INS v. Chadha (1983), the Supreme Court made it perfectly clear that the requirement of bicameral passage is not waivable or adjustable in any way. In order for bills to become law, the Senate and the House of

Representatives must pass identical language and provisions. There must be an exact meeting of the minds. The Court emphasized that there are four (and only four) explicit constitutional mechanisms "by which one House may act alone with the unreviewable force of law," and those are the House power to impeach and the Senate's powers to try impeachments, approve presidential appointments and ratify treaties. It is rudimentary constitutional principle that, outside of these discrete exceptions, bills voted on by one chamber and not the other cannot and do not have the force of federal law under our Constitution. There is no "mistake" exception to the bicameralism requirement.

Surely it may be easier sometimes to ignore the bicameralism requirement or indeed to make a body think it is voting on one bill when it is really voting on another to pull a rabbit out of the hat later. But this does not make it constitutional. The bicameralism requirement, the Chadha Court observed, was "intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the Power of each Branch must not be eroded. [In] purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency."

If political efficiency is insufficient reason to ignore the bicameralism requirement, surely political inefficiency and mistake do not work either. Each house must know what language it is voting on, there must be a complete meeting of the minds between them, and the president must know what bill was passed by both houses before signing.

As the Chadha Court put it, "There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President."

The Senate Resolution stating that the bill presented to the President is the "true" bill reflecting the intent of Congress is (1) not law since it too was adopted by only one house and therefore fails the bicameral passage requirement; (2) essentially irrelevant to the interpretation of the statutory meaning of the bill for the same reason; and (3) inadequate to the task of reversing the unconstitutionality of the prior process. Either the prior legislation is law, in which case Senator Frist's correction is unnecessary and superfluous, or it is not law, in which case it is helpless to change the situation.

Experts who have spoken publicly about this have agreed with the views expressed above. Jonathan Turley, an expert in constitutional law at George Washington University, said:

> I would find it surprising that a court would give the Speaker a pass on effectively negating the bicameral requirement of the Constitution ... Obviously, the Speaker cannot certify a different bill as the will of the House of Representatives. If he could do that, he could become a House unto himself.[4]

Similarly, David Vladeck, a professor at Georgetown University School of Law and an expert in constitutional separation of powers stated:

> This violates one of the most fundamental guarantees in the Constitution, namely that both houses of Congress have to agree on all elements of a bill before it becomes law ... This bill is not a law because it doesn't meet the requirements of bicameralism.[5]

Conclusion

As the views of these legal scholars make clear, the bill the President signed on February 8, 2006, was not a law for one simple reason: It was not passed in identical form by both houses of Congress and therefore violates requirements of the Bicameral Clause of the Constitution.

The effort by the Republican leadership in Congress to enact a law that has not been passed by both Houses of Congress is not a "technical problem," as House Whip Roy Blunt recently called it. It is a major abuse of power. The budget legislation is not valid law and should be brought back before Congress for another vote.

Sincerely,

Henry A. Waxman

Henry A. Waxman
Ranking Minority Member

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[4] *Big or Little Problem With Budget Bill — Experts, Lawmakers Disagree*, CQ Today (Feb. 10, 2006).

[5] *Clerical Error Jeopardizes Deficit-Reduction Law*, NPR's Morning Edition (Feb. 13, 2006).