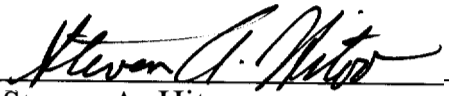




## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for Amici Curiae states that there is no parent corporation, or publicly held company that owns 10% or more of the stock, of any of the Amici herein.

NATIONAL HEALTH LAW PROGRAM

By:   
Steven A. Hitov  
Attorneys for Amici

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The parties have consented to the filing of this brief

The *Amici Curiae* are elected members of the United States House of Representatives. Each has taken an oath to “preserve, protect, and defend the Constitution of the United States,” as have all other members of Congress and the President.

One of the most important responsibilities of the *amici* is to represent the will of the people by voting on legislation that is brought before them. *Amici* and the other members of the House of Representatives voted on a version of the Deficit Reduction Act of 2005, S. 1932, on February 1, 2006. S. 1932 is comprehensive legislation, affecting a number of government programs, from housing and education to Medicare and Medicaid, and including significant appropriations. The version of S. 1932 that was passed by the Senate and signed by the President on February 8, 2006 is different from the version that passed the House.

Representative Henry A. Waxman (CA) is the Ranking Minority Member of the House Committee on Government Reform. Representative Nancy Pelosi (CA) is the Minority Leader of the House of Representatives. Representative John D. Dingell (MI) is the Ranking Minority Member of the House Committee on Energy and Commerce. Representative Charles B. Range1 (NY) is the

Ranking Minority Member of the House Committee on Ways and Means.

Representative Pete Stark (CA) is the Ranking Minority Member of the House Ways and Means Health Subcommittee. Representative George Miller (NY) is the Ranking Minority Member of the House Committee on Education and the Workforce. Representative James L. Oberstar (MN) is the Ranking Minority Member of the House Committee on Transportation and Infrastructure.

Representative Louise McIntosh Slaughter (NY) is the Ranking Minority Member of the House Committee on Rules. Representative Sherrod Brown (OH) is the Ranking Minority Member of the House Energy and Commerce Health Subcommittee. Representative Bennie G. Thompson (MS) is the Ranking Minority Member of the House Committee on Homeland Security.

#### SUMMARY OF ARGUMENT

The House and Senate passed different versions of S. 1932. The version of the bill signed by the President differed from the version passed by the House. The Republican leadership of the House and Senate knew, before the President signed the enrolled bill, that the enrolled version did not reflect what the House had passed. The President was aware that the legislation presented to him had not been passed by the House; yet, he signed it as the Deficit Reduction Act of 2005. The process nullified the votes of the *amici*, as they were never presented with an

opportunity to vote one way or the other on the version of the bill that is now purportedly the law of the land.

There are recognized methods of resolving differences when the House and Senate pass different versions of a bill. These accepted protocols were not used when the House and Senate passed different versions of S. 1932 and the President signed a version that was not passed by the House.

“A bill cannot become a law of the land until it has been approved in identical form by both Houses of Congress.” Charles W. Johnson, *How Our Laws Are Made*, H.R. Doc.No. 108-93, at 50 (2003). The Deficit Reduction Act of 2005 violates Article I, § 7 of the United States Constitution, which requires both houses of Congress to pass the same legislation before it can be signed into law by the President. The Deficit Reduction Act of 2005 also violates Article I, § 9 of the United States Constitution, which provides that money may be drawn from the Treasury only in consequence of appropriations made by the laws of Congress.

#### STATEMENT OF THE FACTS

The “facts are already well known.” U.S. House of Representatives Committee on Government Reform, Adverse Report together with Additional Views to accompany H. Res. 752 at 2 (May 4, 2006)(Exhibit A, hereto). We will summarize them here.

The House of Representatives and the Senate considered the Deficit Reduction Act of 2005, S. 1932, during the fall of 2005. The two chambers passed different versions of the legislation, so a House and Senate conference committee was formed to reconcile the differences.

The conference committee made a number of changes to the legislation. Among other things, the committee addressed Medicare payments for durable medical equipment (DME) and oxygen equipment. Existing law allowed payment for an unlimited period of time. To reduce Medicare spending, the conferees tentatively agreed to reduce the duration of Medicare payments to 13 months, after which the responsibility for payment would pass to the Medicare beneficiary. Senator George Voinovich and Representative David Hobson objected to the inclusion of oxygen equipment in the payment limitation. See Jeffrey Young & Patrick O'Connor, *Small Typo, Big Headache*, The Hill, Feb. 9, 2006. The conferees agreed to reduce the duration of Medicare payments for DME to 13 months and provided that Medicare would pay for oxygen equipment for 36 months.

On December 19, 2005, the conference report was submitted to the House and Senate for a vote. See H.R. Conf. Rep. 109-362 (2005), *reprinted in* 15 1 Cong. Rec. H12641 *et seq.* (Dec. 19, 2005). The House passed the conference report by a vote of 212 to 206 (Roll Call No. 670); 15 1 Cong. Rec. H12276-77

(Dec. 19, 2005). All of the *amici* participated in the consideration of the conference report and voted.

The Senate considered the conference report on December 19, 20, and 21. A point of order was raised against some sections of the report on the ground that they violated section 313(b)(1)(A) of the Congressional Budget Act of 1974, 2 U.S.C. § 644 (2000). See 151 Cong. Rec. S14204-05 (Dec. 21, 2005). Commonly called the “Byrd Rule,” this provision prohibits the Senate from considering extraneous matter as part of a reconciliation bill, resolution, or conference report. A motion was made to waive these points of order, but it failed (Record Vote No. 362). *Id.* at S14205. Thereafter, the Presiding Officer of the Senate sustained the Byrd Rule point of order, striking three provisions from the conference report. *Id.* Thus, the Senate rejected the conference report.

Immediately thereafter, as required by the Byrd Rule, the Senate considered and voted on S. 1932, as amended without the three stricken provisions. See 151 Cong. Rec. S14211 (Dec. 21, 2005). The measure passed by a 51-50 vote, with the Vice President casting the tie-breaking vote (Record Vote No 363). See 151 Cong. Rec. D1331 (Dec. 21, 2005); see 151 Cong. Rec. S 14337, S 14344, S 14360 (Dec. 22, 2005) (Congressional Record print).

The House and Senate had passed different versions of S. 1932. As a result, the Senate was required to engross, or transcribe, the text of the bill. The

engrossed version is the official copy of the bill as passed by the Senate, which must be sent to and acted on by the House. See 7 Lewis Deschler, *Deschler's Precedents of the United States House of Representatives*, ch. 24, § 12, H. Doc. No. 94-661, at 4889 (2d Sess. 1976).

As widely reported, the Senate clerk made an error in transcribing the bill that resulted in a significant, substantive change to the legislation. The change amended section 5 10 1 (a)( 1) of the Deficit Reduction Act to extend the duration of Medicare payments for *all* DME to 36 months. According to the Congressional Budget Office, this change increased the estimated budgetary outlay by about \$2 billion over five years. See Letter from Donald B. Mart-on, Acting Director, Congressional Budget Office, to Honorable John M. Spratt, Jr., Ranking Member, Committee on the Budget, U.S. House of Representatives (Feb. 13, 2006) (Exhibit B, hereto). The Senate clerk realized the error and informed the House leadership before the final House action was scheduled to occur.

Rather than address the difference, the House leadership knowingly sent S. 1932, with the error, to the floor for a vote. On February 1, 2006, the House agreed to the bill it had received from the Senate clerk by a vote of 216-214 (Roll Call No. 4). See 152 Cong. Rec. H68 (Feb. 1, 2006) (regarding H. Res. 653). As passed by the House of Representatives, the engrossed version of S. 1932 extended the duration of Medicare payments for all DME to 36 months. See 152

Cong. Rec. H69, H 77 (Feb. 1, 2006). All of the *amici* participated in consideration of the bill and voted.

Because the legislation had originated in the Senate, it had to return to the Senate to be transmitted to the President for signing. The Senate clerk then made a second, substantive change in the legislation, revising the House-passed text to reflect the language passed in the Senate, thereby restoring the 13-month period for coverage of DME other than oxygen equipment. See Congressional Q. Daily, Feb. 10, 2006, at 5.

The Speaker of the House and the President *pro tempore* of the Senate signed an attestation that the legislation had been passed in identical form by both the House and the Senate. On February, 8, 2006, the President signed the version of S. 1932 that had passed the Senate (authorizing Medicare payment of oxygen equipment for 36 months and all other DME for 13 months).

Later that evening, the Senate passed a resolution, S. Con. Res. 80, 109th Cong. (2nd Sess. 2006), which “deemed” the version of the bill signed by the President to reflect the intent of the Congress. See 152 Cong. Rec. S869-70 (Feb. 8, 2006). The House received the message from the Senate stating that the Senate had agreed to S. Con. Res. 80 and asking the House to agree to it as well. *Id.* at H202-05. However, the House did not take up the measure.

The Republican leadership knew that their respective chambers had not passed identical versions of the Deficit Reduction Act before the President signed it. According to reports published after the fact, Speaker Dennis Hastert asked the President to delay signing the bill to allow the House and Senate time to take further action. When the Speaker and Senate Majority Leader went to the White House on February 8th, they expected only a “mock ceremony,” not a real signing. David Rogers, *Politics & Economics: Watchdogs ‘Suit Could Threaten Budget Cutbacks*, Wall St. J., Mar. 22, 2006, at A-6. However, knowing of the discrepancy, the President signed S. 1932 into law without allowing time for any action by the House and Senate to address the discrepancy. U.S. House of Representatives Committee on Government Reform, Adverse Report together with Additional Views to accompany H. Res. 752 at 2 (Exhibit A, hereto).

#### ARGUMENT

- I. The manner of signing the Deficit Reduction Act of 2005 violated the House Rules and the Constitution itself.

Discrepancies in the legislation passed by the houses of Congress are not unprecedented. They are recorded as having occurred as early as March 13, 1800 and as recently as July 12, 2005. Yet, when such differences occur, they are handled by sending the legislation back to the appropriate chamber for the mistake to be corrected.

The House Rules provide explicit directions and numerous examples of the required approach:

If messengers commit an error in delivering their message, they may be admitted or called in to correct their message. 4 Grey, 41. This is the long-standing rule, as exemplified by the Rules Manual itself. For example, on March 13, 1800, the Senate, having made two amendments to a bill from the House, their Secretary, by mistake, delivered only one, 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 this 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. 3, 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. 295870); (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. 118090); (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 109th Congress House Rules Manual §565, H.R. Doc. No. 108-241, at 296-97; see also *Deschler*, supra page 6, at 17-3 1.

Prior to sending it to the floor for a vote, the Republican leadership of the House knew that the engrossed bill received from the Senate, S. 1932, contained a provision regarding Medicare payment for DME that had not been passed by the Senate. Rather than following the House Rules, the leadership brought the bill to the floor of the House, which passed it by a 216-214 vote margin.

The process leading up to and including the signing of S. 1932 by the President was unprecedented. It is a basic constitutional principle that a bill is not a law unless the same version is passed by both the House and the Senate and signed by the President. See *City of New York v. Clinton*, 985 F. Supp. 168, 178 (D.D.C.), *aff'd*, 524 U.S. 417 (1998) (“At the heart of the notion of bicameralism is the requirement that any bill must be passed by both Houses of Congress in exactly the same form.”) The Constitution gives no authority to any one individual—whether the Speaker of the House, the President pro *tempore* of the Senate, or a Clerk—to change unilaterally the text of legislation passed by either

body. Nonetheless, on February 8, 2006, this fundamental tenet of our democratic system of government was ignored with the full knowledge of high-ranking congressional and White House officials.

In sending a different bill to the President from the bill passed by the House of Representatives, the Speaker of the House became a House unto himself. In signing a bill that he knew the House of Representatives had not passed, the President placed himself above the Constitution. In the process, the votes of the *amici* and all other members of the House of Representatives, except that of the Speaker, were nullified.

The House had passed its version of S. 1932 by a razor-thin 216-214 margin, so it was surely more efficient for a few selected representatives and the President to decide the law and sign it; however, the desire for efficiency cannot trump the Constitutional requirement that legislation pass both houses of Congress in identical form before it is signed by the President. See U.S. Const., art. I, §7. As the Supreme Court has stated, this requirement is

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 records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.

*INS v. Chadha*, 462 U.S. 919, 957, 959 (1983).

More than 100 years ago, the Supreme Court addressed whether a bill could become law if the version signed by the President differed from the version passed by the House and Senate. In *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), the Court held that the President could rely on the attestation of the Speaker of the House and the President of the Senate that the legislation before the President was the same as the legislation that passed the Congress. But the Court also recognized that the outcome would be different if there were a “deliberate conspiracy” to ignore the Presentment Clause of the Constitution:

It is said that . . . it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution.

*Id.* at 672-73.

Prior to February 8, the possibility of any President knowingly signing legislation that did not pass Congress was “too remote to be seriously considered” by most Americans. However, that possibility has now admittedly become reality. See U.S. House of Representatives Committee on Government Reform, Adverse Report together with Additional Views to accompany H. Res. 752 at 2 (Exhibit A, hereto).

II. The court should declare the Deficit Reduction Act of 2005 unconstitutional.

“It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In this case, Article I, § 7 of the Constitution is clear: For a bill to become a law, it must be passed in identical form by both Houses of Congress before it is signed by the President. The congressional leadership and President must follow this “single, finely wrought and exhaustively considered, procedure.” *Chadha*, 462 U.S. at 95 1. The Constitution contains no authority for the congressional leadership or the President to develop their own methods for making law, as was the case with the process leading up to the President’s signing of the Senate version of S. 1932. The *amici* adopt the legal arguments on this point made by the Plaintiffs-Appellants. In addition, they make the following additional points:

The Deficit Reduction Act also violates the Appropriations Clause of the Constitution which provides, “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .” U.S. Const., art. I, § 9. The purpose of the Clause is to “place authority to dispose of public funds firmly in the hands of Congress rather than the Executive.” *Am. Fed ’n Gov’t Employees, AFL-CIO Local 1674 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 408-09(3d Cir. 2004). “It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not

according to the individual favor of Government agents. . . .” *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414,428 (1990). Here, Congress never reached agreement in the Deficit Reduction Act as to how public funds will be spent. The version of the bill passed by the House differed from the version passed by the Senate and signed by the President. With his signature, the President authorized the Treasury to implement unicameral legislation.

In addition, if ignored, the process leading up to the President’s signing of the Senate version of S. 1932 will have seriously eroded the separation of powers envisioned by the Constitution and founding fathers. To safeguard liberty, the Constitution creates three separate, distinct branches of government—the Congress, the President and the federal judiciary. Each branch is assigned differing roles in the exercise of the government’s powers, and there are both substantive and procedural limitations on each branch. The founding fathers of this country “viewed the principle of separation of powers as a vital check against tyranny.” *Buckley v. Valeo*, 424 U.S. 1, 12 1 (1976) (per curiam). Thus, where “[e]xplicit and unambiguous provisions of the Constitution prescribe and define . . . just how powers are to be exercised,” the procedures are to be followed with precision. *Chadha*, 462 U.S. at 945.

The procedures used to sign the legislation at issue here ignored these founding principles. The House of Representatives never voted on the version of

S. 1932 that was purportedly signed into law by the President. The President signed a version of the bill to which only the Senate had consented and thereby knowingly disregarded the legislative process set forth in the Constitution.

Although the House leadership is now saying that the “courts are perfectly capable of addressing” the constitutional infirmities, see Adverse Report together with Additional Views to accompany H. Res. 752 at 2 (Exhibit A, hereto), the Administration is seeking to avoid judicial review altogether. Resting upon dicta in *Field*, 143 U.S. at 649, the Administration has argued that the judicial branch cannot say what the law is because the leadership of Congress certified that the President was being presented with a version of S. 1932 that had passed both chambers. However, this 100-year-old, discredited dicta is not applicable here, because the “well known” facts establish that both the congressional leadership and the President knowingly and deliberately ignored the requirements of the Constitution. As the *Field* Court stated: “There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, not in the president to approve, not in the secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.” *Field*, 143 U.S. at 669.

CONCLUSION

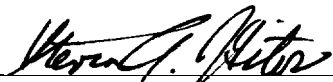
The procedures used to enact S. 1932 violated fundamental Constitutional requirements that cannot be ignored by any branch of the government. The Court should declare the law invalid in its entirety.

Respectfully submitted,

Representatives Henry A. Waxman, Nancy Pelosi,  
John D. Dingell, Charles, B. Rangel, Pete Stark,  
George Miller, James L. Oberstar, Louise McIntosh Slaughter,  
Sherrod Brown, Bennie G. Thompson

Dated: September 8, 2006

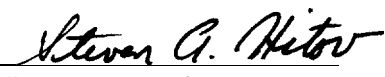
NATIONAL HEALTH LAW PROGRAM

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## CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. Rule 29(d) and Rule 32(a)(7), that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3,893 words.

Dated: September 8, 2006


  
Steven A. Hitov

## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing brief has been forwarded by first class postal service and electronic service to the following counsel this 8<sup>th</sup> day of September 2006:

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## **Exhibit A**

REQUESTING THE PRESIDENT TO TRANSMIT TO THE HOUSE OF REPRESENTATIVES NOT LATER THAN 14 DAYS AFTER THE DATE OF ADOPTION OF THIS RESOLUTION DOCUMENTS IN THE POSSESSION OF THE PRESIDENT RELATING TO THE RECEIPT AND CONSIDERATION BY THE EXECUTIVE OFFICE OF THE PRESIDENT OF ANY INFORMATION CONCERNING THE VARIATION BETWEEN THE VERSION OF S. 1932, THE DEFICIT REDUCTION ACT OF 2005, THAT THE HOUSE OF REPRESENTATIVES PASSED ON FEBRUARY 1, 2006, AND THE VERSION OF THE BILL THAT THE PRESIDENT SIGNED ON FEBRUARY 6, 2006

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MAY 9, 2006.—Referred to the House Calendar and ordered to be printed

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Mr. TOM DAVIS of Virginia, from the Committee on Government Reform, submitted the following

### ADVERSE REPORT

together with

### ADDITIONAL VIEWS

[To accompany H. Res. 752]

The Committee on Government Reform, to whom was referred the resolution (H. Res. 752) requesting the President to transmit to the House of Representatives not later than 14 days after the date of adoption of this resolution documents in the possession of the President relating to the receipt and consideration by the Executive Office of the President of any information concerning the variation between the version of S. 1932, the Deficit Reduction Act of 2005, that the House of Representatives passed on February 1, 2006, and the version of the bill that the President signed on February 8, 2006, having considered the same, report unfavorably thereon without amendment and recommend that the resolution not be agreed to.

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#### COMMITTEE STATEMENT AND VIEWS

The Committee concluded that the requested inquiry was unwarranted because the facts are already well known and the courts will resolve the legal effect, if any, of the clerical error in the Deficit Reduction Act of 2005.

The President was presented with a bill that was certified by the Speaker of the House and the President Pro Tempore of the Senate as being an Act of Congress, and he signed it. It has been widely reported that a Senate clerk made an error in the bill that was transmitted to the President and that White House staff noticed the mistake prior to the signing of the bill.

That error involved the length of time that certain medical devices can be leased under Medicare. The bill that was transmitted to the House by the Senate, voted on by the House, and transmitted back to the Senate, allowed 36-month leases. Apparently the version voted upon by the Senate had limited the lease period to 13 months, but a clerk mistakenly had altered that version to allow 36-month leases before it was transmitted to the House. After the House voted on the bill as transmitted by the Senate, a Senate clerk erroneously changed that 36-month lease period back to 13 months before it was signed by the Speaker and the President Pro Tempore, without knowledge of the error. When White House officials noticed the change, they chose to rely on the signatures on the bill.

Moreover, the Senate was not at all disturbed by the error of its clerk. It passed by unanimous consent that same day S. Con. Res. 80, deeming the bill signed by the President to reflect Congress's intent. In other words, the Senate was satisfied that in the face of its own error, Congress intended to allow such leases for 13 months, not 36 months.

Finally, the courts will determine whether the error has any legal effect. As the Minority have noted in their letters and statements on this subject, clerical errors happen. This was nothing but a clerical error. To the extent that such an error has significant constitutional implications, the courts are perfectly capable of addressing them. The Committee believes that further inquiry into this matter by the Congress will not serve any useful purpose that the courts cannot address.

#### PURPOSE AND SUMMARY

House Resolution 752 is a resolution of inquiry introduced on March 30, 2006, by Government Reform Committee Ranking Member Henry Waxman, seeking all telephone, email, and other records from the Executive Office of the President regarding variations between S. 1932, the Deficit Reduction Act of 2005, as passed by the House and the bill signed by the President.

## BACKGROUND AND NEED FOR LEGISLATION

H. Res. 752 is a resolution of inquiry. The resolution would request the President to transmit to the House of Representatives not later than 14 days after the date of adoption of this resolution, all documents, including telephone and electronic mail records, logs and calendars, and records of internal discussions in the possession of the President relating to the receipt and consideration by the Executive Office of the President of any information concerning the variation between the version of S. 1932, the Deficit Reduction Act of 2005, that the House of Representatives passed on February 1, 2006, and the version of the bill that the President signed on February 8, 2006.

House of Representatives rule XIII clause 7 provides that if the Committee to which a resolution of inquiry is referred does not act on the resolution within 14 legislative days, a privileged motion to discharge the Committee is in order on the House floor. In calculating the days available for Committee consideration, the days of introduction and discharge are not counted.

Upon introduction, H. Res. 752 was referred to the Committee on Government Reform. As of the filing of this report, sixteen resolutions of inquiry have been introduced in the House during the 109th Congress. None of the resolutions have been reported favorably to the House.

## SECTION-BY-SECTION

H. Res. 752 would request the President to transmit to the House of Representatives not later than 14 days after the date of adoption of this resolution, all documents, including telephone and electronic mail records, logs and calendars, and records of internal discussions in the possession of the President relating to the receipt and consideration by the Executive Office of the President of any information concerning the variation between the version of S. 1932, the Deficit Reduction Act of 2005, that the House of Representatives passed on February 1, 2006, and the version of the bill that the President signed on February 8, 2006.

## EXPLANATION OF AMENDMENTS

There were no amendments offered.

## COMMITTEE CONSIDERATION

On May 4, 2006, the Committee met in open session and ordered the resolution to be reported unfavorably to the House by recorded vote.

## ROLLCALL VOTES

H.Res. 752- Resolution of Inquiry Regarding S.1932  
Reported Unfavorably

5-4-06

COMMITTEE ON GOVERNMENT REFORM  
109TH CONGRESS - 2nd SESSION  
ROLL CALL SHEET

MR. DAVIS (VA) (CHAIRMAN)	X			MR. WAXMAN		X	
MR. SHAYS	X			MR. LANTOS		X	
MR. BURTON	X			MR. OWENS			
MS. ROS-LEHTINEN				MR. TOWNS		X	
MR. MCHUGH				MR. KANJORSKI		X	
MR. MICA	X			MR. SANDERS			
MR. GUTKNECHT	X			MRS. MALONEY			
MR. SOUDER	X			MR. CUMMINGS		X	
MR. LATOURETTE				MR. KUCINICH		X	
MR. PLATTS				MR. DAVIS (IL)		X	
MR. CANNON	X			MR. CLAY		X	
MR. DUNCAN	X			MS. WATSON		X	
MRS. MILLER (MI)	X			MR. LYNCH		X	
MR. TURNER (OH)				MR. VAN HOLLEN		X	
MR. ISSA	X			MS. SANCHEZ		X	
MR. PORTER	X			MR. RUPPERSBERGER		X	
MR. MARCHANT				MR. HIGGINS			
MR. WESTMORELAND	X			MS. NORTON			
MR. MCHENRY							
MR. DENT	X						
MRS. FOXX	X						
MRS. SCHMIDT	X						
VACANCY							

Totals: Ayes 1 N a y s 13 Present

## APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of bills and joint resolutions to the legislative branch where the bill or joint resolution relates to the terms and conditions of employment or access to public services and accommodations. The Committee finds that the section does not apply because H. Res. 420 is not a bill or joint resolution.

## STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

## CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the rule does not apply because H. Res. 420 is not a bill or joint resolution that may be enacted into law.

## FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the resolution does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

## UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104-4) requires a statement whether the provisions of the legislation include unfunded mandates. The section does not apply because H. Res. 420 is not a bill or joint resolution that may be enacted into law.

## COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H. Res. 752. The Committee estimates the costs of implementing the resolution would be minimal. The Congressional Budget Office did not provide a cost estimate for the resolution.

## BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CHANGES IN EXISTING LAW MADE BY THE BILL AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee notes that H. Res. 420 makes no changes to existing law.

## ADDITIONAL VIEWS

### VIEWS OF HON. HENRY A. WAXMAN

I introduced H. Res. 752 to require the Administration to provide Congress with documents concerning the President's role in S. 1932, the Deficit Reduction Act of 2005. Constitutional requirements were not followed when the bill was presented to and signed by the President. The resolution seeks to find out why.

On February 8, 2006, President Bush signed into law a version of S. 1932 that was different in substance from the version the U.S. House of Representatives passed on February 1, 2006. The House-passed version of the legislation required the Medicare program to lease "durable medical equipment," such as wheelchairs, for seniors and other beneficiaries for up to 36 months, while the version of the legislation signed by the President limited the duration of these leases to just 13 months. As the Congressional Budget Office reported, this seemingly small change from 36 months to 13 months has a disproportionately large budgetary impact, cutting Medicare outlays by \$2 billion over the next five years.

Under the U.S. Constitution, a bill cannot become law unless the same version is passed by both Houses of Congress and signed by the President. It appears that the Republican congressional leadership knew that the process of enacting S. 1932 violated this principle. Evidence is mounting that the President and his staff may have knowingly participated in this constitutionally infirm process.

It appears that on the morning of February 8—the day the legislation was signed by the President—the office of House Speaker Hastert called senior staff at the White House to notify the file White House that the version of the legislation that had been sent to the President differed from the version passed by the House. Despite these communications from the House Speaker, the President signed the bill on February 8.

This information has serious constitutional implications. When the President took the oath of office, he swore to "preserve, protect, and defend the Constitution of the United States." If the President signed S. 1932 knowing its constitutional infirmity, he would in effect be placing himself above the Constitution.

The President's decision to authorize the National Security Agency to conduct warrantless wiretaps despite federal laws forbidding the practice has raised questions in the minds of many Americans about whether he considers himself bound by the laws enacted by Congress. The President's assertion that he can ignore a recently enacted law prohibiting torture has raised similar questions.

The evidence that the President signed the Deficit Reduction Act knowing that it differed from legislation passed by the House presents an even more fundamental issue:

Does the President consider himself bound by the provisions of our nation's Constitution?

Given the constitutional issues at stake, it is imperative that Congress exercise its oversight powers to examine what the President and his staff knew about the defects in S. 1932 and how they considered and acted on any such information. The resolution of inquiry would advance such a congressional inquiry by requesting that the White House provide Congress with all documents relating to information the White House had about the difference between the version of the bill the House passed on February 1 and the version the President signed on February 8.

#### BACKGROUND

Last fall, the House and Senate passed different versions of the Deficit Reduction Omnibus Reconciliation Act of 2005. During the House-Senate conference committee on the bill, a significant last-minute issue arose in the conference involving how long Medicare should pay for durable medical equipment (DME). 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 a Senator and representative from Ohio, where a major manufacturer of oxygen equipment is located. 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.

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 deciding vote. 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.

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.

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.

On February 7, the budget legislation was presented to the President. The documents transmitted to the President included an attestation by House Speaker Dennis Hastert and President pro tern of the Senate Ted Stevens that the legislation had been passed by both the Senate and the House.

On the morning of February 8, the White House Office of Management and Budget notified Republican congressional staff that the version of the legislation presented to the President was not the same as the version of the legislation passed by the House. This information was conveyed to the office of House Speaker Hastert. The Speaker's chief of staff then called senior staff at the White House to advise the White House of this mistake and to request a delay in signing of the legislation.

According to a recent Wall Street Journal account, the Speaker's office "confirmed \* \* \* that the Illinois Republican had asked the administration to delay proceedings until the problem could be addressed by the House and Senate." Indeed, the Wall Street Journal reported, "When the Speaker and Senate Majority Leader \* \* \* went to the White House for the Feb. 8 ceremony, they expected only a 'mock ceremony'-not a real signing of the parchment that had been presented in error."

On the afternoon of February 8, despite the communications from the House Speaker, the President signed the bill. The version the President signed is the version that reflected the Senate-passed amendment, not the House-passed text.

#### CONSTITUTIONAL ISSUES

Some have attempted to suggest the differences between the versions signed by the President and passed by the House amount-

ed to a “technicality.” But the difference between the versions of the bill had a substantial budgetary impact, amounting to \$2 billion over 5 years. Two billion dollars in federal spending is not a mere technicality.

Even more important, there are serious constitutional concerns with the legislative process on the Deficit Reduction Act. A number of preeminent constitutional scholars agree that the Deficit Reduction Act is not a valid law.

Professor Michael Gerhardt of the University of North Carolina School of Law stated: “the bill signed by President Bush was not constitutionally permissible.”

Professor Michael Dorf of Columbia University Law School said: “the Constitution specifies that a bill becomes law when passed by both houses of Congress and signed by the President. [This bill] was not passed by the House of Representatives. Thus, it is not law.”

Professor Jamin Raskin of the American University Washington College of Law stated: “the Deficit Reduction Omnibus Reconciliation Act of 2005 may be something but it is not law within the meaning of the Constitution.”

It is true that the problems with the Deficit Reduction Act process included clerical errors. But the Republican leadership did not have to present a bill to the President that was not passed by both houses. They could have fixed this problem along the way. And it appears they avoided doing so because the measure had passed by such slim margins in both the House and Senate that they feared losing on any additional votes necessary to correct the error.

Further, the President didn’t have to sign the bill. If he was concerned about its constitutional infirmity he could have urged congressional leadership to request the bill’s return to Congress so that Congress could address the problems relating to inconsistency between the House and Senate.

So while the problem may have started with a clerk’s error, it appears to have devolved into a deliberate effort on the part of Republican congressional leadership and the White House to ignore constitutional requirements.

#### THE NEED FOR THE RESOLUTION

Over 100 years ago, the Supreme Court addressed whether a bill could become law if the version signed by the President differed from the version passed by the House and Senate. In the case of *Field v. Clark*, 143 US 649 (1892), the Court held that the President could rely on the attestation of the Speaker of the House and the President of the Senate that the legislation before the President was the same as the legislation that passed the Congress. But the Court also recognized that the outcome would be different if there were a “deliberate conspiracy” to ignore the Constitution. As the Court wrote:

It is said that \* \* \* it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It

suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the constitution

It now appears that the possibility that a President would knowingly sign legislation that did not pass Congress is no longer "too remote to be seriously considered." In fact, this is exactly what appears to have happened when President Bush signed the Reconciliation Act.

To learn more about this matter, I wrote the President's chief of staff, Andrew Card, on March 15, seeking information on the President's knowledge of the bill's constitutional infirmity. When the Wall Street Journal reported on March 22 that Speaker Hastert's office had informed the White House of the problems with the legislation, I joined Democratic Leader Nancy Pelosi in sending a second letter to the White House. Unfortunately, there has been no White House response.

H. Res. 752 constitutes a step essential to any congressional review of the role the White House played in the flawed process on the Deficit Reduction Act. The resolution simply requires the White House to provide Congress with information regarding what the White House knew about the constitutional infirmities of the bill.

One of Congress' main responsibilities is to conduct oversight to check abuses by other branches of government. As the Supreme Court has stated:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.<sup>1</sup>

Yet during the Bush Administration, congressional Republican leaders have refused to conduct meaningful probes of significant allegations of wrongdoing by the Bush Administration.

For example, Congress has failed to examine the role of White House officials in outing covert CIA agent Valerie Plame, even though this conduct is thought to have involved the top aides to the President and Vice President.

Congress has failed to examine the role of the White House in manipulating intelligence about Iraq's weapons of mass destruction and ties to al Qaeda.

Congress has failed to conduct a thorough review up the chain of command to determine the responsibility of senior Administration officials for the abuse of detainees.

In fact, I am not aware of a single subpoena that congressional Republicans have issued to the White House during the entire five and half years of President Bush's tenure.

<sup>1</sup>*Watkins v. United States*, 354 U.S. 178,187 (1957).

H. Res. 752 provided an opportunity for Congress to take a step toward reversing this egregious pattern. Yet instead of seizing the opportunity, every Republican member of the Committee who voted on H. Res. 752 voted to report it unfavorably.

CONCLUSION

It is important to the American people that the President and Congress protect the integrity of the legislative process. What went wrong with the Deficit Reduction Act process should be of concern to all members of Congress, regardless of their party. We and the American public deserve a thorough explanation of how the President came to sign the Deficit Reduction Act of 2005.

HENRY A. WAXMAN.

## **Exhibit B**



February 13, 2006

Honorable John **M. Spratt Jr.**  
Ranking Member  
Committee on the Budget  
U.S. House of Representatives  
Washington, DC **20515**

Dear Congressman:

At the request of your staff, CBO has examined the effect on Medicare spending of implementing an alternative policy to one specified by the Deficit Reduction Act of **2005** (Public Law 109-171). That law contains a provision that limits rentals of certain items of durable medical equipment (**DME**) to 13 months. Your **staff** asked for an estimate of the cost of limiting that rental period to 36 months, as specified in the engrossed amendment as **agreed** to by the **Senate** on December **21, 2005**.

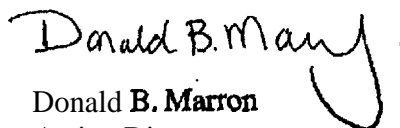
Based on information provided by the Centers for Medicare & Medicaid Services, we estimate that about half of the affected **DME** items are rented for at least a year. ~~Data on use beyond 15 months are not readily~~ **because Medicare** did not make rental payments beyond 15 months under prior law. After consulting with several providers of **DME**, **CBO** assumed that the use of **such** equipment erodes over time and that 10 percent of items are still being used after **three** years. Based on those assumptions, we **estimate** that extending the **rental** period **would** increase net Medicare spending by about \$2 **billion** over the 2006-2010 period, relative to the costs under the **13-month** limit in Public Law **109-171**. (That estimate reflects a \$2.6 billion increase in payments to **DME providers** and Medicare Advantage **plans**, offset by \$0.6 billion in **higher Part B** premiums paid by beneficiaries.)

**Exhibit B**

Honorable John M. **Spratt Jr.**  
Page 2

I hope this **information** is helpful to you. The staff contact for further information is Tim **Gronniger**, who **can** be reached at **226-9010**.

Sincerely,



Donald **B. Marron**  
Acting Director

**cc:** Honorable Jim **Nussle**  
Chairman  
**Committee on** the Budget

**Honorable** Joe Barton  
chairman  
Committee on Energy **and Commerce**

Honorable John **D. Dingell**  
Ranking **Member**

Honorable William "Bill" M. Thomas  
**Chairman**  
Committee on Ways and Means

**Honorable Charles B.** Rangel  
**Ranking** Democrat