

A Chronicle of the Republican Reconciliation Spending Cuts Bill: Is it the Law of the Land?

“A bill cannot become a law of the land until it has been approved in identical form by both Houses of Congress.” — How Our Laws Are Made, Parliamentarian, U.S. House of Representatives

On February 8, 2006, the President signed into law the Republican reconciliation spending cuts bill (P.L. 109-171). However, the version signed into law is not the same version that passed the House of Representatives on February 1, 2006, raising serious constitutional problems and calling into question whether the law is valid. Following is an explanation of how these events came to pass.

Last-Minute Change to Medicare Payments for Oxygen in Conference Report — Late in the evening of December 19, 2005, the Republican leadership made a last-minute change to the conference report for the Republican reconciliation spending cuts bill. This last-minute concession restored Medicare payments for oxygen equipment manufacturers, allowing these manufacturers to receive Medicare rental payments for 36 months. However, the bill capped rental payments to manufacturers of certain durable medical equipment (such as nebulizers and hospital beds) at 13 months, yielding savings of \$700 million over five years.

First House Vote on Republican Reconciliation Spending Cuts Bill — Early in the morning of December 20, 2005, the House of Representatives passed the conference report for the Republican reconciliation spending cuts bill by a vote of 212 to 206, with all Democrats voting against the bill.

Senate Strips Some Provisions from the Spending Cuts Bill — On December 21, 2005, the Senate voted to strip three provisions from the conference report that did not have budgetary effects and were in violation of the Byrd Rule. The Senate passed the amended version of the conference report by a vote of 51 to 50, with Vice President Cheney casting the tie-breaking vote. The changes in the Senate meant that the House needed to vote again on the amended version of the conference report.

Clerical Error Occurs During Senate Engrossment of the Bill — When engrossing the bill to send it back to the House for a second vote, the clerk made an error, changing the reimbursement period for both oxygen and durable equipment manufacturers to 36 months.

Clerical Error Has Large Budget Implications — The budgetary effect of the clerical error was to eliminate the \$700 million in savings over five years from the 13-month durable medical equipment (DME) policy, and instead cause a new cost to Medicare of \$1.3 billion over five years, resulting in a swing in spending of \$2 billion.

Republican Leadership Makes No Effort to Correct the Error — According to press reports, the House Republican leadership learned of this error in mid-January, but made no effort to correct it.

At this point, the Senate could have voted to ask the House to “return the papers,” corrected the error, and sent the House a correct version of the conference report. The Republican leadership chose not to take this step.

Second House Vote on Bill; House-Passed Version Differs from Senate — On February 1, the House voted for a second time on the conference report for the Republican reconciliation spending cuts bill, passing the conference report by a vote of 216 to 214. Again, all Democrats voted in opposition. The version passed by the House on February 1 differed from the Senate-passed version. The House voted for 36 months of rental payments for both oxygen and DME while the Senate-passed version provided for only 13 months of rental payments for DME. At this point, the Republican leadership had another opportunity to fix the mistake by passing a concurrent resolution in the House and Senate to correct the error. The Republican leadership chose not to take this step.

Senate Clerk Fixes the Error — Because the legislation began as a Senate bill, the bill was returned to the Senate to be enrolled for presentation to the President. At this point, the Senate clerk fixed the original error, changing the language so that it provides 13 months of rental payments for DME, and 36 months for oxygen. This change meant that the enrolled bill reflected the Senate-passed version, but it did not reflect the House-passed version.

Speaker of the House Signs Off on the Bill — Prior to sending any bill to the President for his signature, the Speaker (or Speaker pro tempore) of the House of Representatives and the President (or President pro tempore) of the Senate must sign the final enrolled version of the legislation *attesting to the fact that the bill being sent to the President is the same bill as passed by the House and Senate*. The Speaker of the House signed the bill despite the fact that the version sent to the President was not the version passed by the House.

President Signs the Republican Reconciliation Spending Cuts Bill — On February 8, 2006, President Bush signed the bill; however, the version signed is not the version that passed the House.

Procedural Errors Raise Constitutional Questions — The fact that the President signed a law that did not pass the House raises serious constitutional questions and calls into question the legal status of the legislation. The Bicameral Clause in Article I, Section 7 of the U.S. Constitution states, “Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it...” In a document from 2003, the Parliamentarian of the U.S. House of Representatives stated: “A bill cannot become a law of the land until it has been approved in identical form by both Houses of Congress.” Despite these basic facts of how a bill becomes a law, the Republican leadership continues to assert that the law is valid.

Senate Belatedly Tries to Clarify the Situation — On February 8, 2006, the Senate passed a concurrent resolution (S. Con. Res. 80) stating that the version of the bill signed by the President reflects the intent of Congress. This resolution is non-binding, was not voted on in the House, and most importantly, cannot possibly fix the constitutional problem of the President signing a version that was not passed by the House. The only clear remedy is for the House and Senate to pass a new bill that the President signs.

First Lawsuit Filed, With More Likely to Follow — On February 13, 2006, the first lawsuit challenging the validity of the Republican reconciliation spending cuts bill was filed. Jim Zeigler, an elder law attorney, filed a lawsuit in the U.S. District Court for the Southern District of Alabama alleging that the legislation was not constitutionally enacted because differing versions passed the House and Senate. Additional lawsuits are likely to follow.

House Refuses to Look Into the Matter — On February 16, 2006, the House voted to block a request from House Minority Leader Nancy Pelosi for an ethics investigation into how the House and Senate ended up approving different versions of the legislation.

Who Has Standing to Bring a Lawsuit? — In order to have legal standing to bring a lawsuit, a person must be sufficiently affected by the case at hand. One question is whether an individual needs to have standing under the durable medical equipment provision that caused the problem in order to file a lawsuit, or if anyone affected by any provision of the legislation can file a lawsuit.

What Do Constitutional Scholars Say?

- ▶ “S. 1932 [the Republican reconciliation spending cuts bill] was not passed by the House of Representatives. Thus, it is not a law.” – *Michael C. Dorf, Michael I. Sovern Professor of Law, Columbia University Law School.*
- ▶ “The ‘Deficit Reduction Omnibus Reconciliation Act of 2005’ may be something but it is not law within the meaning of the Constitution... There is no ‘mistake’ exception to the bicameralism requirement.” – *Jamin Raskin, Professor of Constitutional Law and Director, Program on Law and Government, American University Washington College of Law*
- ▶ “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.” – *David Vladeck, Professor, Georgetown University School of Law.*

What Happens in the Meantime? — The Administration is presumably moving forward with implementation of the legislation. If the law is struck down as invalid, one question is whether the entire law is invalid, or only the durable medical equipment provision in question. If the entire law is stricken, another question is what happens to all the policies that will have already been implemented by that time.