STATEMENT OF REP. HENRY A. WAXMAN
REGARDING RESOLUTION OF INQUIRY SEEKING DOCUMENTS CONCERNING WHITE HOUSE KNOWLEDGE OF THE CONSTITUTIONAL INFIRMITY OF S. 1932
March 30, 2006

Today, I and a number of my colleagues are introducing legislation to investigate the White House's knowledge of the constitutional defects of S. 1932, the Deficit Reduction Act of 2005, at the time the President signed the bill into law.

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. Now evidence is mounting that the President and his staff may have knowingly participated in this constitutionally infirm process.

As I wrote to former White House chief of staff Andrew Card on March 15, I have learned that the Speaker of the House advised the White House of the differences between the House-passed bill and the bill presented to the President before the President signed the legislation. This account was confirmed in a March 22 *Wall Street Journal* article, which reported that the Speaker's chief of staff "called a high ranking White House official" and "asked the Administration to delay proceedings until the problem could be addressed by the House and Senate." Nevertheless, the President signed S. 1932 into law without any action by the House and Senate to address the problem.

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 mounting evidence that the

President signed the Reconciliation Act into law knowing that it differed from the legislation passed by Congress now raises the issue whether he considers himself bound by the provisions of the federal 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 I am introducing today would advance such a congressional inquiry by requesting that the White House provide Congress with all documents relating to information the White House received 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 tem 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.

The *Wall Street Journal* recently published an account of the communications between the Speaker's chief of staff and the White House. According to the *Wall Street Journal*, 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.

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.

I therefore urge my colleagues to support the resolution of inquiry I am introducing today. The American public deserves a detailed explanation of what went wrong with the enactment of S. 1932 — and assurance that government leaders will not ignore basic constitutional requirements regarding the legislative process.