

March 17, 2010

MEMORANDUM

FROM: Michael Hammond

RE: Three ObamaCare Lies -- and the Rebuttal to Them

LIE #1: PELOSI: "...REPUBLICANS USED [SELF-EXECUTING RULES], PERHAPS, HUNDREDS OF TIMES..."

Let's start with the proposition that self-executing rules are an abuse of parliamentary process -- even if used, as they frequently are, for obscure issues such as making technical corrections.

And, when used for major issues, more often than not, the process is used for sleazy purposes, such as efforts by both parties to do things like raising the debt limit or increasing congressional salaries, while pretending not to.

And, finally, let's concede that the abuses have occurred on both sides of the aisle -- more often than not, to accomplish big-government ends which, unfortunately, have been pursued by both Republicans and Democrats. This disregard of ethical issues played a major role in removing Republicans from power.

Having said this, FOR A BILL TO BECOME LAW, IT HAS TO BE PASSED IN IDENTICAL FORM BY BOTH HOUSES OF CONGRESS. And, before this past month, according to the former senior Republican staffer of the House Rules Committee, THERE WERE ONLY TWO TIMES IN AMERICAN HISTORY WHERE BILLS WHICH HAD NOT PASSED THE HOUSE WERE "DEEMED" ONTO THE PRESIDENT'S DESK AND INTO LAW -- AND WERE NOT SUCCESSFULLY CHALLENGED AS UNCONSTITUTIONAL IN THE COURTS. NEITHER OF THESE INSTANCES HAS BEEN SUBJECT TO A JUDICIAL TEST.

Make no mistake about it: "Deeming" an action at an intermediary step in the legislative process is different from "deeming" a bill not considered by the House onto the president's desk. Hence, phony "analogies" dealing with smoking bans on airplanes, census sampling, and deficit reduction dealt with amendments to larger legislation -- which were subject to up-or-down votes in the House on final passage. "Deeming" a bill to the president's desk, on the other hand, is almost unprecedented and is unconstitutional.

Article I, Section 5, of the Constitution provides:

...the Yeas and Nays of the Members of either House on ANY question shall, at the Desire of one fifth of those Present, be entered on the Journal. ...
[emphasis added]

Article I, Section 7, Clause 2, of the Constitution provides, in what is called the "presentment clause":

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes Law, be presented to the President of the United States...

As this language indicates, a bill, before it goes to the president's desk, must pass the Senate and the House. Furthermore, it is indisputable that the bill must pass the Senate and the House in identical form. And, as Article I, Section 5, provides, you can't pass a bill without giving the House an opportunity to cast an "up-or-down" "yeas-and-nays" vote on the issue.

True, this right doesn't have to be implemented. The bill can be passed unanimously "by unanimous consent" if no one objects. But you cannot create a procedure where the yeas-and-nays are not available with respect to an entire bill.

WHAT ABOUT ALL THE LEGISLATIVE PRECEDENTS? As we have said, there are only two times in American history, before this past month, when the House has "deemed" a bill onto the president's desk -- and it has been signed into law -- and it has not been successfully challenged as unconstitutional. According to Donald Wolfensberger, former Republican staff director of the House Rules Committee, quoted in the Washington Post --

[there have been only] four instances when a measure that was deemed to have passed went directly to the White House. The first, in 1933 during the Great Depression, involved Senate amendments to legislation pertaining to the United States' creditworthiness. The tactic was employed twice in the 1990s, by Democrats on a bill involving the Family Medical Leave Act, and by Republicans on a measure involving a line-item veto. {The line item veto was declared

unconstitutional in the 1998 case of Clinton v. City of New York.] Most recently, it was used a few weeks ago, when the House voted on both an increase in the debt ceiling and a pay-as-you-go budget provision.

WHAT HAVE THE CASES HELD? Certainly, the most on-point precedent is Chadha v. Immigration and Naturalization Service, the 1982 case which declared the one-house veto to be an unconstitutional violation of the presentment clause.

Although Chadha dealt with the prerogatives of the president, rather than the Congress, under the presentment clause, it makes it pretty clear that the political question doctrine cannot be used to bar adjudication of something as fundamental as whether a bill has to pass both houses of Congress in order to become law.

There are no cases which are on point. As we have seen, before this past month, only H.R. 2820 (the 1933 credit legislation) and parental leave were sent to the president's desk and signed into law after the House "deemed" final passage of that legislation. And neither of these has been subject to a judicial test.

But Chadha makes it clear that compliance with the presentment clause is justiciable -- and that the courts will enforce its mandates.

LIE #2: RECONCILIATION HAS BEEN USED EXTENSIVELY IN CONTEXTS ANALOGOUS TO OBAMACARE -- MOST OFTEN BY REPUBLICANS

Let's look at the 22 reconciliation bills which have been considered since Congress created the procedure in 1974.

The first use of reconciliation was a small bill (Public Law 96-499, signed December 5, 1980) -- implemented under the leadership of Robert Byrd. At the time, Minority Leader Howard Baker assured concerned Republicans that this was a one-time thing which would not set a precedent.

Between 1981 and 1986, under the Finance Committee Chairmanship and Majority Leadership of Bob Dole, Congress, in the words of this morning's New York Times, "followed

[initial Reagan tax cuts] by years of tax increases to reduce deficits smaller than the current ones." Particularly after conservatives mounted a 1982 filibuster of a 5 cent increase in the gasoline tax which lasted until Christmas eve, this series of tax increases was implemented through the reconciliation process. During Dole's tenure as committee chairman and Majority Leader from 1981 through 1986, six Dole-backed reconciliations bills passed. It is significant that Democrats were in charge of the House during this entire period and supported this process.

Three more reconciliation bills were passed under the leadership of Democrat George Mitchell while Dole was Minority Leader and Democrats were in charge of the House.

In 1993, there was the highly partisan Clinton/Democrat tax increase package.

And, during the 1990's, three reconciliation bills pushed by conservative Republicans were vetoed by Bill Clinton (in 1995, 1999, and 2000).

This brings the total to 14.

The bottom line is that the general theme of these 14 bills -- at least those which were not vetoed -- was to cram tax increases down conservatives' throats. Having said that, these were budgetary issues within the intended scope of reconciliation.

Of the remaining eight reconciliation bills, the four most controversial were the welfare reform legislation in 1996, COBRA in 1997, and the Bush tax cuts in 2001 and 2003.

Welfare reform, enacted on a bipartisan basis and with the support of Bill Clinton, implemented social policy changes which were intended to vastly reduce the size of federal and state expenditures on welfare programs.

Let's concede that the 2001 and 2003 tax cuts -- which either "managed" the budget surplus or increased the deficit -- were an abuse of the process. But there are at least four observations to be made:

-First, these two bills dealt with the budgetary issues which reconciliation was designed to address

-- not social policy issues.

-Second, the effect of these bills was temporary and will shortly expire.

-Third, House Republican leaders who presided over this process are, in most instances, no longer in Congress. Their party was ousted from power due to ethical irregularities, and some have spent the last decade awaiting the possibility of prosecution.

-Fourth, all of this is irrelevant because the Senate acted, in 2007, to prohibit the use of reconciliation for legislation which increased, rather than reducing, the size of the deficit.

ObamaCare, on the other hand, is the biggest social-policy-oriented deficit engine in human history, when you discount four accounting fraud schemes:

-The fact that the "doc fix" -- which was the bribe for the AMA's support of ObamaCare -- is being snuck through on separate legislation.

-The fact that almost half the total "deficit reduction" -- about \$460 billion -- consists of Medicare cuts which cannot conceivably be implemented.

-The fact that the bill in general -- and long-term care provisions in particular -- consist of Ponzi schemes which initially produce "deficit reductions," but have back-loaded costs.

-The fact that some of CBO's assumptions are really questionable, including assumptions that taxing "Cadillac plans" will not produce less of them and that money which employers who drop employee health care would have spent on health insurance will be spent, in equal amounts, on salary increases.

Hence, for the first time in the history of the process, reconciliation is being used for massive social policy changes which are not directed toward drastically cutting the deficit by reducing the size of current programs.

But, say Democrats, reconciliation is only being used to adjust money issues in a bill that has already passed the Senate.

First, this is not true. The House reconciliation bill deals with large numbers of issues which run afoul of the Byrd rule.

Second, since the vote on reconciliation will be "deemed" to be a vote on the policy-loaded deficit-enlarging Senate bill, this is a particularly big lie.

LIE #3: ANY NUMBER OF PEOPLE: "THIS BILL DOES NOT PROVIDE FOR TAXPAYER FUNDING OF ABORTION"

Every pro-lifer understands what Henry Waxman told Bart Stupak -- that congressional Democrats WANT taxpayer financing for abortions -- and that this bill would increase federal funding for abortion in a way that is unprecedented since Roe v. Wade.

First and foremost, the bill would give REFUNDABLE TAX CREDITS for the purchase of large numbers of insurance policies providing for abortion. That means the government would issue a check to pay for these abortion-covering policies. This is fundamentally different from tax deductions and credits which allow individuals and businesses to keep THEIR OWN MONEY -- which they proceed to use for abortions.

Although states have an option, states with an overwhelming percentage of the U.S. population will provide access to policies with abortion coverage, and the only requirement is that each state allow ONE policy which does not cover abortion. In the hands of a pro-abortion state bureaucracy, the non-abortion policy could well be a very expensive or undesirable one.

Second, we are told that abortion policyholders will have to write two checks -- a requirement which is largely dissipated by the fact that most of these policies will be funded by direct withdrawals from the policyholders' checking accounts or paychecks.

We have seen Planned Parenthood's skill at manipulating the fungibility of money in connection with

section 1008 of the Public Health Services Act. The abortion provider will segregate abortions to a particular room in a building with activities which are largely funded with taxpayer dollars. It will "deem" all of the taxpayer dollars to go to the non-abortion activities, and all of the non-taxpayer dollars to go for the abortion room.

You wouldn't allow this shell game in any other similar context. For example, you wouldn't allow taxpayer dollars to go to a day care center operated by the Ku Klux Klan. The activities of the organization would be viewed as sufficiently toxic that, given the fungibility of money, no funds would be allowed.

Finally, in section 2303 of the bill, as a bribe to Vermont Senator Bernie Sanders, \$9.5 billion is spent on community health centers -- a \$2.5 billion increase over the Senate bill. There is a real probability that these funds would be used to fundamentally reanimate Planned Parenthood.

Proponents argue that abortions aren't currently being provided by community health centers and that federal regulations currently prohibit it.

Two observations:

- As we have seen, the prohibition on using taxpayer dollars for abortions does not prevent those dollars from being a cash cow for abortion providers.
- Given that one of the Obama administration's first official acts was to repeal regulations implementing the Mexico City policy, we can hardly rely on current regulations to prohibit funding for abortion.