Constitutionality of the Deficit Reduction Act of 2005: Litigation

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Summary

The Deficit Reduction Act of 2005 has been challenged as unconstitutional in several lawsuits. The plaintiffs have alleged that the House and Senate did not comply with the constitutional provisions relating to enacting bills because the bill that was sent to the President did not pass the chambers in identical form. All the district courts that have decided these cases have dismissed them on the basis of the enrolled bill rule enunciated by the Supreme Court in 1892. This rule provides that courts should not look behind the text of an enrolled bill signed by the presiding officers of the House and the Senate and presented to the President; the signatures of these congressional officers on the enrolled bill attest that it has passed both chambers. Appeals have been filed in some of the decided cases. In two of these appealed cases, district court dismissals have been affirmed. The United States Supreme Court has denied a petition to review a circuit court's dismissal. This report will be updated to reflect further developments.

Several lawsuits have been filed requesting courts to declare that the Deficit Reduction Act of 2005, P.L. 109-171, is not law because the House and Senate did not agree to identical text and, consequently, did not comply with the provisions for lawmaking prescribed in the Constitution. Article I, Section 1, clause 1, which expresses the principle of bicameralism, provides that all legislative powers shall be vested in a Congress consisting of a Senate and a House of Representatives. Article I, Section 7, clauses 2 and 3, the Presentment Clauses, state that every bill which has passed the House and Senate, and every order, resolution, or vote to which the concurrence of both chambers is necessary, must be presented to the President before it becomes law.

The act is one of three budget reconciliation measures that were contemplated by the Concurrent Resolution on the Budget for Fiscal Year 2006, H.Con.Res. 95, 109th Cong., 1st sess. The Congressional Budget Office has estimated that the act is expected to reduce mandatory spending by about $39 billion on a net basis over FY2006-FY2010.[1]

A review of the legislative history helps explain the basis for these suits.[2] The House on December 19, 2005, agreed to the conference report, H.Rept. 109-362, 109th Cong., 1st sess. (2005), to S. 1932, which included a provision, section 5101(a)(1), stating that Medicare would reimburse rental of durable medical equipment other than oxygen equipment (e.g., wheelchairs) for 13 months.[3] On December 21, 2005, the Senate agreed to the conference report that included the 13-month rental period after certain provisions not related to this time period were stricken.[4] Because these unrelated provisions were stricken, the Senate-passed text had to be returned to the House for a final vote to complete legislative action. An error allegedly was made in transcribing this text (i.e., the engrossed bill),[5] before it was sent to the House for a final vote: 13 months for the rental period for nondurable medical equipment other than oxygen equipment was changed to 36 months. This error may have been made because section 5101(b) provides for a rental period of 36 months for oxygen equipment.

On February 1, 2006, the House agreed to H.Res. 653, 109th Cong., 2nd sess. (2006), which stated that, "Resolved: That the House concurs in the Senate amendment to the House amendment to the bill (S. 1932) to provide for reconciliation pursuant to section 202(a) of the budget for Fiscal Year 2006."[6] After this vote, the alleged error in the engrossed version that had been sent to the House (i.e., 36 months for durable medical equipment other than oxygen equipment) reportedly was changed to 13 months when the text of the bill was enrolled[7] (i.e., transcribed to be signed by

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[1] Congressional Budget Office, *Cost Estimate of S. 1932, the Deficit Reduction Act of 2005*, at 1 (January 27, 2006), accessible in the Cost Estimates link at http://www.cbo.gov.

[2] *See* CRS Report RL33132, *Budget Reconciliation Legislation in 2005-2006 Under the FY2006 Budget Resolution*, by (name redacted), for a detailed description of the legislative history.

[3] 151 *Cong. Rec.* H12276-H12277 (daily ed. December 19, 2005); the vote in the House was 212 to 206.

[4] *Id.* at S14221 (daily ed. December 21, 2005); the vote in the Senate was 51 to 50, with the Vice President, who is the President of the Senate, voting yea to break a tie vote of Senators.

[5] Section 106 of title 1of the United States Codes requires that every bill which passes the House or Senate must be printed and signed by the Clerk of the House or the Secretary of the Senate, as the case may be. This printed copy, called the engrossed bill, is sent to the other chamber and "... in that form shall be dealt with by that House and its officers, and, if passed, returned to the chamber that first passed it] signed by said Clerk or Secretary."

[6] 152 *Cong. Rec.* H68 (daily ed. February 1, 2006); the vote in the House was 216 to 214.

[7] Section 106 of title 1 of the U.S. Codes mandates that a bill must be printed after it has passed the House and Senate. This printed version, called the enrolled bill, must be signed by the presiding officers of both chambers and sent to the President.

legislative officials and sent to the President).[8] The Speaker of the House and the President pro tempore of the Senate reportedly certified that the enrolled version of S. 1932 had passed the House and Senate.[9] The President signed the enrolled S. 1932 after noon on February 8, 2006,[10] and it became P.L. 109-171.

On the evening of February 8, after the President signed the bill, the Senate by unanimous consent agreed to S.Con.Res. 80, 109th Cong., 2nd sess. It stated that the enrollment of S. 1932 as presented to the President was deemed the true enrollment reflecting the intent of Congress in enacting it.[11] The House did not consider S.Con.Res. 80.

On February 16, 2006, then-House Democratic Leader Nancy Pelosi offered a privileged resolution, H.Res. 687, 109th Cong., 2nd sess., directing the House Committee on Standards of Official Conduct to investigate the matter, but the House tabled this resolution by a vote of 219 to 187.[12]

After the President signed the bill, several lawsuits challenging its constitutionality were filed on the ground that the Senate and House did not pass identical text.[13] All of the district courts that have reached decisions have dismissed these cases. The cases are:

- *OneSimpleLoan* v. *U.S. Secretary of Education*[14] in the Southern District of New York,
- *California Department of Social Services* v. *Leavitt*[15] in the Eastern District of California,
- *Public Citizen* v. *Clerk of the District Court of the District of Columbia*[16] in the District of Columbia,
- *Conyers* v. *Bush*[17] in the Eastern District of Michigan, and
- *Zeigler* v. *Gonzalez*[18] in the Southern District of Alabama.

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[8] *CQ Daily* 5 (February 10, 2006).

[9] *Id.*

[10] *Id.*

[11] 152 *Cong. Rec.* S870 (daily ed. February 8, 2006).

[12] 152 *Cong. Rec.* H351-H352 (daily ed. February 16, 2006).

[13] *See* CRS Congressional Distribution Memorandum entitled *Constitutionality of the Deficit Reduction Act of 2005*, by (name redacted) (available from the author), which was prepared before these cases were decided, for a discussion of the constitutional issues involved and relevant court precedents.

[14] 06-Civ. 2979 (RMB) (S.D.N.Y. June 9, 2006), 2006 U.S. Dist. LEXIS 38714, 2006 WL [West Law] 1596768, decided by Judge Richard M. Berman. *See* CRS Congressional Distribution Memorandum entitled *Constitutionality of the Deficit Reduction Act of 2005: Dismissal of OneSimpleLoan et al. v. U.S.Secretary of Education et al.* (available from the author), by (name redacted), for a summary of this case.

[15] 444 F. Supp.2d 1088 (E.D.Calif. July 18, 2006), No. Civ. S-99-0355-FCD-JFM, 2006 U.S. Dist. LEXIS 48753, 2006 WL 12034650, decided by Judge Frank C. Dambrell, Jr.

[16] 451 F. Supp. 2d 109 (D.D.C. August 11, 2006), No. 1:06-00523-JDB, 2006 U.S. Dist. LEXIS 44740, 2006 WL 2329329, decided by Judge John D. Bates, available at http://www.dcd.uscourts.gov/opinions/district-court-2006.html.

[17] No. 2:06-cv-11972 (E.D. Mich. November 6, 2006), 2006 U.S. Dist. LEXIS 80816, 2006 WL 3834224, decided by Judge Nancy Edmunds.

[18] No. 1:06-CV-00080-CG-M (S.D. Ala. June 28, 2007), 2007 U.S. Dist. LEXIS 47134, 2007 WL 1875945, decided by Chief Judge Callie V.S. Granade.

The *Conyers* case was filed by Representative John Conyers, Jr., the then-ranking Democratic member of the House Committee on the Judiciary, and other then-ranking Democratic members of House committees in the 109th Congress with jurisdiction over agencies affected by the Deficit Reduction Act of 2005.

In dismissing the constitutional challenges, these district courts invoked the enrolled bill rule enunciated by the United States Supreme Court in *Marshall Field & Co.* v. *Clark*[19] in 1892. This rule provides that the signing by the Speaker of the House of Representatives and the President of the Senate or the President pro tempore of the Senate of an enrolled bill is "an official attestation of its passage" by both chambers and that when a bill thus attested receives the approval of the President of the United States and is deposited in the public archives, "its authentication as a bill that has passed Congress should be deemed as complete and unimpeachable."[20] The Court explained the reason that it applied this rule: "The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated;...."[21]

When a court applies the enrolled bill rule, it does not look behind the text of the bill as enrolled; that is, it does not examine congressional documents such as House and Senate journals to ascertain whether the language in the enrolled bill comports with versions that appear in legislative sources which precede enrollment. According to the Supreme Court,

> [T]he evils that may result from the recognition of the principle that an enrolled act is conclusive evidence that it was passed by Congress according to the forms of the Constitution would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.[22]

These district courts appear to have affirmed the current viability of the enrolled bill rule, expressly or implicitly acknowledging that the Supreme Court has not overruled it. They rejected an assertion based on a footnote in a 1988 Supreme Court case, *United States* v. *Munoz-Flores*, which stated that "... where, as here, a constitutional provision is implicated, *Field* does not apply."[23] The plaintiffs argued that this statement raised a question about whether the rule should apply to a case that alleges a violation of a constitutional provision. Responding to this contention, the courts in the *OneSimpleLoan* case and the *Public Citizen* case, for example, observed that another part of the same footnote provided that, "The Constitution left it to Congress to determine how a bill is authenticated as having passed."[24] Moreover, they quoted language from Supreme Court cases which have held that lower courts should leave to the High Court itself the prerogative of overruling its own precedents.[25]

[19] 143 U.S. 649 (1892).

[20] *Id.* at 672.

[21] *Id.*

[22] *Id.* at 673.

[23] 495 U.S. 385, 391, n. 4 (1988).

[24] OneSimpleLoan at 17 and Public Citizen, 451 F. Supp.2d at 122.

[25] OneSimpleLoan at 18 and Public Citizen, 451 F.Supp.2d at 124 and 128.

In another case, *Cookeville Regional Medical Center* v. *Leavitt*,[26] a federal district judge acting on a procedural motion rejected an assertion that the Deficit Reduction Act was not constitutionally enacted. The court cited the enrolled bill rule to support this conclusion.

In the *Conyers* case, the district court also held that the plaintiffs, Members of Congress, did not have standing (i.e., were not proper parties) to file suits challenging the constitutionality of the Deficit Reduction Act.[27]

An appeal has been filed and oral arguments were heard on October 10, 2007, in the *California Department of Social Services* case.[28]

The Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the *Public Citizen* case on May 29, 2007.[29] Conceding that the bill signed by the President did not pass the House and Senate in identical form, the court of appeals agreed with the district court that the enrolled bill rule precluded a court from considering extrinsic evidence; it cited the reasons undergirding the rule that the Supreme Court gave in the *Marshall Field* case: to preserve the certainty and validity of congressional enactments and to respect Congress, a coequal branch of government. The court rejected the plaintiff's arguments to distinguish and narrow *Marshall Field* based on the footnote in the *Munoz-Flores* case. On August 6, 2007, Public Citizen, the group that filed suit, sought Supreme Court review of the circuit court's opinion,[30] but the High Court denied review in a December 10, 2007, order.[31]

The Court of Appeals for the Second Circuit on July 19, 2007 affirmed the district court's dismissal of the *OneSimpleLoan* case for the same reasons given in the *Public Citizen* case by the District of Columbia Circuit.[32] It also held that a court may dismiss a claim on the basis of the enrolled bill rule before assessing whether a plaintiff has standing to file suit.

The plaintiffs in these cases asked the courts to strike down the Deficit Reduction Act in its entirety because the House and Senate allegedly did not agree on identical text in one subsection. If a court in the future should agree that the constitutional provisions for lawmaking were violated, however, it is not clear whether it would invalidate the entire statute or only the subsection involved, section 5101(a). In a case decided in January of 2006 regarding abortion

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[26] Civ. No. 04-01053 (D.D.C. September 26, 2006), 2006 U.S. Dist. LEXIS 68961, 2006 WL 2787831, before Judge James Robertson. The constitutionality of the Deficit Reduction Act did not arise directly in this case. According to a published report, the district court in September of 2005 awarded $100 million in additional Medicare reimbursements to the plaintiffs, several hospitals. Shortly after the President approved the Deficit Reduction Act in February of 2006, the defendant, Michael O. Leavitt, the Secretary of Health and Human Services, filed a motion to alter the September award on the ground that a provision of the act precluded the Department from paying it. In response to this motion, the plaintiffs challenged the constitutionality of the act. *See* "One Small Typo, Lots of Lawsuits," *The National Law Journal* at 5 (July 31, 2006).

[27] Conyers at 3.

[28] The Leavitt case docket number is 06-56136 (August 23, 2006) in the Court of Appeals for the Ninth Circuit.

[29] Public Citizen v. United States District Court for the District of Columbia, 486 F.3d 1342 (D.C. Cir. 2007), *cert. denied*, 552 U.S. ___ (Dec. 10, 2007), available at http://www.cadc.uscourts.gov by decision date, May 29, 2007.

[30] Bureau of National Affairs, "Deficit Reduction Law Legal Despite Drafting Glitch, Courts Say," *Daily Report for Executives*, A-14 (Aug. 17, 2007).

[31] Supreme Court Orders , December 10, 2007, available at http://www.supremecourtus.gov relating to No. 07-141, Public Citizen v. United States District Court for the District of Columbia.

[32] OneSimpleLoan v. U.S. Secretary of Education, 496 F.3d 197 (2d Cir. 2007), No. 06-2770-cv (L), available at http://www.ca2.uscouirts.gov by name, OneSimpleLoan.

restrictions, *Ayotte* v. *Planned Parenthood of Northern New England*,[33] the Supreme Court indicated that it preferred to invalidate only the portion or portions of an act held to contravene the Constitution while upholding remainder of it. The Court observed that:

> Generally, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving the other applications in force, *see United States* v. *Raines*, 362 U.S. 17, 20-22 (1960), or to sever its problematic portions while leaving the remainder intact, *United States* v. *Booker*, 543 U.S. 20, 227-229 (2005).[34]

The Court added that after finding that a portion of a statute is unconstitutional, it must ask, "Would the legislature have preferred what is left of its statute to no statute at all?"[35] Typically, to make this determination, a court conducts a detailed analysis of legislative intent; it must ascertain whether the legislative body would have preferred that the remainder of a statute should continue in effect if it had known that a court would strike down a portion of it or if it would have preferred no statute without the unconstitutional portion.

An analysis of this kind would not appear be necessary in this case because the House and Senate agreed to identical text of all portions of the Deficit Reduction Act except for section 5101(a). They did not agree to identical text of that section because of a transcription error.

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[33] 546 U.S. 320, 126 S.Ct. 961(2006).

[34] 546 U.S. at 328-329, 126 S.Ct. at 967.

[35] 546 U.S. at 330, 126 S.Ct. at 968.