IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HONORABLE JOHN CONYERS, JR., *et al.*,

Plaintiffs	) Civil Action 2:06-CV- 11972
	) Judge Edmunds
v.	)
	)
GEORGE W. BUSH, *et al.,*	)
	)
Defendants	)
	)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs oppose the defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The reasons for this opposition are stated in the accompanying Brief in Opposition to the Motion to Dismiss. The Opposition, and the accompanying brief, are in response to both of the motions filed by defendants in this lawsuit.

Respectfully submitted,

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_____	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Statement of the Issues Presented

1. Whether members of the House of Representatives have standing to sue when they were denied the ability to participate in the legislative process and thus disenfranchised when a Senate version of a bill was signed by the President even though it had never been approved by the House of Representatives.

2. Whether the failure of the House of Representatives to approve the bill signed by the President means that it is not a validly enacted law, even if the Speaker of the House of Representatives and President *pro tempore* of the Senate attested that it had passed both houses of Congress.

3. Whether the allegations of the complaint are sufficient to state a claim that the Deficit Reduction Act of 2006 did not properly pass the House of Representatives.

4. Whether a law that was not properly enacted because of its failure to pass the House of Representatives is completely void because the Constitution's requirements for enacting a law were not met.

Controlling Authorities

Issue 1 (Standing):

Coleman v. Miller, 307 U.S.433 (1939)
Raines v. Byrd, 521 U.S. 811 (1997)

Issue 2 (Failure to follow procedures for enacting a law):

Marshall Field & Co. v. Clark, 143 U.S. 649 (1892)
United States v. Munoz-Flores, 495 U.S. 385 (1990)
Clinton v. City of New York, 524 U.S. 417 (1998)

Issue 3: (Allegations in the Complaint about the Deficit Reduction Act)

Conley v. Gibson, 335 U.S. 41 (1959)

Issue 4: (Effect of failing to follow constitutionally required procedures)

Clinton v. City of New York, 524 U.S. 417 (1998)

Introduction

Few principles of American government are more basic than that enacting a law requires that the identical bill be passed by both the United States House of Representatives and the United States Senate. Under Article I, Section 7 of the Constitution, "[e]very 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." U.S. Const. art. I, § 7. The Supreme Court has expressed the importance of strict adherence to bicameral passage of bills. *I.N.S. v Chadha*, 462 U.S. 919, 954-56 (1983); *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

Indeed, the Supreme Court has expressly held that a law is valid only if the identical version is passed by both the House and the Senate and signed by the

President. In *Clinton v. City of New York*, 524 U.S. at 448, the Supreme Court addressed this explicitly and explained that the law at issue in that case was valid because three steps had been followed: "(1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved *precisely the same text*; and (3) that text was signed into law by the President. . . . *If one paragraph of that text had been omitted at any one of those three stages, [the law] would not have been validly enacted."* (emphasis added)

That is exactly what this lawsuit is about: The House and the Senate passed different versions of the Deficit Reduction Act. The President signed the Senate version into law. But since the texts were different, the Deficit Reduction was not validly enacted and is not a law.

Factual Background

The case is about the procedure that must be followed in order for a bill to become a law. When one chamber of Congress passes a bill, the bill is then printed, signed by the Clerk of the House or the Secretary of the Senate (depending on which chamber passed the bill), and sent to the other chamber. The printed version of the bill passed by a single chamber is called the "engrossed bill." 1 U.S.C. § 106. If the other chamber passes the engrossed bill without

amendment, the Clerk or Secretary signs the bill and returns it to the originating chamber. *Id*. The bill is then printed again and, at this point, is called the "enrolled bill." *Id*. The presiding officers of both the House and the Senate sign the enrolled bill to attest that it passed each chamber. *Id*. The enrolled bill is then sent to the President. *Id*.

Despite the clear requirements of the Constitution, in the fall of 2005, the House and Senate passed different versions of S. 1932, a budget bill referred to as the Deficit Reduction Act ("DRA"). To reconcile the differences between the House and Senate bills, the legislation was sent to a House-Senate conference committee. The bill was modified in conference, and the final conference report was submitted to the House and Senate for their votes.

On December 19, 2005, the House passed the conference report on S. 1932 by a vote of 212 to 206. 151 Cong. Rec. H12277 (Dec. 19, 2005). On December 19, 20, and 21, 2005, the Senate considered the conference report. Four points of order were raised against the report, and three were sustained on the ground that the provisions of the conference report on which they rested violated the rules of the congressional budget process. A motion was made to waive the points of order, but the motion was defeated. As a result, the conference report did not pass in the Senate. *Id*. at S14205.

On December 21, 2005, the Senate then voted on an amended version of S. 1932 that omitted the items that gave rise to the points of order. *Id*. at S14337-86. The amended bill passed 51 to 50, with Vice President Cheney casting the tie-breaking vote. *Id*. at S14221.

When engrossing the amended bill for transmittal to the House, a Senate clerk made a substantive change to section 5101(a)(1). In two places, the clerk altered the duration of Medicare payments for certain durable medical equipment, stated as 13 months in the version passed by the Senate, to 36 months. *Compare* 151 Cong. Rec. S14337, S14346 (Dec. 21, 2005) (version passed by Senate) (Exh. B), *with* S. 1932, engrossed in Senate (Dec. 21, 2005). The budget impact of the change is $2 billion over five years.

Errors in engrossed bills have occurred before. The proper procedure is for the chamber that made the error to send a message to the other chamber requesting return of the bill, so that the error can be corrected. *See* 109th House Rules and Manual § 565 at 296-97 (2005) (House Doc. No. 108- 241) (listing examples). On December 22, the Senate enrolling clerk informed the House enrolling clerk that such a mistake had been made. Letter from Karen L. Hass, Clerk of the House, to the Honorable Vernon J. Ehlers, Chairman, Committee on the House Administration, et. Al, at 3 (May 11, 2006). The Senate then informed the House

that there were three options to correct the defect: (1) the Senate could request that the official papers conveyed by its December 22, 2005 message be returned to the Senate; (2) if the House concurred in the Senate amendment, the House and Senate could pass a concurrent resolution correcting the enrollment; or (3) the House and Senate could later pass a technical corrections bill to correct the law. *Id*. at 4. The enrolling clerk informed the House Parliamentarian's Office, the Office of the House Clerk, and the Speaker on January 19, 2006, of the problem. But none of these three perfecting actions ever took place. *Id*.

Despite receiving notice two weeks in advance that the papers before it were incorrect, on February 1, 2006, the House leadership scheduled a vote on the engrossed version of S. 1932, which contained the clerk's error and, therefore, was not identical to the version of the bill passed by the Senate. See S. 1932, engrossed in Senate; 152 Cong. Rec. H69, H77 (Feb. 1, 2006). The House passed S. 1932, with the error, by a vote of 216 to 214. *Id*. at H68. Because the legislation originated in the Senate, the House returned the legislation to the Senate for transmission to the President for his signature. See 152 Cong. Rec. S443 (Feb. 1, 2006) (message from House to Senate announcing that House agreed to Senate amendment to S. 1932)

When the enrolled bill was prepared, a Senate clerk, apparently aware of the

earlier mistake, altered the legislation by changing the provision in section 5101(a)(1) for 36 months of payment for certain durable medical equipment back to 13 months, as earlier approved by the Senate. See S. 1932, enrolled in Senate, at § 5101.5

The enrolled bill was signed by the Speaker of the House and President pro tempore of the Senate on February 7, 2006, and transmitted to the President later that day. 152 Cong. Rec. S768 (Feb. 7, 2006). The House, however, had never passed that version of the bill; indeed, the House had never even been sent that version for consideration. Displaying knowledge of the constitutional flaw in the bill's passage, Senator Frist, on February 8, submitted a resolution to the Senate stating "That the enrollment of the bill S. 1932 as presented to the President for his signature on February 8, 2006, is deemed the true enrollment of the bill reflecting the intent of Congress in enacting the bill into law." S. Con. Res. 80, 152 Cong. Rec. S869 (Feb. 8, 2006). The Senate agreed to the resolution. *Id*. at S870. The Senate requested that the House concur in the resolution, *id*. at H202, but the House did not act on it.

Even if the House had agreed to the resolution, a concurrent resolution "makes no binding policy; it is 'a means of expressing fact, principles, opinions, and purposes of the two Houses.' . . . It is settled, however, that if a resolution is

intended to make policy that will bind the Nation and thus is 'legislative in its character and effect,' — then the full Article I requirements must be observed." *Bowsher v. Synar*, 478 U.S. 714, 756 (1986) (Stevens, J., joined by Marshall, J., concurring) (citations omitted).

On February 8, 2006, President Bush signed the enrolled bill. *See* 120 Stat. 4, Pub. L. No.109-171 (2006).[*] Plaintiffs, members of the United States House of Representatives, brought this lawsuit and contend that the Deficit Reduction Act was not validly enacted and thus is not a law of the United States.

Standard of Review

In evaluating the defendants' motion to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6), the court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations [of the plaintiff] as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Marks v. Newcourt Credit Group, Inc*., 342 F.3d 444, 451-52 (6th Cir.2003).

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[*]This occurred even though the White House was warned on February 8, 2006, that the bill it had received never passed the House. House Speaker Dennis Hastert confirms that his office spoke to a "high-ranking White House official" hours before the signing ceremony and asked that actual signing be delayed. David Rogers, Wall Street Journal, Mar. 22, 2006.

Argument

I. MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES HAVE STANDING TO SUE

The law is clear that legislators have standing for injuries that they personally suffer. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969). The defendants' motion to dismiss tellingly omits any mention, let alone discussion, of the key Supreme Court case allowing members of a legislature to sue: *Coleman v. Miller*, 307 U.S.433 (1939). In that case, the Kansas Senate voted 20-20 on whether to approve a proposed amendment to the United States Constitution. The Lieutenant Governor cast the tie-breaking vote in favor of the amendment and it was deemed approved. A challenge was brought by members of both the Kansas Senate and House of Representatives to void the State's approval of the proposed amendment.

The defendants moved to dismiss on standing grounds, but the Supreme Court expressly rejected that argument and found that the plaintiffs had standing to sue in their capacity as legislators. Chief Justice Hughes, writing for the Court, explained: "Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat

ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." 307 U.S. at 438.

In *Raines v. Byrd*, 521 U.S. 811, 823 (1997), the case primarily relied upon by the defendants, the Supreme Court expressly reaffirmed *Coleman v. Miller.* In *Raines v. Byrd,* the Court explained that when legislators have suffered an injury that impairs their ability to perform as elected representatives, they must allege either that they have been singled out as opposed to other members of their respective bodies, or that their votes have been "denied or nullified." 511 U.S. at 821, 824 n.7.

That is exactly what occurred here: the plaintiffs, as members of the House of Representatives, were "denied" the opportunity to vote on a bill signed into law by the President. As such, they were disenfranchised in a literal sense. The law is clear that "disenfranchisement" is a form of denial or nullification sufficient to meet the requirement for standing. *See, e.g., Goldwater v. Carter,* 617 F.2d 697, 702 (1979), *aff'd on other grounds,* 444 U.S. 996 (1979) (for legislators to establish standing "the alleged dimunition in congressional influence must amount to a disenfranchisement . . . or withdrawal of a voting opportunity.")

Plaintiffs, and all members of the House of Representatives were "disenfranchised" by being "denied" the opportunity to vote on the Senate version

of the bill which was signed into law by President Bush. It is difficult to imagine a more direct form of denial and disenfranchisement. Plaintiffs, as members of the House of Representatives, have standing because, in the words of *Coleman v. Miller*, they have "a plain, direct and adequate interest in maintaining the effectiveness of their votes." 307 U.S. at 438.

The defendants argue that plaintiffs in this lawsuit were members of the House of Representatives who were opposed to either version of the bill. Memorandum in Support of Motion to Dismiss ("Motion to Dismiss"), at 7. Defendants quote *Baird v. Norton*, 266 F.3d 408, 412 (6th Cir.2000), as standing for the proposition that "[f]or legislators to have standing as legislators . . . they must possess votes sufficient to have either defeated or approved the measure at issue." Motion to Dismiss, at 6.

This argument rests on a fundamental misunderstanding of what occurred and of plaintiffs' argument. *No one* in the House of Representatives voted on the version of the bill which was signed into law. The Senate version was never presented in the House for a vote. That is precisely the "denial" and "disenfranchisement" which is the basis for this lawsuit. *Baird v. Norton* is distinguishable from this situation because here, of course, there is no way to know whether there were sufficient votes to defeat the Senate version.

Plaintiffs were denied the ability to persuade their colleagues and of the opportunity to vote as required by the Constitution. Defendants argue that this is not an injury by stating: "Since what they challenge is an Act of Congress, not a constitutional amendment, all or any of it can be rescinded at any time; plaintiff's still have every opportunity to persuade their colleagues to modify or repeal any provision of the act. They have not been disenfranchised." Motion to Dismiss, at 8-9 (emphasis and citations omitted). But even if plaintiffs today persuaded every one of their colleagues to vote unanimously against the Senate version that would have absolutely no effect. Unless the Senate also passed the House bill and the President signed it, there would be no effect to the House vote.

Indeed, by the defendants' standing argument, there would be no standing for members of the House of Representatives even if the President signed into law a bill considered only by the Senate. Defendants argue that there is not standing because the injury was not "fairly traceable to the defendants' unlawful conduct." Motion to Dismiss, at 9 (citations omitted). It was, though, the President signing the bill which caused the injury and thus the President, and the heads of executive agencies answerable to the President, are the cause of the injuries here. Besides, again, by defendants' theory no one would have standing to challenge a law, such as a spending bill, passed just by the Senate and signed by the President. That

cannot be right; disenfranchisement of members of Congress is a basis for standing.

II. THE ATTESTATION AND AUTHENTICATION OF THE ENROLLED BILL DOES NOT ESTABLISH THAT IT WAS CONSTITUTIONALLY ADOPTED.

Defendants argue that "plaintiffs' claim is squarely foreclosed by *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)." Defendants' Motion to Dismiss, at 10. Defendants read that case far too broadly and ignore subsequent decisions.

In *Marshall Field & Co. v. Clark*, the plaintiffs claimed that the Tariff Act of October 1, 1890 was not a law of the United States because a section in the enrolled act was not in the version passed by either house of Congress. 143 U.S. at 668-669. The plaintiffs based their claim on Article I, § 5 of the Constitution, which states "that 'each house shall keep a journal of its proceedings.'" *Id.* at 670 (quoting U.S. Const. art. I, § 5). Specifically, the plaintiffs argued the Tariff Act was not a law because the Congressional Record revealed that a section of the enrolled act was omitted from the version passed by the House and the Senate. *Id.* at 668-69.

The Court framed the issue in *Field* as a question of evidence. The question before the Court concerned "the nature of the evidence upon which a court may act when the issue is made as whether a bill. . . was or was not passed by

congress." *Id.* at 670. Although the Court recognized the need for the judiciary to rely on attestations by the Speaker of the House and the President *pro tempore* of the Senate, the decision expressly left open the possibility of a court finding such an enrolled act invalid because it did not actually pass both houses of Congress. The Court observed that the judiciary still could find that "an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of congress, and by the approval of the president, and had been deposited in the public archives, as an act of congress, was not in fact passed by the house of representatives and the senate, and therefore did not become a law." *Id.*

In its recent discussions of the portion of the *Marshall Field* opinion relevant here, the Supreme Court has reiterated that *Marshall Field* is about "'the nature of the evidence' the Court would consider in determining whether a bill had actually passed Congress" and the requirement for Congress to keep journals of its proceedings. *United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990) (quoting *Marshall Field*, 143 U.S. at 670); *see United States Nat'l Bank of Or. v. Independent Ins. Agents of Am.*, 508 U.S. 439, 455 n.7 (1993) (*Marshall Field* concerns "the nature of the evidence").

This description is consistent with Supreme Court precedent from the years

soon after *Marshall Field*, which confirms that the holding in the case was tied to the plaintiffs' contention about the evidentiary value of congressional journals. *See, e.g., Harwood v. Wentworth*, 162 U.S. 547, 562 (1896).

But this case, in sharp contrast, raises no issues about the weight to give to congressional journals or whether they are required. This case is about whether a bill can become a law if it is not passed with exactly the same content by both the House and the Senate. Subsequent cases make clear that such challenges to non-compliance with the Constitution's requirements for enacting laws are not covered by *Marshall Field*.

In *United States v. Munoz-Flores*, the Court reviewed the legislative process to determine whether a law had been properly adopted even though there had been attestation that the bill was passed by the House and the Senate. There, the Court held that a special assessment statute was not a revenue raising bill and therefore did not violate the Origination Clause in Article I, § 7 of the Constitution. *Id.* at 401. The Court found that the holding from *Marshall Field* did not control because "[w]here, as here, a constitutional provision *is* implicated, *Field* does not apply." *Id.* at 391 n.4.

The issue in the present case is quite similar to that in *Munoz-Flores*. The failure of the House of Representatives to pass the enrolled version of the Deficit

Reduction Act presents a constitutional issue, like in *Munoz-Flores*, not an evidentiary question as in *Field v. Clark.*

Quite importantly, in *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court explained that for a bill to become a law the House and the Senate must approve "precisely the same text" and that must be signed by the President; if even "one of paragraph of that text had been omitted at any one of those three stages, [the law] would not have been validly enacted." *Id*. at 448.

In *Munoz-Flores*, *Clinton v. New York City*, and this case, that was the claim: that Congress was violating a constitutional requirement binding on it. That was not the issue in *Field v. Clark.* There is no basis for concluding that attestation is sufficient to make a law constitutional if the statute was not enacted in accord with the procedures prescribed by the Constitution. Indeed, *Munoz-Flores* holds exactly the opposite; the fact of attestation did not resolve the constitutional question.

III. THE DEFENDANTS' ASSERTION THAT BOTH HOUSES PASSED THE SAME BILL IS NOT A BASIS FOR DISMISSING THE LAWSUIT

Defendants argue that the "same bill did pass both houses of Congress before being presented to the President and signed into law." Defendants' Motion to Dismiss, at 13. In presenting this argument, defendants present their version of

the facts as to what occurred. This, however, is completely inappropriate in considering a motion to dismiss for failure to state a claim. A motion to dismiss is considered, of course, solely on the basis of the plaintiff's complaint. *Conley v. Gibson*, 335 U.S. 41, 45-46 (1959). Defendants' version of what happened, and any factual dispute over it, is appropriate to consider on a motion for summary judgment or at trial, but not on a motion to dismiss.

Moreover, defendants are simply wrong. The same version of the bill did not pass both the House and the Senate. On February 1, 2006, the House voted on Papers sent by the Senate that reflected 36 months of funding for durable medical equipment – not the 13 months actually passed in the Senate.

The defendants argue that when the House voted on February 1, 2006, to concur to the Senate amendment, it, by reference, adopted the exact language passed by the Senate. Motion to Dismiss, at 13-15. This, in their estimation, is so because the incorrect papers sent by the Senate were not put into the House record before the recorded vote.

However, this argument ignores hundreds of years of House precedent that clearly states that the actual physical papers transmitted between the Houses serve as the only record of action in the other body. As explained by the Clerk of the House herself: "The House and Senate communicate their respective legislative

actions by formal messages which transmit official papers between the two chambers. According to the Office of the Parliamentarian and the precedents of the House, such messages constitute the sole source of official information in one chamber regarding actions taken in the other." Letter from Karen L. Hass, Clerk of the House of Representatives to The Honorable Vernon J. Ehlers, Chairman, Committee on House Administration, et. al. at 4 (May 11, 2006) (citing 16 Deschler-Brown ch. 32, § 1; 8 Cannon §§ 3342-3.

The Clerk, citing long standing rules of the House, therefore confirms that the House's February 1, 2006, vote was on the actual papers transmitted by the Senate, which erroneously provided for 36 months of funding, and not on the bill containing 13 months of funding passed by the Senate. *Id.*

The Defendants ask this court to intervene in House procedure, overturn explicit and long-standing rules, and declare that a different bill was adopted by reference no less. They argue that if this court does not simply accept the enrolled version of the Deficit Reduction Act, it cannot look to the Senate engrossed bill as evidence that two different bills passed the two houses. Motion to Dismiss, at 14. Defendants then go on to contradict themselves and claim the court can look to the Congressional Record to support it's "adoption by reference" theory.

If this court is going to examine the legislative history, it would be

nonsensical to ignore the actual text of the bills and the procedures in which they were passed and instead elevate the phrase "concurrence in the amendment" to conclusive evidence and then simply infer what the House was concurring in. In fact, if the court were to accept the Defendant's argument, there would be no acceptable record of any House or Senate actions for the purpose court inquiry.

This court should focus solely on the plaintiffs' complaint and not look at the underlying facts in considering the motion to dismiss. But if it looks beyond the complaint, then it is clear that defendants' account of the facts is incorrect.

IV. THE UNCONSTITUTIONALITY OF THE DEFICIT REDUCTION ACT CANNOT BE SOLVED BY SEVERABILITY

Finally, defendants argue that the solution is simply to sever §5101 of the Act, declare it unconstitutional, and allow the rest of the Act to remain in effect. Once more, defendants miss the point of plaintiffs' lawsuit. The Deficit Reduction Act needed to be passed by the House of Representatives in the same form that it passed the Senate. The Act never did and thus the Act is not valid. A law is not validly enacted if even "one of paragraph of that text" is different. *Clinton v. City of New York*, 524 U.S. at 448.

All of the cases concerning severability cited by the defendants are instances where a bill is properly enacted into law, one part is declared

unconstitutional, and then the issue is whether the bill would have passed without that part. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) ("[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which it is not, the invalid part may be dropped if what is left is fully operative as a law.") But this is not a situation in which a law was properly passed and the question is how to handle the unconstitutionality of a particular section. The entire law is void because the bill never passed the House of Representatives as required by Article I, §8 of the Constitution.

Defendants cite no precedent, because there is none, for the proposition that a law adopted without proper procedures can go into effect with only a portion being invalidated. Since the entire bill never was presented or voted in the House, the entire bill is unconstitutional.

Conclusion

For these reasons, the defendants' motion to dismiss should be denied.

Respectfully submitted,

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