Memorandum April 5, 2006

SUBJECT: **Constitutionality of the Deficit Reduction Act of 2005**

FROM: Thomas J. Nicola
Legislative Attorney
American Law Division

This memorandum responds to inquiries regarding whether the Deficit Reduction Act of 2005, S. 1932, 109th Cong., 1st Sess., was enacted as Public Law 109-171 in compliance with the Constitution. A question has been raised about whether the text of the enrolled version of S. 1932 that was sent to and signed by the President and certified as passing the Senate by the President *pro tempore* and the House by the Speaker accurately reflected the text that each chamber had passed. A published report has indicated that after the Senate acted on the text that the House had passed, an error allegedly was made in transcribing the Senate-passed text and that the incorrectly transcribed text, known as the engrossed version, was returned to the House which then agreed to it. *CQ Today* 5 (Feb. 10, 2006). It also has been reported that after the House passed the allegedly incorrectly transcribed engrossed text, the error was corrected by a Senate clerk before the bill was certified as passing the House by the Speaker and the Senate by the President *pro tempore* in the enrolled version before it was sent to President George W. Bush, who signed it on the afternoon of February 8, 2006. *Id.*

Procedural Background

This question has arisen because of the way that the House and Senate took action on the conference report to S. 1932, H. Rept. 109-362, 109th Cong., 1st Sess.. The House passed it on December 19, 2005 by a vote of 212 to 206. 151 *Cong. Rec.* H12276-H12277 (daily ed. Dec. 19, 2005). When the Senate took up the House-passed conference report on December 21, 2005, a point of order was raised by Senator Kent Conrad against four sections on the ground that they violated the so-called Byrd Rule, section 313 of the Congressional Budget Act, 2 U.S.C. 644, which prohibits including in a conference report to a reconciliation bill extraneous provisions including those that do not change outlays and revenues. 151 *Cong. Rec.* at S14204 (daily ed. Dec. 21, 2005). By a vote of 52 to 48, the Senate did not garner the 60 votes needed to waive the Byrd Rule point of order. *Id.* at 14205. After this vote, the Presiding Officer sustained the point of order against three sections of the conference report, but not against a fourth section. *Id.* The consequence of sustaining the Byrd Rule point of order and striking three sections of the conference report

CD06169

was that the Senate rejected the conference report; instead, the product of the Senate action was a Senate amendment.

When a Byrd Rule point of order is sustained, the Senate proceeds to the immediate consideration of an amendment which consists of the text of the conference reported version without the stricken provisions. The Byrd Rule provides, in relevant part, that if a point of order on this ground is sustained, ". . . the Senate shall proceed, without intervening action or motion, to consider the question of whether the Senate shall recede from its amendment and concur with a further amendment, or concur in the House amendment without further amendment, as the case may be, which further amendment shall consist of only that portion of the conference report or House amendment, as the case may be, not so stricken."

When the time came for a final vote in the Senate, the Presiding Officer said that, "The question is on agreeing to the motion to concur in the House amendment with the Senate amendment." *Id.* at S 14221. Under the Byrd Rule, the Senate amendment was the text of the conference report without the three stricken sections. The Daily Digest reported that, "By 51 yeas to 50 nays, the Vice President voting yea (Vote No. 363), the Senate concurred in the amendment of the House of Representatives to S. 1932, to provide for reconciliation pursuant to section 202(a) of the concurrent resolution on the budget for Fiscal Year 2006 (H. Con. Res. 95), with the following amendment proposed thereto: Conrad Amendment No. 2691 (to the amendment of the House), in the nature of a substitute." 151 *Cong. Rec.* D1331 (daily ed. Dec. 21, 2005).

The text of the Conrad Amendment No. 2691 was printed in the *Congressional Record.* 151 *Cong. Rec.* S14337 (daily ed. Dec. 22, 2005, which included continuation of proceedings of December 21). Although the *Record* states that the version printed therein was proposed by Senator Conrad, it reflects the Senate amendment in the nature of a substitute, *i.e.*, the text that the Senate actually passed, the conference report without the three stricken sections. As noted earlier, Senator Conrad raised a Byrd Rule point of order against four sections of the conference report, but the point of order was sustained against three of the four sections. The text that was printed in the *Record* excludes the sections against which the point of order was sustained, but includes the section against which it was not sustained. *See* 151 *Cong. Rec.* S14337, S14344, and S14360 (daily ed. Dec. 22. 2005, continuation of proceedings of December 21, 2005), which exclude sections 5001(b)(3), section 5001(b)(4), and a portion of section 6043, but include section 7404.

After the Senate completed this action, it was necessary to engross, *i.e.*, transcribe, the the text that the Senate passed. The engrossed version is the official copy of a measure as passed by the Senate that is sent to the House to allow the House to act on it. The House cannot act on legislation coming from the Senate unless the House is in possession of the signed copy of the engrossed bill. *See* 7 *Deschler's Precedents of the United States House of Representatives* Chap. 24 § 12, H. Doc. No. 94-661 94th Cong., 2d Sess. 432 (1976). An error allegedly was made in engrossing the Senate-passed text, *i.e.*, the Conrad Amendment No. 2691 in the nature of a substitute. This alleged error was not in one of the sections that was the subject of the Byrd Rule point of order; it was in section 5101(a)(1) relating to the time period that Medicare Part B would pay a percentage of rent for durable medical equipment, other than oxygen equipment, and the date that ownership, *i.e.*, title, would pass from an equipment supplier to an individual Medicare beneficiary.

The text of the conference report that the House passed on December 19 and the text of the Conrad amendment in the nature of a substitute that the Senate passed on December

21 both provided that the rental period for durable medical equipment other than oxygen equipment would be 13 months and that title to it would pass from the equipment supplier to the individual on the first day of the 13th month. H. Rept. 109-362, 109th Cong., 1st Sess. 36-38 (2005) and 151 *Cong. Rec.* S14346-S14346 (daily ed. Dec. 22, 2005, continuation of proceedings of Dec. 21, 2005).

The text of the engrossed version that was sent to the House following Senate action, which is alleged to have been inaccurately transcribed, however, stated that the rental period for durable medical equipment other than oxygen equipment would be 36 months and that title would pass on the first day of the 36th month.

On February 1, 2006, the House by a vote of 216 to 214 agreed to H. Res. 653, 109th Cong., 2d Sess.. 152 *Cong. Rec.* H68 (daily ed. Feb. 1, 2006). This resolution 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." *Id.* at H37. The Senate amendment that the House concurred in was printed in the *Congressional Record. See* 152 *Cong. Rec.* H69, H77 (daily ed. Feb. 1, 2006) for the text, which in section 5101(a)(1) states that the rental period for durable medical equipment other than oxygen equipment is 36 months and that title transfers on the first day after the 36th month.

After the Senate and House completed action on S. 1932, as amended by the Conrad amendment in the nature of a substitute by the Senate, the text was transcribed in an enrolled bill. At this stage the error in the engrossed version that the Senate had sent to the House, *i.e.*, 36 months for rental of durable medical equipment other than oxygen equipment and title transfer on the first day after the 36th month in section 5101(a)(1), reportedly was corrected to 13 months and the first day after the 13th month. *CQ Daily* 5 (Feb. 10, 2006). The Speaker of the House and the President *pro tempore* of the Senate reportedly certified that the text in the enrolled version of S. 1932 reflected text that their respective chambers had passed. *Id.* The President signed the enrolled bill on February 8, 2006.[1] *Id.* It became P.L. 109-171

On the evening of February 8, the day that the President signed S. 1932, the Senate by unanimous consent agreed to S. Con. Res. 80, 109th Cong., 2d Sess., which stated, "That the enrollment of 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 the Congress in enacting the bill into law." 152 *Cong. Rec.* S869, S870 (daily ed. Feb. 8, 2006). The House received a message from the Senate which stated that the Senate had agreed to S. Con. Res. 80 and requested concurrence of the House. *Id.* at H202. The House reportedly did not take up S. Con. Res. 80 because some Members informally objected to it. *CQ Daily* 5 (Feb. 10, 2006).

On February 13, 2006, a lawsuit seeking a declaratory judgment that the Deficit Reduction Act was unconstitutionally enacted on the ground that different bills allegedly

---

[1] A published report has indicated that Speaker Dennis Hastert asked the President to delay signing the enrolled bill to allow the House and Senate to take further action, but the President, on the advice of his attorneys, proceeded to signed it. *The Wall Street Journal* A-6 (Eastern ed. Mar. 22, 2006).

passed the House and Senate was filed in the United States District Court for the Southern District of Alabama by elder law attorney Jim Zeigler.[2]

The House on February 16, 2006 by a vote of 219 to 187 tabled H. Res. 687, 109th Cong., 2d Sess., a privileged resolution that would have required the Committee on Standards of Official Conduct to begin an immediate investigation into allegations relating to inaccuracies in the process and enrollment of S. 1932 cleared for the President on February 1, 2006. 152 *Cong. Rec.* H353 (daily ed. Feb. 16, 2006).

On March 21, 2006, another lawsuit seeking a declaratory judgment that the Deficit Reduction Act was unconstitutionally enacted because different bills allegedly passed the House and Senate was filed in the United States District Court for the District of Columbia by Public Citizen.[3]

For purposes of this analysis, we accept the information in the *CQ Today* and *The Wall Street Journal* articles as accurate.[4]

Relevant Constitutional Provisions

The facts surrounding Senate and House passage of versions of S. 1932 that reportedly were not identical have raised a constitutional question because of the principle of bicameralism and the Presentment Clause. The bicameralism principle appears in Art. I, Section 1, clause 1 of the Constitution, which states that, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The Presentment Clause, Art. I, Section 7, clauses 2 and 3, in relevant part, provides that, "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it. . . .;" and "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, ..."

Enrolled Bill Rule

The enrolled bill rule holds that if a bill is authenticated as duly passed by the House and Senate by the Speaker of the House and the President of the Senate or the President *pro tempore* of the Senate, a court treats the bill as properly adopted and unimpeachable; it refuses to "look behind" these attestations. Late in the Nineteenth Century, the Supreme Court addressed whether an alleged omission of a paragraph from an enrolled bill that the Speaker of the House and President of the Senate had certified as passing their respective chambers and the President of the United States had signed rendered it a nullity on the ground that the enrolled bill did not accurately reflect the entire text that the House and Senate had passed. In *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892), the Court characterized the argument presented by the appellants.

---

[2] *See* http://www.jimzeigler.com for the text of the complaint captioned Zeigler v. Gonzalez, Civ. Action 2006-80.

[3] *See* http://www.citizen.org for the text of the complaint captioned Public Citizen v. Clerk, United States District Court for the District of Columbia.

[4] These reports have not been verified independently by the Congressional Research Service.

> . . . that a bill, signed by the Speaker of the House of Representatives and the President of the Senate, presented to and approved by the Secretary of State, as an act passed by Congress, does not become a law of the United States if it had not in fact been passed by Congress. In view of the express requirements of the Constitution the correctness of this general principle cannot be doubted. There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.
>
> But this concession of the correctness of the general principle for which the appellants contend does not determine the precise question before the court; for it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become a law, was or was not passed by Congress. This question is now presented for the first time in this Court. It has received, as its importance required that it should receive, the most deliberate consideration.

Field, 143 U.S. at 669-670.[5]

The Court framed the issue in the following terms:

> We recognize, on one hand, the duty of this Court, from the performance of which it may not shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged in fidelity to the Constitution, to declare 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 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. at 670. (Emphasis in original.)

The appellants urged the Court to inspect the journals of the House and Senate, arguing that the constitutional provision, Art. I, Section 5, which requires that each House of Congress shall keep them intimated that the journals should be viewed as the best, if not conclusive, evidence to determine whether a bill was, in fact, passed by the House and Senate. The Court declined to inspect the journals for this purpose, saying that the words of

---

[5] Under section 106a of title 1 of the United States Code, a bill, order, resolution, or vote of the Senate and House that has been approved by the President or passed over the President's veto is now received by the Archivist of the United States rather than the Secretary of State.

the Journal Clause do not require that interpretation. It added that no clause of the Constitution, either expressly or by necessary implication, prescribes the mode in which the fact of the original passage of a bill by the House and Senate shall be authenticated, or precludes Congress from adopting any mode to that end which its wisdom suggests. "Although the Constitution does not expressly require that bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative bodies, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication." *Field* at 671.[6]

The Court held that the signing by the Speaker and the President of the Senate, in open session,

> . . . is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when such a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.

Id. at 672.[7]

The Court held that an enrolled bill with the official attestations of the Speaker and the President of the Senate and approved by the President of the United States ". . . carries, on its face, a solemn assurance by the legislative and executive departments of the government, . . . that it was passed by Congress." *Id.*

The Court gave the reason it took this position. "The respect due to coequal and independent departments of the government requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution." *Id.*

The Court also rejected an assertion that an enrolled act should not be regarded as a law if the House or Senate journal failed to show that it passed in the precise form in which it was signed by the presiding officers of the two houses.

> It is said that, under any other view, 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

---

[6] This authentication requirement currently appears in 1 U.S.C. sec. 106 , which states that every bill or resolution that passes the House or Senate must be printed as the engrossed version, signed by the House Clerk or Secretary of the Senate as the case may be, and sent to the other House which shall deal with it in that form. When a bill or joint resolution passes both Houses, it must be printed as the enrolled version and signed by the presiding officers of both Houses and sent to the President.

[7] 1 U.S.C. sec. 106a prescribes the current procedures for promulgating statutes.

> 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 Congress. Judicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses, and the approval of the President, 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 the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.

Id. at 672-673.

The United States Court of Appeals for the Seventh Circuit cited the *Field* case in a suit brought by a tax protester who asserted that the Sixteenth Amendment was not validly ratified by the states because the ratifying instruments of some states did not repeat the text of the amendment exactly as Congress approved it. Of the 37 states that transmitted written ratifying instruments that reflected text that their legislatures had passed to the Secretary of State, one state notified him orally that its legislature had agreed to it, only four state legislatures agreed to text that was identical to the one that Congress had passed and submitted to the states; the others had errors of diction, capitalization, punctuation, and spelling. The document that Illinois approved, for example, substituted "remuneration" in place of "enumeration" used in the text that Congress had approved, Missouri's document substituted "levy" in place of "lay," and the one for Washington said "income" instead of "incomes." *See United States* v. *Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986). The protester alleged that because an insufficient number of states had agreed to state ratifying instruments that were identical to the language that Congress had passed and submitted to them for ratification, the Sixteenth Amendment did not go into effect and, consequently, that he could not be convicted of not paying income tax.

The court responded that:

> Although Thomas urges us to take the view of several state courts that only agreement on the literal text may make a legal document effective, the Supreme Court follows the "enrolled bill rule." If a legislative document is authenticated in regular form by the appropriate officials, the court treats that document as properly adopted. *Field* v. *Clark*, 143 U.S. 649 (1892). This principle is equally applicable to constitutional amendments. *See Leser* v. *Garnett*, 258 U.S. 649 (1922),

> which treated as conclusive the declaration of the Secretary of State that the Nineteenth Amendment had been adopted.

Thomas, 788 F.2d at 1253.[8]

In the *Leser* case, the Supreme Court held that the duly authenticated notices by state officials to the Secretary of State that their legislatures had ratified a constitutional amendment, the Nineteenth Amendment, and the Secretary's certification by issuing a proclamation that the states had done so was conclusive on the courts. "The rule declared in *Field* v. *Clark*, 143 U.S. 649, 669-673, is applicable here." *Leser*, 258 U.S. at 137.

The *Field* case was cited by Justice Antonin Scalia in a concurring opinion in *United States* v. *Munoz-Flores*, 495 U.S. 385, 408 (1990). There the Court considered whether a provision of law which required that persons who had been convicted of crimes should be assessed an amount to be paid into the Victims of Crime Fund contravened the Origination Clause, Art I, Section 7, clause 1, of the Constitution. That clause provides that, "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." Mr. Munoz-Flores asserted that the provision mandating this assessment violated the Clause because it had originated in the Senate. After reaching the merits of this challenge, the Court rejected his contention on the ground that the Origination Clause only applies to bills that raise revenue to support the government generally and not to other bills such as the assessment provision which incidentally may raise revenue.

In his concurring opinion, Justice Scalia agreed with the result reached by the Court in an opinion written by Justice Thurgood Marshall, but asserted that under the *Field* case the Court should not have looked behind the designation of H.J. Res. to try to determine whether the House or Senate actually had originated the provision in question. Instead, he would have applied the enrolled bill rule.

A footnote in the opinion of the Court responded to Justice Scalia's approach:

> Justice Scalia . . . contends that Congress' resolution of the constitutional question [relating to the Origination Clause] in passing the bill bars the Court from considering it. The only case he cites for this argument is *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892). But *Field* does not support his argument. That case concerned "the nature of the evidence" the Court would consider in determining whether a bill had actually passed Congress. *Id.* at 670. Appellants had argued that the constitutional clause providing that "[e]ach House shall keep a journal of its proceedings" implied that whether a bill had passed must be determined by an examination of the journals. *See ibid.*

---

[8] *See* N. Singer, 1 *[Sutherland] Statutes and Statutory Construction* § 15.2 (6th ed. 2002), which provides that many states apply the enrolled bill rule, which holds that an enrolled bill is conclusive, but other states apply other evidentiary rules. Some states view an enrolled bill as *prima facie* correct and uphold it unless a legislative journal shows affirmative contradiction of a constitutional requirement. Some states hold that although an enrolled bill is considered *prima facie* correct, evidence from legislative journals is admissible to strike down a bill. Finally, other states regard a legislative journal as conclusive and consider an enrolled bill conclusive only if it accords with the recital in the journal and constitutional procedure.

> (quoting Art I, § 5) (internal quotation marks omitted). The Court rejected that interpretation of the Journal Clause, holding that the Constitution left it to Congress to determine how a bill is to be authenticated as having passed. *Id.*, at 670-671. In the absence of any constitutional requirement binding Congress, we stated that "[t]he respect due to coequal and independent departments" demands that the courts accept as passed all bills authenticated in the manner provided by Congress. *Id.* at 672. Where, as here, a constitutional provision is implicated, *Field* does not apply.

Munoz-Flores, 495 U.S. at 392, n. 4.

The constitutional provision to which Justice Marshall referred was the Origination Clause. It is not clear whether the view expressed in this passage that the *Field* case does not apply "where a constitutional provision is implicated" would extend to constitutional provisions that prescribe procedures for lawmaking such as bicameralism and the Presentment Clause. This passage, however, acknowledges that the Court in *Field* "left it to Congress to determine how a bill is to be authenticated as having passed" because "'the respect due to coequal and independent departments' demands that the courts accept as passed all bills authenticated in the manner provided by Congress." This acknowledgment may suggest that the *Field* case and the enrolled bill rule may apply to cases that involve constitutional provisions that prescribe the procedures for lawmaking, as distinguished from the Origination Clause which mandates where revenue bills must originate.

A few years after the *Munoz-Flores* case was decided, the Court quoted from the above footnote to affirm that the enrolled bill rule precludes it from reviewing evidence in legislative documents such as journals to determine whether a bill had actually passed Congress, but not to ascertain the meaning of language used in a statute. A party in *United States National Bank of Oregon* v. *Independent Insurance Agents of America*, 508 U.S. 461 (1993), asserted that the *Field* doctrine precluded the Court from reviewing these materials to determine the meaning of a statute. The Court responded that:

> Contrary to respondents' argument, the *Marshall Field* case does not preclude us from asking whether the statute means something other than what the punctuation dictates. . . . The *Marshall Field* doctrine concerns "'the nature of the evidence' the Court [may] consider in determining whether a bill had actually passed Congress," *United States* v. *Munoz-Flores*, 495 U.S. 385, 391, n. 4 (1990) (*quoting from Marshall Field, supra*, 143 U.S. at 670); it places no limits on the evidence a court may consider in determining the meaning of a bill that has passed Congress.

National Bank of Oregon, 508 U.S. at 455, n. 7.

The Court of Appeals for the Second Circuit cited this passage from the *National Bank of Oregon* case in *United States* v. *Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004). The court acknowledged that the Supreme Court and many courts including it invoke the enrolled bill rule, which holds that, "'[i]f a legislative document is authenticated in regular form by the appropriate officials, the court[s] treat [ ] that document as properly adopted.'" *Id.* at 99, *quoting from United States* v. *Sitka*, 845 F.2d 43, 46 (2d Cir. 1988), *which quoted from United States* v. *Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986), *citing Field* v. *Clark*, 143 U.S.

649, 672-673 (1892). (Brackets in original.) In accord with the *National Bank of Oregon* case, the court added that the enrolled bill rule did not preclude it from using legislative materials to ascertain the meaning of language used in a statute.

Political Question Doctrine

The enrolled bill rule applied in the *Field* case is closely related to, "if not inherent in," the political question doctrine under which courts decline to hear cases that they deem more suitable for decision by the legislative and executive branches of government. *United States* v. *Sitka*, 845 F.2d 43, 46 (2d Cir. 1988).

In *Baker* v. *Carr*, 369 U.S. 186 (1962), the Supreme Court held justiciable, *i.e.*, reached the merits and decided, a matter relating to apportionment of seats in a state legislature and delineated the contours of the political question doctrine. The Court quoted the following passage from *Coleman* v. *Miller*, 307 U.S. 433, 454-455 (1939) : "'In determining whether a question falls within [the political question] category, the appropriateness of our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.'" *Baker*, 369 U.S. at 210. (Brackets in original.) The Court added that, "The nonjusticiability of a political question is primarily a function of the separation of powers." *Id.*

The Court identified cases which it said represented examples of the kinds of cases that presented political questions. It included among these the *Field* case under the category "validity of enactments." The Court observed that in the *Coleman* case it had held that questions relating to how long a proposed amendment to the Constitution remained open to ratification and the effect that prior rejection of a proposed amendment had on a subsequent ratification "... were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." *Id.* at 214. (Footnote omitted.)

> Similar considerations apply to the enacting process: "The respect due to coequal and independent departments" and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities. *Field* v. *Clark*, 143 U.S. 649, 672, 676-677; *see Leser* v. *Garnett*, 258 U.S. 130, 137. But it is not true that courts will never delve into a legislature's records upon such a quest: If the enrolled statute lacks an effective date, a court will not hesitate to seek it in the journals in order to preserve the enactment. *Gardner* v. *The Collector*, 6 Wall. [73 U.S.] 499 [1867]. The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.

Id.

In the *Gardner* case, the Court had to determine when a statute that raised the rate of a tax took effect. When President Lincoln signed it, he affixed next to his signature only the date and month "December 24" but not the year. Unless a statute includes a provision stating when it will take effect, and this one did not, it takes effect when the President signs it or

when Congress overrides a veto. A party to the suit alleged that the higher tax rate did not apply because the enrolled bill did not reveal the year that the statute took effect.

The Court reviewed the legislative journals and the record of the Secretary of State which showed the year when the President signed the bill. In this circumstance, the Court said that, "There is no reason, then, on sound principle, why the Court should confine itself to the date made by the President, or, if he has made none, should reject all other sources of knowledge. The judicial notice of the Court must extend, not only to the existence of the statute, but to the time at which it takes effect, and to its true construction." *Gardner*, 6 Wall. at 509. The Court added that:

> We are of the opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.

Id. at 511.

The Court in the *Field* case in 1892 quoted this passage from the *Gardner* case of 1867, but expressly said that it did not apply to the facts it addressed, *i.e.*, whether the legislative journals should be inspected to determine whether a paragraph that the House and Senate allegedly had passed had been omitted from an enrolled bill. "It is scarcely necessary to say that that case does not meet the question here presented." *Field*, 143 U.S. at 679.

In *Baker* v. *Carr*, the Supreme Court catalogued the various factors that may make a matter nonjusticiable under the political question doctrine.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker at 217.

Since the Court decided the *Baker* case in 1962, it has quoted the above passage in cases where litigants have argued that the Court should not hear a given issue because it presents a nonjusticiable political question. This argument has been rejected in some cases and accepted in at least one. In *Powell* v. *McCormack*, 395 U.S. 486 (1969), for example, the Court held justiciable a case in which the House of Representative voted to exclude Adam Clayton Powell from the House of Representatives. The grounds for exclusion were that

Representative Powell, who had been reelected to the 90th Congress, previously as a Representative had asserted an unwarranted privilege and immunity from the process of a state court, wrongfully diverted House funds for his own uses, and made false reports on expenditures of foreign currency. *Powell*, 395 U.S. at 489-493.

The Court found that even though there was a "textually demonstrable commitment of the issue to a coordinate political department" because Article I, Section 5, clause 1 grants each House of Congress the power to judge the qualifications of its Members, the case did not present a political question. It concluded that the qualifications of a Representative prescribed in Art. I, Section 2, clause 2 of age of 25 years, citizenship for seven years, and inhabitancy in the state when elected, were exclusive and that the House could not add additional qualifications for office in determining whether to seat a person who met the constitutionally prescribed ones and had been duly elected.

In *Immigration and Naturalization Service* v *Chadha*, 462 U.S. 919 (1983), the Supreme Court held that a question regarding the constitutionality of a one-House veto provision was not a political one; it was justiciable. It rejected arguments, based on some of the factors mentioned in *Baker* v. *Carr*, that considering the merits of the claim would be an assault on the power of Congress to enact the provision in question or would show disrespect for a coordinate branch of government. *Chadha*, 462 U.S. at 941-942.

The Court concluded that a section of the Immigration and Nationality Act which authorized one House of Congress to overturn a decision by the executive branch to allow a deportable alien to remain in the United States violated the principle of bicameralism and the Presentment Clause of the Constitution. The Court said that the Framers of the Constitution divided Congress into two distinctive chambers "to divide and disburse power in order to protect liberty," *id.*, 462 U.S. at 950, and to "assure that the legislative power would be exercised only after opportunity for full study and debate in separate settings." *Id.* at 951.

Dividing Congress into two chambers, the Court said, stemmed from the Framers' fear that "special interests could be favored at the expense of public needs" if the legislative power was given only to one chamber and their concern over apprehensions of smaller states. *Id.* at 950. The Framers included the Presentment Clause to give the President a role in the legislative process "to protect the Executive Branch from Congress and to protect the whole people from improvident laws." *Id.* The Court added that, "It emerges clearly that the prescription for legislative action in Art. I, §§ 1 [bicameralism], 7 [Presentment Clause], represents the Framers' decision that the legislative power of the federal government be exercised in accordance with the finely wrought and extensively considered procedure." *Id.*

According to the Court, the constitutional provisions for lawmaking, bicameralism and presentment to the President, apply to any action which has a "legislative purpose and effect." *Id.* at 952, *citing* S. Rept. 54-1335, 54th Cong., 2d Sess. 8 (1897). Any such action which "alters the legal rights, duties, and relations of persons . . . outside the legislative branch" must be passed by both Houses and presented to the President for approval or repassed over the President's disapproval. *Id.* at 952.

In *United States* v. *Munoz-Flores*, 495 U.S. 385 (1990), the Supreme Court observed that the political question doctrine ". . . is designed to restrain the judiciary from inappropriate interference in the business of the other branches of government, ..." *Id.* at 394.

In the *Munoz* case, the Court held that the doctrine did not bar it from deciding the merits of a dispute involving the Origination Clause of the Constitution, Art. I, Section 7, clause 1. This clause provides that, "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." The case allegedly presented a political question because the House could have protected its constitutional prerogative by declining to act on any bill that it believed to be a violation of the Origination Clause. Moreover, it was argued, complying with the Clause did not significantly affect individual rights. The Court agreed that the House could have refused to pass a bill that it deemed a violation of the Origination Clause, but said that this ability did not absolve the Supreme Court of its responsibility to consider constitutional challenges to congressional enactments. *Munoz-Flores*, 495 U.S. at 393-394.

The Court said that the assertion that complying with the Origination Clause did not significantly affect individual rights was an error. It added that the principle of separation of powers embodied in the Constitution applies not only to the allocation of power between the three branches of government, but also to the allocation of power within the Legislative Branch. Citing earlier cases, the Court said that, "What the Court has said of the allocation of powers *among* branches is no less true of such allocations *within* the Legislative Branch. *See, e.g., Chadha, supra*, 462 U.S. at 948-951 (bicameral National Legislature essential to protect liberty) . . . . Provisions for the separation of powers within the Legislative Branch are thus *not* different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty." *Id.* at 394-395. (Emphasis in original.)

As mentioned in the above section on the enrolled bill rule, when the Court reached the merits of the controversy in the *Munoz* case, it concluded that the statutory provision which required a person convicted of a federal crime to pay an assessment to the Crime Victims Fund did not violate the Origination Clause because the Clause applies only to bills that raise revenue for the general purposes of government and not for a single program that may incidentally raise revenue. *Id.* at 401. Five other members of the Court joined Justice Thurgood Marshall in the 6-3 opinion of the Court.

Justice John Paul Stevens, in an opinion joined by Justice Sandra Day O'Connor, concurred in the result, but would have concluded that a bill for raising revenue which originated in the Senate nonetheless could become an enforceable law if it had passed both Houses of Congress and been signed by the President or passed over a presidential veto because the Origination Clause does not describe a consequence if the Senate originates a bill to raise revenue. *Id.* at 401-402. Justice Antonin Scalia, as noted earlier, concurred in the result, but wrote separately to indicate that he would have applied the enrolled bill rule declared in the *Field* case and would not have looked behind the designation of H.J. Res. to ascertain whether the House or Senate actually originated the challenged provision.

The Supreme Court reached a different result, that an issue was a nonjusticiable political question, in *Nixon* v. *United States*, 506 U.S. 224 (1993). A former federal district judge who had been impeached by the House and removed from office after he was convicted by the Senate sought a declaratory judgment to be reinstated to office. He asserted that his Senate conviction did not comply with the Impeachment Trial Clause of the Constitution, Article I, Section 3, clause 6. This clause provides, in relevant part, that, "The Senate shall have the sole power to try all impeachments . . . ." A rule of the Senate delegated to a select committee the task of hearing testimony from witnesses. This select committee then presented its recommendation to the full Senate which voted to convict. The former judge

argued that the term "try" precluded the Senate from delegating this task and that the Constitution required that the full Senate had to hear all testimony.

The Court concluded that the issue was a nonjusticiable political question under two of the factors mentioned in *Baker* v. *Carr*. The grant to the Senate of the "sole power to try all impeachments" was "a textually demonstrable commitment of the issue to a coordinate political department" and there was a "lack of judicially discoverable and manageable standards for resolving it." *Nixon*, 506 U.S. at 735, 740.

This review of the cases summarized here reveals that it is difficult to predict whether the Supreme Court may or may not consider a matter a nonjusticiable political question and decline to reach the merits of a dispute.

Clinton v. *City of New York*

The Supreme Court in *Clinton* v. *City of New York*, 524 U.S. 417 (1998), held that the Line Item Veto Act, P.L. 104-130 (1996), 2 U.S.C. sections 691 *et seq.*, was unconstitutional because it violated the procedures for lawmaking prescribed in Article I, Section 7 of the Constitution. The Act gave the President power to "cancel in whole" any dollar amount of discretionary budget authority, any item of direct new spending, or any limited tax benefit. At the end of the opinion of the Court, Justice John Paul Stevens observed that a statute on which the President had exercised a line item veto had become a law

> . . . after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may "become a law." Art. I, Section 7. If one paragraph of that text had been omitted at any one of those three stages, Public Law 105-33 [the Balanced Budget Act of 1997] would not have been validly enacted.

Clinton, 524 U.S. at 448.

Justice Stevens made this point in the context of striking down the Line Item Veto Act. He added that, "If the Line Item Veto Act were valid, it would authorize the President to create a different law---one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as 'Public Law 105-33 as modified by the President' may or may not be desirable, but it is surely not a document that may 'become law' pursuant to the procedures designed by the Framers of Article I, Section 7 of the Constitution." *Id.* at 448-449.

It is possible that the statement of Justice Stevens regarding the effect of omitting one paragraph at a stage of passing a bill may influence a court to strike down the Deficit Reduction Act as a nullity. While this statement on casual reading may suggest a departure from the Court's decision in *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892), close examination of the *Field* case suggests that this passage may not necessarily depart from it. In the *Field* case a party asked the Court to declare a statute a nullity because the bill as enrolled and signed by the President allegedly omitted a paragraph that both the House and Senate had passed and, consequently, that the enrolled bill did not reflect the entire text that these bodies had passed. The Court declined to invalidate it, but not because it disagreed

with the party's contention that a bill must pass the House and Senate to become law. The Court conceded this point, saying, ". . . a bill does not become a law of the United States if it had not in fact been passed by Congress. In view of the express requirements of the Constitution the correctness of this general principle cannot be doubted." *Field*, 143 U.S. at 669.

The Court added, however, that this concession did not end its responsibility; ". . . it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become law, was or was not passed by Congress." *Id.* at 669-670. The Court held that the best evidence of text that had passed the House and Senate was the enrolled bill because the signatures of the Speaker and President of the Senate on it attested that their respective bodies had passed it. The enrolled bill, when signed by the President or passed over a veto, the Court said, ". . . carries, on its face, a solemn assurance by the legislative and executive departments of the government, . . . that it was passed by Congress." *Field* at 672. "The respect due to coequal and independent departments of the government requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution." *Id.*

As noted earlier, the Court in *Baker* v. *Carr* in 1962 said that one of the factors which characterizes a political question is ". . . the impossibility of a court's undertaking independent resolution [of a matter] without expressing lack of respect due coordinate branches of government." *Baker*, 369 U.S. at 217. The Court in *Baker* quoted the following passage from the *Field* case: "'The respect due to coequal and independent departments' . . ." *Baker* at 214, *quoting from Field*, 143 U.S. 649, 672, 676-677. To this passage the Court in *Baker* added that, ". . . and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities." *Baker* at 214.

Severability

In *Ayotte* v. *Planned Parenthood of Northern New England*, ___ U.S. ___, 126 S. Ct. 961 (2006), decided in January, the Supreme Court declined to strike down in its entirety a state statute that contained a number of restrictions on abortion and instead remanded the case to a lower court to ascertain whether some of the restrictions could survive while others should be invalidated as unconstitutional. In taking this approach, 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. 220, 227-229 (2005)." *Ayotte*, 126 S. Ct. at 967. The Court noted 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?" *Id.* at 968.

This approach could be held to be an appropriate way to resolve the issue of the constitutionality of the Deficit Reduction Act if a court should reach the merits of the dispute. To determine whether a portion of a statute can be severed, the Court in the *Ayotte* case said that a court must ask whether a legislative body would have preferred what is left

of a statute to no statute at all. Generally this kind of inquiry involves a detailed analysis such as whether a legislative body would have delegated power to an executive branch agency if it had known that the means it had chosen to check that power, a legislative veto, for example, would be held unconstitutional. *See Alaska Airlines* v. *Brock*, 480 U.S. 678 (1987), which addressed this issue and held that the legislative veto was severable.

Under the facts relating to passage of the Deficit Reduction Act, there is little need for detailed analysis because the House and Senate did in fact agree to identical text; it appears that only the section that was inaccurately transcribed was not passed in identical form by the House and Senate after the engrossed Senate-passed version was returned to the House. The House earlier had agreed to the correct text of that section when it passed the conference report before sending it to the Senate.

In determining how to adjudicate the issues of constitutionality and severability, it is possible that a court may be influenced by the fact that the House had agreed to the correct version of the section that was the subject of the transcription error when it agreed to the conference report before sending it to the Senate. It also may be significant that the Senate as a result of the Byrd Rule point of order removed three sections from the conference report which the House had passed; the Senate did not add sections that the House had not previously passed.

Conclusion

This memorandum has analyzed whether the Deficit Reduction Act, P.L. 109-171, was constitutionally enacted. The House passed the conference report in December of 2005 and sent it to the Senate. A point of order was sustained in the Senate and three sections were removed from the conference report. As a result of this action, the conference report fell and it was necessary to return to the House the text that the Senate passed. The form of this message was a Senate substitute amendment to a House amendment to S. 1932. The Senate amendment was the text of the conference report with the three sections removed. In transcribing the text of the Senate amendment, an error reportedly was made so that the text that was sent to the House, the engrossed version, was not identical to the text that the Senate had passed. This reported error was not made in a section that was removed because of the point of order from the text that the Senate had passed. The House voted to concur in the Senate amendment in February of 2006.

Following House action, the error in the engrossed text that the House passed reportedly was corrected by a clerk, the Speaker of the House and the President *pro tempore* of the Senate certified that the corrected text passed each respective chamber, and the President of the United States signed it.

If this matter should be litigated there appear to be three possible outcomes. A court may concede that identical text must pass both Houses of Congress before it can become law, but nonetheless decline to declare the act a nullity. The reason would be the enrolled bill rule, pursuant to which a court would not review legislative materials to "look behind" the text of the enrolled bill, the version that was certified as passing the House and Senate by the Speaker and Senate *pro tempore*. In *Marshall Field & Co.* v. *Clark* decided in 1892, the Supreme Court held that an enrolled bill signed by these officers attests to passage by the House and Senate and that reviewing legislative material to ascertain whether text actually had passed each body would show disrespect for a coordinate branch of government. The enrolled bill rule has been characterized as a part of the political question doctrine under which courts

decline to decide some kinds of lawsuits. The enrolled bill rule has been acknowledged as a viable doctrine by the Supreme Court as recently as 1993 and by a United States circuit court of appeals as recently as 2004.

On the other hand, a court may declare that the entire Deficit Reduction Act is a nullity on the ground that the House and Senate did not pass identical text. Normally, when a transcription error in an engrossed bill is discovered, the House and Senate pass a concurrent resolution to correct it so that the text that is presented to the body receiving it will be identical so that congressional action can be completed and the bill can be sent to the President.[9] That step was not taken for this bill.

Language could be cited from some Supreme Court cases decided subsequent to the *Field* case to support an argument that the entire Deficit Reduction Act should be held unconstitutional. These cases include *Immigration and Naturalization Service* v. *Chadha*, which struck down the legislative veto mechanism, *United States* v. *Munoz-Flores*, which reached the merits of a claim involving the Origination Clause of the Constitution, and *Clinton* v. *City of New York*, which held that the Line Item Veto Act was unconstitutional. These cases, however, did not involve the same kind of question that the Court addressed in the *Field* case, *i.e.*, whether legislative materials could be reviewed to declare text that appeared in an enrolled bill on the ground that the enrolled bill omitted a paragraph that allegedly had passed the House and Senate. On the other hand, in all three cases the Court was concerned with the mechanisms by which legislation is passed and becomes law. The importance that the Court accorded to the "finely wrought and extensively considered procedure" for lawmaking (*Chadha* at 950) in these more recent cases may cause a court to examine more closely the procedures that were followed in passing the Deficit Reduction Act.

These two possible outcomes — declining to review legislative materials and thereby permitting the Deficit Reduction Act to stand as constitutionally enacted as reflected in the enrolled bill or striking the entire text down as unconstitutional on the ground that identical text did not pass each House of Congress — would represent the extremes. It also is possible that a court may reach a conclusion other than all or nothing such as invalidating only the text that the House and Senate did not pass in identical form and upholding the rest of the statute. The Supreme Court in *Ayotte* v. *Planned Parenthood of New England* decided in January of 2006 cited some earlier cases to support its holding that only the unconstitutional portion of a statute should be struck down while leaving the remainder intact if the legislative body that passed it would have preferred what is left of a statute to no statute at all.

---

[9] *See* precedents cited in J. V. Sullivan, *Constitution, Jefferson's Manual, and Rules of the House of Representatives* § 565, 108th Cong., 2d Sess., H. Doc. No. 108-241 (2005).