ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5232

PUBLIC CITIZEN,

Appellant,

v.

CLERK, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

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October 6, 2006

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for appellant certifies as follows:

(A) Parties and Amici

In the district court, Public Citizen was the plaintiff; the Clerk of the United States District Court for the District of Columbia was the defendant; and CTIA - The Wireless Association was an amicus curiae.

In this Court, Public Citizen is the appellant; the Clerk of the United States District Court for the District of Columbia is the appellee. CTIA - The Wireless Association has appeared as amicus curiae in support of appellee. Representatives Henry Waxman, Nancy Pelosi, John Dingell, Charles Rangel, Pete Stark, James Oberstar, Louise Slaughter, and Bennie Thompson have appeared as amici curiae in support of appellant.

Public Citizen is a not-for-profit consumer advocacy organization based in Washington, DC. Public Citizen has no parent company and no publicly-held company has an ownership interest (such as stock or partnership shares) in Public Citizen.

(B) Rulings Under Review

Appellant seeks review of district court Judge John Bates's August 11, 2006 order dismissing the case. The opinion appears in the appendix beginning at page 4, and the order appears in the appendix at page 37. The opinion is not yet reported in F. Supp. 2d.

(C) Related Cases

This case was not previously before this Court or any other court. Similar issues are raised in *Cookeville Regional Medical Center v. Leavitt*, D.D.C. No. 04-1053; and *OneSimpleLoan v. Secretary of Education*, 2d Cir. No. 06-2770.

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Allison M. Zieve

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GLOSSARY

DRA Deficit Reduction Act of 2005

GPO Government Printing Office

INTRODUCTION

Some constitutional provisions are open to interpretation. One constitutional requirement that is not ambiguous, however, is the requirement that every bill pass both houses of Congress before it can be presented to the President and become law. The Deficit Reduction Act of 2005 ("DRA") was presented to the President in violation of that requirement: The Senate passed one version of a bill, the House another, and then the Senate's version was presented to the President, who signed it. Under the Constitution, that bill has not become a law.

Notwithstanding the straightforward constitutional requirement of bicameralism, the district court dismissed appellant's claim that the DRA was invalid under the United States Constitution. The court held that *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), established an "enrolled bill rule" that required dismissal. According to the court, under that rule, the courts must conclusively presume that signed legislation was constitutionally enacted and not consider any evidence to the contrary. The court's broad reading of *Marshall Field*, however, is divorced from the context and substance of the decision itself and from the authoritative limiting construction placed on it by the Supreme Court's more recent decision, *United States v. Munoz-Flores*, 495 U.S. 385 (1990). Furthermore, an enrolled bill rule has no place here, where the facts are readily established. "To hold otherwise would raise

form over substance, fact over fiction, and amount to government by clerical error." *Association of Tex. Prof. Educators v. Kirby*, 788 S.W.2d 827, 830 (Tex. 1990) (discussing enrolled bill rule).

STATEMENT OF JURISDICTION

This appeal is from a decision of the district court granting defendant's motion to dismiss. The district court had jurisdiction under 28 U.S.C. § 1331. The district court's Memorandum Opinion, entered on August 11, 2006, disposed of all claims of all parties. Plaintiff filed a notice of appeal on August 14, 2006. This Court has jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 7, clause 2 of the United States Constitution states:

> 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.

1 U.S.C. § 106 states, in relevant part,

> Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be. Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary. When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint

resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States.

Excerpts of the Deficit Reduction Act of 2005, Public Law No. 109-171, are included in the Appendix beginning on page 45.

STATEMENT OF THE ISSUE

Whether the Deficit Reduction Act of 2005, Pub. L. No. 109-171, violates the bicameralism requirement of article I, section 7, clause 2 of the United States Constitution and is invalid because the version passed by the House of Representatives was substantively different from the version signed by the President.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This case arises from a substantive discrepancy between House and Senate bills that arose during the process of preparing a bill for transmission from the Senate to the House and, later, to the President. Because an explanation of the factual background involves some terminology specific to the legislative process, part A below provides a brief description of that process. Part B describes the facts underlying the lawsuit, and Part C provides a summary of the proceedings below.

A. The Legislative Process

Although the Constitution does not spell out in detail procedures for complying with the bicameralism requirement, Congress has enacted statutes specifying such procedures. After one chamber of Congress passes a bill, the bill is printed and signed by the Clerk of the House or the Secretary of the Senate (depending on which chamber passed the bill). The printed version of the bill passed by a single chamber is called the "engrossed bill." 1 U.S.C. § 106. The engrossed bill is sent to the other chamber and "in that form shall be dealt with by that House and its officers." *Id*. If the other chamber passes the engrossed bill without amendment, the Clerk or Secretary of that chamber signs the bill and returns it to the originating chamber. *Id*. The engrossed bill is then reprinted 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*.

B. The Deficit Reduction Act of 2005

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 of 2005 or 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. *See*

H.R. Conf. Rep. No. 109-362 (2005), *reprinted in* 151 Cong. Rec. H12641 *et seq*. (Dec. 18, 2005).

On December 19, 2005, the House passed the conference report on S. 1932 by a vote of 212 to 206. 151 Cong. Rec. H12276-77 (Dec. 18, 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 that they challenged violated the rules of the congressional budget process. 151 Cong. Rec. S14203-04 (Dec. 21, 2005).[1] As a result, the conference report did not pass in the Senate. *Id*. at S14205. On December 21, 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; *see also id*. at H13178 (Dec. 22, 2005) (message from Senate clerk to House).

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[1]A point of order is "[a] claim made by a Senator from the floor that a rule of the Senate is being violated. If the Chair sustains the point of order, the action in violation of the rule is not permitted." U.S. Senate, *Senate Glossary*, www.senate.gov/reference/glossary_term/point_of_order.htm. In this case, the points of order were based on items in the bill that would have had no budgetary impact or only an incidental budgetary effect. "Under the Byrd rule, any provisions in a final budget reconciliation bill that are extraneous to changing the budget can be stricken." 151 Cong. Rec. S14204 (Dec. 21, 2005). The three points of order were claims that particular provisions violated the Byrd rule. *Id*.

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) (App. 51-52), *with* S. 1932, engrossed in Senate (Dec. 21, 2005) (App. 55-62).[2] The budget impact of the change is $2 billion over five years.[3]

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, House Doc. No. 108-241, § 565 at 296-97 (2005) (listing examples), *available at* www.gpoaccess.gov/hrm/browse_109.html. That procedure was not followed here. Rather, on February 1, 2006, the House voted on the engrossed version of S. 1932, which contained the clerk's error and, therefore, was not identical to the version of

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[2]S. 1932 as engrossed in the Senate on December 21, 2005, is available in full from the Government Printing Office at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s1932eas.txt.pdf. The discrepancy appears twice in section 5101(a)(1).

[3]Letter from Congressional Budget Office Acting Director Marron to Rep. Spratt (Feb. 13, 2006), *cited in* Letter from Rep. Waxman to Andrew Card (Mar. 15, 2006), *available at* www.democrats.reform.house.gov/Documents/20060315121422-08628.pdf.

the bill passed by the Senate. *See* S. 1932, engrossed in Senate (full citation *supra* note 2); 152 Cong. Rec. H69, H77 (Feb. 1, 2006) (App. 65, 73). The House passed S. 1932, with the error, by a vote of 216 to 214. 152 Cong. Rec. H68 (App. 64).[4]

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, the Senate clerk changed 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 (App. 44-49).[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. App. 113; 152 Cong. Rec. S768 (Feb. 7, 2006). The House, however, had never

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[4]The Congressional Record provides authoritative evidence of the vote on and passage of bills. *See*, *e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 232 n.2 (2005); *McCreary Cty. of KY v. ACLU*, 545 U.S. 844, 125 S. Ct. 2722, 2750 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[5]A link to the enrolled bill is available online from the Government Printing Office at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s1932enr.txt.pdf.

passed that version of the bill; indeed, the House had never even been sent that version for consideration.

On February 8, 2006, President Bush signed the enrolled bill. App. 113; *see* 120 Stat. 4, Pub. L. No. 109-171 (2006), *available at* www.gpoaccess.gov/plaws/index. html.

C. Plaintiff's Injury and Proceedings Below

Since February 6, 2005, the fee for instituting a civil action in the United States district courts has been $250. 28 U.S.C. § 1914(a). Section 10001 of the DRA purports to increase the fee to $350, effective April 9, 2006. *See* Pub. L. No. 109-171, § 10001(a).

On April 11, 2006, plaintiff Public Citizen attempted to file a new case in the United States District Court for the District of Columbia by presenting the complaint, other necessary papers, and a $250 check for the filing fee. The clerk's office refused to file the case on the ground that the $250 check was insufficient because the fee had increased to $350. App. 38-39. Public Citizen had no choice but to pay a $350 fee to file the case. *Id*. Without the relief sought in this suit, Public Citizen will suffer this injury again each time it initiates a civil suit in the district court for which it pays the filing fee. Public Citizen has paid a fee to file a civil case in the district court

every year since at least 1976, *id*. at 38, and will continue to file cases in the district court.

Public Citizen brought this action on March 21, 2006, alleging that the DRA is invalid because the means by which it was purportedly enacted violates the bicameralism requirement of the Constitution. The complaint requested declaratory relief and an order directing the clerk to accept $250 as the filing fee for civil cases, in accordance with 28 U.S.C. § 1914(a).

On May 9, 2006, Public Citizen filed a motion for summary judgment. On May 30, the Clerk opposed that motion and filed a motion to dismiss. The district court heard oral argument on July 10, and on August 11, 2006, issued an order and opinion denying Public Citizen's motion for summary judgment and granting the Clerk's motion to dismiss. The court found that, under *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), it could not look past the enrolled bill to determine whether the DRA had been enacted in accordance with the Constitution.

SUMMARY OF ARGUMENT

In *United States v. Munoz-Flores*, the Supreme Court reaffirmed the judiciary's "duty to review the constitutionality of congressional enactments." 495 U.S. 385, 391 (1990). Faced with the question whether a statute had been enacted in violation of the Origination Clause, article I, section 7, clause 1, the Court rejected the notion that

Congress's designation of the bill as "H.J. Res." and transmission of the bill to the President for signature resolved the issue. In light of *Munoz-Flores*, there can be no question that courts may look behind an enrolled bill to assess whether a law was passed in accordance with constitutional requirements. The only question is in what circumstances they may do so.

Here, the district court held that *Marshall Field & Co.* precludes courts from going beyond an enrolled bill to consider whether a statute has been enacted in violation of the bicameralism requirement of article I, section 7, clause 2. The court could state no principle to justify a rule that would allow consideration of challenges based on clause 1 but not challenges based on clause 2. Nonetheless, the court believed that *Marshall Field* required such an outcome. It does not.

The distinction made in both *Munoz-Flores* and *Marshall Field* is between requirements with respect to the enactment of laws and requirements that do not affect valid enactment. Thus, for example, the Constitution requires Congress to keep journals, but neither the Constitution nor any statute conditions the enactment of laws on the keeping of journals or imposes requirements on the content of journals. Accordingly, as in *Marshall Field*, the content of congressional journals cannot be used to impeach the validity of an enrolled bill that has been signed and presented to the President. On the other hand, the Constitution requires that legislation to raise

revenue originate in the House. Therefore, as in *Munoz-Flores*, the courts may look beyond an enrolled bill to determine whether a law has been passed in accordance with that constitutional condition; indeed, they have a duty to do so.

At issue in this case is another requirement for the valid enactment of law—the requirement that identical legislation be passed in both the House and the Senate before it is presented to the President for his signature. In accordance with both *Munoz-Flores* and *Marshall Field*, the Court can and should examine the evidence that this requirement has been violated.

Although the *Marshall Field* plaintiffs also alleged an article I, section 7, clause 2 challenge, the Court there focused on a predicate issue: whether journals offer reliable evidence of whether a bill has passed both houses of Congress. In this case, the evidence is an engrossed bill, printed pursuant to statute, 1 U.S.C. § 106. Such an official printing was unavailable to the *Marshall Field* Court in 1892, for the requirement that engrossed bills be formally printed and published—and that the second house deal with the legislation in the form in which it is set forth in the engrossed bill—was not adopted until 1893 and not enacted into positive law until 1947. The nature of the evidence in this case is thus different than in *Marshall Field*, and the outcome of the case should be different as well.

STANDARD OF REVIEW

The district court's decision granting a defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and denying a plaintiff's motion for summary judgment is reviewed de novo. *See*, *e.g.*, *Center for Auto Safety v. NHTSA*, 452 F.3d 798, 805 (D.C. Cir. 2006).

ARGUMENT

I. The DRA Is Not A Law Because Its Enactment Did Not Comply With The Requirements Of Article I, Section 7, Clause 2 Of The United States Constitution.

A. The Constitution's Bicameralism Requirement

The United States Constitution provides: "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 . . . ." U.S. Const., art. I, § 7, cl. 2; *see also id.* art. I, § 1 ("All legislative Powers granted herein shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives.") (emphasis added). The requirement that a bill pass both chambers of Congress before being presented to the President, referred to as bicameralism, is not a formality but rather "serve[s] essential constitutional functions." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Under the Constitution's bicameralism requirement, before a bill may become a law, it must be passed in identical form by both chambers. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998) ("The Constitution explicitly requires that each of [] three steps be taken before a bill may 'become a law'": a bill containing the "exact text" must be approved by one house; the other house must approve "precisely the same text," and "that text" must be signed by the President) (quoting art. I, § 7); *City of New York v. Clinton*, 985 F. Supp. 168, 178 (D.D.C.) ("At the heart of the notion of bicameralism is the requirement that any bill must be passed by both Houses of Congress in exactly the same form."), *aff'd*, 524 U.S. 417 (1998); Parliamentarian, U.S. House of Reps., *How Our Laws Are Made*, at XVII (June 30, 2003) (bill must be "agreed to in identical form by both bodies" before presentation to the President); *see also West Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991) (statutory purpose determined by "statutory text adopted by *both* Houses of Congress and submitted to the President") (emphasis added). If any provision of the text of a bill voted on in one house differs from the text voted on in the other or from the version signed by the President, the law has not been validly enacted. *Clinton*, 524 U.S. at 448.

"By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their

belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." *Chadha*, 462 U.S. at 948-49. Indeed, "[Alexander] Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution," for to adopt a unicameral legislature would be to confer on a single body "'all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived.'" *Id*. at 949 (quoting The Federalist No. 22, at 135 (H. Lodge ed. 1888)). Bicameralism is a central part of the system of checks and balances erected "to protect the people from the improvident exercise of power." *Id*. at 957.

B. Evidence Of The Bicameralism Violation

Here, the version of the DRA passed by the Senate was not identical to the version passed by the House, and the House never passed the version of the bill that was presented to the President. The DRA is thus invalid under article I, section 7, clause 2. *See Munoz-Flores*, 495 U.S. at 396 ("[T]he principle that the courts will strike down a law when Congress has passed it in violation of [a constitutional] command has been well settled for almost two centuries.").

1. Only two documents are needed to demonstrate the constitutional violation: Public Law No. 109-171 (the version of the bill signed by the President) and S. 1932

as engrossed in the Senate (the version of the bill passed by the House). Comparison of these two bills shows that the bill passed by the House was substantively different from the bill sent to and signed by the President.

First, as for the Public Law, courts regularly rely on the Public Law printing, the United States Code, and even non-governmental publications such as West's as evidence of the text of statutes. *See*, *e.g.*, *Schaffer v. Weast*, 126 S. Ct. 528, 535, 536 (2005) (cites to Pub. L., U.S.C., and U.S.C.A.); *United States v. Booker*, 543 U.S. 220, 261-63 (2005) (same). Here, there is no dispute about what the President signed or what purports to be the law.

Second, as for the engrossed bill on which the House voted, Congress, through laws passed subsequent to the decision in *Marshall Field*, has established formal mechanisms for the printing and publication of the official text of engrossed bills. Pursuant to statute, an engrossed bill is the official printed version of a bill passed by one chamber, which is then sent to the other, where "in that form [it] shall be dealt with by that House." 1 U.S.C. § 106. Also pursuant to statute, an official copy of the precise text of the engrossed bill on which the House voted on February 1, 2006, was printed by the Government Printing Office ("GPO"). *See* 44 U.S.C. § 706 (enacted 1968). That official version is readily available to the public and the Court from GPO:

> The information provided on [GPO's website, known as GPO Access] is the *official*, published version and the information retrieved from GPO Access can be used without restriction, unless specifically noted. This free service is funded by the Federal Depository Library Program and has grown out of Public Law 103-40, known as the Government Printing Office Electronic Information Enhancement Act of 1993.

GPO, *About GPO Access*, www.gpoaccess.gov/about/gpoaccess.html (emphasis added); *see also id.* ("The National Archives and Records Administration (NARA) recognizes GPO as an official archival affiliate for the electronic content on GPO Access."). The text of the engrossed bill is also available from the Congressional Record. *See* 152 Cong. Rec. H68-H114 (Feb. 1, 2006). These official publications offer reliable evidence of the content of bills. *See*, *e.g.*, *Granholm v. Heald*, 544 U.S. 460, 505-06 (2005) (Thomas, J., joined by Rehnquist, C.J., and Stevens and O'Connor, JJ., dissenting) (citing a Senate report, a House report, and the Congressional Record to show content of bills); *Lamie v. United States Trustee*, 540 U.S. 526, 539 (2004) (citing a Senate report and the Congressional Record to show content of bill and amendments); *see also Cook County v. Chandler*, 538 U.S. 119, 131 (2004) (citing Senate and House bills, as reprinted in U.S.C.C.A.N., to show content of bills).

2. That the House voted on the engrossed Senate bill cannot legitimately be questioned. Nonetheless, below, the government sought to confuse the facts by

pointing out that the House passed S. 1932 by voting to "concur[] in the Senate amendment to the House amendment to the bill (S. 1932) . . . ." 152 Cong. Rec. H37 (Feb. 1, 2006). According to the government, this language might indicate that the House was voting on the Senate amendment actually passed by the Senate, rather than the amendment as engrossed and transmitted to the House. *But see* App. 33 (district court opinion noting that government's argument has "some credibility problems").

The government's argument is belied by 1 U.S.C. § 106. Under section 106, after a bill is passed in the Senate, it is printed and then called an "engrossed bill." The engrossed bill is then sent from one chamber to the other and "in that form . . . dealt with" by the House. 1 U.S.C. § 106. This provision shows beyond question that the version of S. 1932 passed by the House on February 1, 2006, was the engrossed (*i.e.*, printed) version, which states in bold letters on its first page "SENATE AMENDMENT TO HOUSE AMENDMENT," App. 55, and which had been sent from the Senate to be "dealt with by [the] House."

Long-standing House practice conforms to the affirmative statutory requirements of section 106. Members of the House do not vote on legislation that they think the Senate has passed or should have passed. They vote on printed bills. And House precedent directs that the only Senate bill that the House receives, and hence the only Senate bill that can be presented to the House for its vote, is an

engrossed Senate bill. 7 *Deschler's Precedents of the U.S. House of Reps.* (House Doc. No. 94-661), ch. 24, § 12 at 4889, *available at* http://origin.www.gpoaccess.gov/precedents/deschler/ browse.html.[6] Engrossed bills are conveyed through formal messages, and such messages are "the sole source of official information in one chamber regarding actions taken by the other House." 16 *Deschler's Precedents*, ch. 32, § 1 at 1 (citing 8 *Cannon's Precedents*, ch. 268, §§ 3342-43 (1936)). In fact, House members "are not assumed to know anything about the action of the Senate except what is conveyed in the papers that are delivered to [them]." 8 *Cannon's Precedents*, ch. 268, § 3342 at 805 (quoting Rep. Mondell), *available at* www.gpoaccess.gov/precedents/cannon/ vol8.html; *see id*. § 3343 at 805 (where a bill transmitted from the Senate to the House was different from the bill passed in the Senate, the Speaker explained that the House is "bound by the formal interchange of documents between the bodies . . . and the House can only look at the record as forwarded to it by the Senate"). In short, the House can vote only on bills that are before it, and the only way for the Senate to place a bill before the House is to engross it and send it over.

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[6] *Deschler's Precedents* "set[s] forth and analyze[s] the modern precedents of the House of Representatives." *Decschler's Precedents*, Preface at iii. "[T]he precedents may be viewed as the 'common law,' so to speak, of the House, with much the same force and binding effect." *Id*. at vii.

Thus, on February 1, 2006, when the House voted to concur "in the Senate amendment to the House amendment to S. 1932," 152 Cong. Rec. H68 (Feb. 1, 2006), the House could only have been voting on the engrossed bill. No other version of S. 1932 and no other Senate amendment regarding S. 1932 was before the House or eligible to be voted on under 1 U.S.C. § 106 and House procedures.[7]

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[7]A report from the Office of the Clerk of the House of Representatives confirms the facts. In response to an April 6 request from the chairman and the ranking member of the Committee on House Administration, the Office of the Clerk of the House prepared a "report on the activities of the Office of the Clerk related to the engrossment, enrollment and presentment procedures used to process S. 1932." *See* App. 77. The House Clerk's report states that the bill engrossed in the Senate on December 21, 2005 was sent to the House on December 22, *id*. at 79, and that the House passed the Senate engrossed amendment to S. 1932 *"without any change from the form in which the Senate delivered its amendment to the House*." *Id*. at 80 (emphasis added). The report further states that "section 5101(a) of the Senate amendment . . . both as passed by the House and as passed by the Senate according to the Senate's December 22, 2005 message to the House, reflected the number '36.'" *Id*. And the report states that on February 6, the Senate delivered the enrolled version of S. 1932 to the Office of the House Parliamentarian for presentation to the Speaker for his signature and that "[a]t this point, section 5101(a) . . . reflected the number '13.'" *Id*. *See also* H. Rep. No. 109-457, at 2 (May 9, 2006), *available from GPO at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr457.109.pdf (in rejecting request that House Government Reform Committee ask President for information about discrepancy between versions of DRA, the Committee report stated that "the requested inquiry was unwarranted because the facts are already well known and the courts will resolve the legal effect, if any, of the clerical error in the Deficit Reduction Act of 2005.").

II. This Court May Properly Consider The Evidence Before It.

There is no serious question that enactment of the DRA violated the bicameralism requirement of article I, section 7 because the House did not approve the version of S. 1932 presented to and signed by the President. Rather, the question here is whether, in the face of indisputable evidence proving a constitutional violation, the judiciary must turn a blind eye and permit enforcement of a bill that the Constitution does not recognize as law. The answer is no.

The court below accepted the argument that—no matter the evidence showing that the House did not pass the bill presented to the President—courts are precluded from considering any evidence aside from the enrolled bill signed by the Speaker of the House and President pro tempore of the Senate. App. 15. That conclusion was based entirely on *Marshall Field*. *Id*. at 14-20. A full discussion of the case demonstrates that *Marshall Field* does not bar the Court from considering the evidence presented here. *See also* 1 Singer, *Statutes and Statutory Construction* § 15.2 at 821-22 (6th ed. 2002) (conclusive presumptions, such as that embodied in an enrolled bill rule, "are capable of producing results that do not accord with fact. . . . 'Courts applying such a rule are bound to hold statutes valid which they and everybody know were never legally enacted.'" (quoting *Bull v. King*, 286 N.W. 311 (Minn. 1939)).

A. *Marshall Field* Turns On An Argument About Legislative Journals.

In *Marshall Field*, the plaintiffs alleged that the Tariff Act of October 1, 1890, was not enacted in accordance with the Constitution because, according to the legislative journals, the enrolled bill presented to the President omitted a section that was included in the bill passed by both Houses. The Supreme Court held that the journals could not be used to challenge the validity of a statute. However, in dicta going beyond what was necessary to decide the case, the Court stated that when an enrolled bill has been signed by the Speaker of the House and the President of the Senate attesting to its passage and then signed by the President, "its authentication as a bill that has passed congress should be deemed complete and unimpeachable." 143 U.S. at 673. To reconcile this dicta with the courts' "duty to review the constitutionality of congressional enactments," *Munoz-Flores*, 495 U.S. at 391, the statement must be considered in context as an explanation of why, as between an enrolled bill signed by the Speaker of the House and the President of the Senate, on the one hand, and information gleaned from congressional journals, on the other, the Court in 1892 would credit the enrolled bill.

The argument of the *Marshall Field* plaintiffs turned on the significance of journals: "The clause of the constitution upon which the [plaintiffs] rest[ed] their contention that the act in question was never passed by congress is the one declaring

that 'each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy.'" *Marshall Field*, 143 U.S. at 670 (quoting art. I, § 5). The plaintiffs argued that "the object of [article I, section 5] was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by two houses of congress." *Id*.; *see id*. at 672 ("[T]he contention is that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and signed by the president."). Journals were so central to the case that the United States attached to its brief an appendix containing a list of state authorities addressing the question whether legislative journals could be used to impeach an enrolled act. *Id*. at 661-66 (reproducing list).

The Supreme Court fully agreed that "a bill signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, . . . does not become a law of the United States if it ha[s] not in fact been passed by congress." *Id*. at 669. "In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted." *Id*. Moreover, the Court expressly recognized that the Speaker of the House and the President of the Senate have no authority to attest by their signatures

to any bill not passed by each house, and likewise that the President has no authority to approve a bill not passed by Congress. *Id*.

Nonetheless, the Court rejected the plaintiffs' article I, section 5 argument about the significance of congressional journals. It held instead that the keeping of the journals, although required by the Constitution, was not a requirement for the valid passage of a bill. Moreover, the Court noted that the Constitution does not prescribe precisely what matters must be recorded in the journals, but rather left those details to the discretion of Congress. *Id*. at 671. And to explain the "evils" that would 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 673, the Court quoted extensively from cases decrying the "danger" of "intentional corruption" of the journals, the concern of putting every law "at the mercy of all persons having access to these journals," the "mischiefs absolutely intolerable" of allowing a law to be "impeached by the journals," and the likelihood of errors in journals "made amid the confusion of the dispatch of business." *Id*. at 674-77. For all of these reasons, the Court held that the journals could not be used to determine whether the enrolled bill signed by the President was the same bill passed by Congress.

After its extended discussion of the unreliability of journals, the Court concluded:

> We are of the opinion, for the reasons stated, that it is not competent for the [plaintiffs] to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of congress, that the enrolled bill, designated 'H. R. 9416,' as finally passed, contained a section that does not appear in the enrolled act in the custody of the state department.

Id. at 680. The district court read that sentence broadly to mean that courts could look at no evidence aside from the enrolled bill. App. 18. However, the sentence need not be read broadly; and, in the context of the opinion as a whole, it makes little sense to do so. Aside from a paragraph discussing the congressional leaders' signatures attesting to the passage of a bill and the respect due to Congress, 143 U.S. at 672, the "reasons stated" focus exclusively on journals and their shortcomings. Moreover, the Court's conclusion is specific to "the [plaintiffs]" (in original, "appellants") before it. In light of the lengthy discussion of journals that precedes the Court's conclusion, and given the Court's statement that the plaintiffs' contention that the Tariff Act of 1890 never passed Congress "rest[ed]" on the Journal Clause, a broad reading of the one sentence conclusion is unwarranted.

The district court noted that the plaintiffs in *Marshall Field* had offered exhibits other than the journals, such as excerpts from the Congressional Record. App. 17-19. However, the *Marshall Field* opinion makes clear that the plaintiffs'

ability to prove their case turned on their argument with respect to the significance of journal entries. *See* 143 U.S. at 670 ("The clause of the constitution upon which [plaintiffs] rest their contention that the act in question was never passed by congress is the one declaring that 'each house shall keep a journal of its proceedings. . . .'"); *id*. (Marshall Field "assumed in argument that the object of [the Journal] clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of congress."). Accordingly, journals are the only evidence discussed in the Court's opinion.

Consistent with Public Citizen's understanding of *Marshall Field*, the Supreme Court, in its recent discussions of the portion of the *Marshall Field* opinion relevant here, 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 that the evidence at issue was journals. *Munoz-Flores*, 495 U.S. at 391 n.4 (quoting *Marshall Field*, 143 U.S. at 670); *see id*. (describing the plaintiffs' argument in *Marshall Field* to be 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"); *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").[8]

B. The Constitutional Violation Here Is Unrelated To Any Contention About Journals And Is Shown By Undisputed Evidence Created By Statutory And Congressional Mandate.

Whereas the Supreme Court viewed *Marshall Field*, first and foremost, as a case about article I, section 5's journal requirement, this case does not concern journals at all. The only constitutional requirement on which Public Citizen "rest[s] [its] contention," *Marshall Field*, 143 U.S. at 670, is the bicameralism requirement of article I, section 7, clause 2.

This difference is critical. In *Munoz-Flores*, the Supreme Court rejected the argument, based on *Marshall Field*, that Congress's designation of a bill as "H.J. Res." precluded judicial review of the issue whether a revenue bill had originated in the Senate. 495 U.S. at 391 n.4 (responding to concurrence at 408-09). Although

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[8] *See also Harwood v. Wentworth*, 162 U.S. 547, 562 (1896) (emphasis added):

> We see no reason to modify the principles announced in Field v. Clark, and therefore hold that, having been officially attested by the presiding officers of the territorial council and house of representatives, having been approved by the governor, and having been committed to the custody of the secretary of the territory as an act passed by the territorial legislature, the act of March 21, 1895, is to be taken to have been enacted in the mode required by law, and to be *unimpeachable by the recitals, or omissions of recitals, in the journals of legislative proceedings*, which are not required by the fundamental law of the territory to be so kept as to show everything done in both branches of the legislature while engaged in a consideration of bills presented for their action.

Munoz-Flores recognized that the "H.R." designation on a bill could be taken to mean that "Congress explicitly determined" that the bill had originated in the House, as is constitutionally required of revenue bills, the Court stated that "congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality." 495 U.S. at 391.

Although the clause of the Constitution at issue in *Munoz-Flores* was article I, section 7, clause 1 (origination), and the clause at issue here is article I, section 7, clause 2 (bicameralism and presentment), the distinction drawn in *Munoz-Flores* is one between constitutional provisions that establish requirements with respect to the enactment of laws—such as the Origination Clause and the bicameralism requirement—and constitutional provisions that do not—such as the Journal Clause. *Id*. at 391 n.4; *see Board of Comm'rs v. W.N. Coler & Co.*, 180 U.S. 506, 524 (1901) (distinguishing *Marshall Field* from a case challenging law's validity based on items required to be entered on journals but omitted); *Harwood*, 162 U.S. at 562 (Arizona statute not impeachable by journals where Arizona law did not require journals to reflect necessary facts). *Munoz-Flores* expressly rejects a distinction between article I, section 7, clause 1 and clause 2, explaining that "§ 7 gives effect to *all* of its Clauses in determining what procedures the Legislative and Executive Branches must follow to enact a law." 495 U.S. at 396 (emphasis in original). The notion that a

purported law may be challenged based on clause 1 of section 7 but not based on clause 2 thus rests on a distinction that was correctly rejected in *Munoz-Flores* and that, more fundamentally, lacks any principled basis.

The district court recognized that allowing claims based on article I, section 7, clause 1 violations to go forward, but not claims based on article I, section 7, clause 2 violations "is not entirely satisfying." App. 26. Nonetheless, the court found that this outcome "is the only reading [of *Munoz-Flores*] that is consistent with *Marshall Field*." *Id*. There is another reading, however, that shows the two cases to be consistent: If the holding in *Marshall Field* is read in context, with its sharp focus on journals, then *Munoz-Flores* does not reveal an "unsatisfying" distinction between claims based on clause 2 violations and claims based on clause 1 violations. To the contrary, under our reading, the distinction is between constitutional requirements that affect the valid enactment of law (*e.g.*, origination requirement) and constitutional requirements that do not affect valid enactment (*e.g.*, journal requirement). *See*, *e.g.*, *W.N. Coler*, 180 U.S. at 524. Furthermore, our reading gives effect to all of *Munoz-Flores*. In contrast, the district court's reading requires it to dismiss statements in *Munoz-Flores* about the Court's "duty to review the constitutionality of legislative enactments," 495 U.S. 390-91, as observations with no real impact.

Thus, *Munoz-Flores* explains that *Marshall Field* involved an "interpretation of the Journal Clause," which is not "a constitutional requirement binding Congress" with respect to the enactment of laws. 495 U.S. at 391 n.4. Where such a constitutional requirement *is* implicated, *Marshall Field*'s discussion of the value of Congress's authentication "does not apply." *Id*. Here, a constitutional requirement with respect to the enactment of laws is directly implicated—the requirement that both Houses pass the same version of a bill before that bill can be presented to the President and become law. Bicameralism was, among other things, "designed to prevent" "[u]nilateral action by any single participant in the law-making process." *City of New York*, 985 F. Supp. at 179. A violation of the bicameralism requirement is a violation of a fundamental tenet of our representative form of government. *See Chadha*, 462 U.S. at 949 (discussing the founders' Great Compromise); *see also Clinton*, 524 U.S. at 439-40 ("[T]he power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'") (quoting *Chadha*, 462 U.S. at 951).

To be sure, the plaintiffs in *Marshall Field* were also alleging an article I, section 7 violation. The Court's opinion, however, does not focus on that issue. Rather, after quickly agreeing to the plaintiffs' position with respect to the requirements of article I, section 7, clause 2, the Court framed the issue before it in

terms of a different constitutional provision: "The clause of the constitution upon which [plaintiffs] rest their contention that the act in question was never passed by congress is the one declaring that 'each house shall keep a journal of its proceedings. . . .'" 143 U.S. at 670 (quoting art. I, § 5). From that point on, with the exception of one paragraph, the Court discussed journals and state court cases about journals. *See id*. at 671-80.

Whereas *Marshall Field* found that examination of the journals to contradict the enrolled bill was not proper because the Constitution does not require that the text of bills and amendments be included in journals and leaves the content of journals to the discretion of each chamber, *id*. at 671, the House had no discretion with respect to the content of S. 1932 as engrossed in the Senate on December 21, 2005. "Engrossed" is the term used for a bill that has passed one chamber and been printed. 1 U.S.C. § 106. When the House receives an engrossed bill from the Senate, the House has no way to alter the text of that printed bill. The House can amend the bill, but the amended bill is then no longer the bill engrossed in the Senate.[9]

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[9]*See also* 7 *Deschler's Precedents of the United States House of Representatives* (House Doc. No. 94-661), ch. 24, § 12 at 4889 (1976) ("A Senate bill cannot be acted on in the House . . . until the House is in possession of the signed copy of the engrossed Senate bill."), *available at* http://origin.www.gpoaccess.gov/ precedents /deschler/chap24.html.

Notably, in 1890, when the law at issue in *Marshall Field* was enacted, no statute required printing and publication of engrossed bills. Indeed, in *Marshall Field*, the government argued that the Court should not consider the bills themselves because "[n]o provision of law exists for recording or filing in any office, as a public record, the bills introduced into Congress, the bills as they are reported from either House, or the bills as they are reported by committees. There is no appropriation for their publication by Congress, and there is no way of proving their contents except by oral evidence." Br. for U.S. in *Marshall Field*, No. 1052 at 31 (filed Oct. 24, 1891). Therefore, the government argued, "[t]he authenticity of these bills lies wholly in parol." *Id*. at 32. The Court was apparently persuaded, as its opinion does not mention the bills.

By contrast, today, a law does exist for creating an official public record of the bills that pass each chamber: 1 U.S.C. § 106. That statutory provision gives official status to the engrossed bill. Indeed, it elevates the engrossed bill at least to the level of the enrolled bill, by defining the enrolled bill as a subsequent printing of the engrossed bill, after passage by the second chamber. *Id*. ("When such bill [referring to the engrossed bill] . . . shall have passed both Houses, it shall be printed and shall then be called the enrolled bill. . . ."). Section 106 was adopted by Congress in 1893

and enacted into positive law in 1947. Courts since then have not had occasion to consider an engrossed bill as the basis for an article 7, section 2 challenge.[10]

The district court suggested that, by relying on the engrossed bill, Public Citizen is advocating an "engrossed bill rule," and that there is no basis for adopting such a rule over what the district court called the "enrolled bill rule." App. 34. The court was wrong on both counts. An "engrossed bill rule" analogous to the district court's irrebuttable "enrolled bill rule" would presumably provide that the engrossed bill is irrebuttable evidence of the content of a bill passed by the engrossing house (in this case, the Senate)—even if, as here, the engrossed bill differed from what that house had actually passed. In this case, such a rule would require reversal of the decision below because the bill signed by the President differed from the engrossed bill, which would be conclusively presumed to be the bill passed by the Senate as well as the House. Nonetheless, Public Citizen is not advocating for that rule. Such an irrebuttable presumption could have consequences in other situations as potentially mischievous as the consequences of the district court's "enrolled bill rule." We note,

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[10]The provision that is now section 106 was adopted as a concurrent resolution in 1893 and later appeared in the U.S. Code as 1 U.S.C. § 26. In 1947, when Congress enacted Title 1 of the U.S. Code into positive law, the provision was renumbered as section 106. *See* H. Rep. No. 251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511, 1511-12.

however, that, in contrast to the district court's "enrolled bill rule," adopting such an engrossed bill rule would at least have some statutory basis, given section 106's emphasis on the primacy of the engrossed bill as the basis for subsequent legislative action, including preparation of the enrolled bill to be presented to the President.

Unlike either an "enrolled bill rule" or an "engrossed bill rule," the approach that Public Citizen urges here does not rest on the fiction that mistakes can never be made in the preparation of an enrolled or engrossed bill. Rather, it rests on the reality that the bill engrossed in the Senate was, necessarily, the bill presented to the House. After all, the engrossed bill is created prior to the vote of the second chamber; and the second chamber is required by law to deal with it "in that form." 1 U.S.C. § 106. Therefore, when an engrossed bill is passed by the second chamber, that bill irrefutably shows what that chamber has approved. In other words, because an engrossed Senate bill is the only Senate bill that the House receives and the only Senate bill presented to its members for a vote, *see supra* pp. 17-18, the engrossed bill is not *evidence* of the bill that passed the House; it *is* the bill that passed the House, as a matter of law and fact. And, here, that bill provides a conclusive rebuttal to any otherwise applicable presumption that the subsequently printed enrolled bill reflects what the House passed.

Finally, *Marshall Field*'s deference to the enrolled bill and the congressional leaders' attestation was based largely on the Court's skepticism about the evidentiary value of journals and the mischief that would result from relying on them to prove the invalidity of a law. In contrast, because, after its formal printing—which preceded the House vote—the content of S. 1932 as engrossed in the Senate was not susceptible to alteration, consideration of the engrossed bill to show the content of the bill that passed the House on February 1 raises none of the fears about "intentional corruption" or "mischiefs absolutely intolerable" that concerned the Court in *Marshall Field*. To the contrary, on the facts of this case, to limit judicial review to the enrolled bill would pave a clear road for deliberate abuses of the kind that *Marshall Field* considered unthinkable. Here, a Senate clerk made a substantive change to the text of a bill after the House vote. If the enrolled bill and attestation were dispositive, a clerk of either chamber could become the sole lawmaker by purposely altering the text of a bill during the enrollment process, and Congress itself would have little defense against such mischief.

In *Christoffel v. United States*, 338 U.S. 84 (1949), the defendant claimed that he could not be convicted of perjury based on statements he made before a congressional committee because a quorum was not present when he testified before the committee, as required by congressional rules. Relying on congressional rules,

the trial court had instructed the jury that it should assume that a quorum was present if, at the start of the committee's session several hours before the defendant's testimony, a quorum had been present. *Id*. at 86-87. The jury convicted the defendant, and the court of appeals affirmed. Reversing, the Supreme Court explained that Congress's practice for determining the presence of a quorum did not decide the matter. Rather, "to charge . . . that such a requirement is satisfied . . . in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed." *Id*. at 90; *see id.* (error to affirm jury instructions that "allowed them to find a quorum present without reference to the facts at the time").

Similarly here, Congress's method of authenticating that a bill has passed each chamber should not be allowed to decide the matter when the facts demonstrate otherwise. To hold the DRA validly enacted, "in the face of evidence indicating the contrary," would be to rule as a matter of law that both chambers need not pass the same bill for it to become law. The Constitution does not permit that result.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed. The Court should hold that the DRA is invalid because it was not enacted in conformity with article I, section 7, clause 2 of the United States Constitution.

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATION

Using the word count provided on our word processing system, I hereby certify that the above brief was produced in WordPerfect using 14-point Times New Roman typeface and contains 8,709 words.

Allison M. Zieve

October 6, 2006

CERTIFICATE OF SERVICE

I, Allison M. Zieve, certify that on this 6th day of October, 2006, I served the foregoing Brief for Appellant on all parties required to be served by causing two true and correct copies thereof to be sent by U.S. mail, first class postage prepaid, to counsel at each of the following addresses:

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