



Written by [Joe Wolverton, II, J.D.](#) on March 16, 2010

## Healthcare Debate: The Real March Madness

In the spirit of the NCAA Men's Basketball Tournament, President Obama and his starting line up are running a full court press this week in the hopes of slam-dunking a healthcare package.

Theories abound as to the possible trick plays the President or one of the star players may employ to pull off the upset of the Constitution — their most formidable and familiar foe.

Currently, one of the most talked-about maneuvers is the parliamentary pastiche known as the "deem and pass," known more officially as the "self-executing rule." This is a variation of the famously successful "no look" pass used for years in basketball as members of the House won't have to actually "look" at the version of the healthcare bill already passed in the Senate, they will simply vote on it (up or down), then vote on a second bill comprising changes to the Senate measure, then "pass" it on to the President for his signature. Pretty slick.



The Xs and Os of this backdoor play are as arcane as they are unconstitutional. Basically, the House Rules Committee is the pivot man. It will take the bill that was passed to it by the Senate. Then the Rules Committee will call for a majority vote on a rule that would "deem" the Senate version of the bill passed. Next, the whole House would debate the slate of changes to the "rule" (i.e., the Senate bill) and a bill containing those changes would need to be passed, as well. If the House is able to carry out this gambit, then all that is required to make that bill into the law of the land is the signature of President Barack Obama.

This play is especially pernicious as it violates the rigid separation of powers established by the Constitution in Articles I, II, and III. You may think of the separation of powers as a sort of rule against illegal formations. The Congress may not abrogate their legislative power to the President. Similarly, the Supreme Court must confine itself to its enumerated role, not to legislating from the bench. The chief constitutional objection to the "deem and pass" option is that it effectively endows the President with the ability to breathe life into this healthcare Frankenstein by way of executive fiat, an idea explicitly rejected by [our Founding Fathers](#) and the [Supreme Court](#).

Notwithstanding the noxious nature of this tactic, according to a report published by [the Congressional Research Service](#), the public policy research arm of the Congress, this devious example of sleight of hand has been used six times since 1989 for the purpose it has been recently proposed. As that report clearly states, "If the House adopts a resolution, no further action by the House is required. The



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[Senate] amendment is never before the House for separate consideration.” Well that makes things tidy, doesn’t it?

Sounds a bit different than the procedure you were taught in eighth grade civics? That’s because it is completely different. The checked and balanced method set forth in the Constitution for proposing, debating, and passing a bill and the way that bill then becomes a law is described in Article I, Section 7 of the Constitution. This is the playbook all the teams in this tournament have sworn (literally) to abide by, but none of the plays currently being drawn up by Nancy Pelosi, Harry Reid, *et al.*, have any basis in our founding document whatsoever.

As John F. McManus, President of the John Birch Society, so succinctly said today, as quoted in [The Hill](#):

Let’s suppose you are a junior high school student and you’ve just learned how Congress conducts its business. You have now been instructed that both Houses of Congress can pass a bill with a majority vote of its members. A presidential signature completes the process and there’s a new law. So now you know how Congress works.

Except that that’s *not* how Congress works!

With the understanding that there is no way President Obama’s squad can be convinced to play by the rules, we need to do a little more investigatory work and get some defenses plays drawn up in anticipation of the other gimmicks they might use to power this healthcare “reform” bill up the court and through the hoop.

We might look out for the old “reconciliation.” It’s a difficult play, but the congressional starters have plenty of experience and just might be able to pull it off.

This play is similar to the “deem and pass” (or “self-executing rule”), but the formation is just slightly readjusted. This play is usually called for when the party in control wants to avoid being blocked by the minority party. Reconciliation allows the Senate Majority Leader to use the obfuscation of Senate parliamentary procedure as a pick or screen, thus freeing the bill’s handlers to roll unchallenged around the objections of the opposition on toward the goal of expedited enactment.

Here are the Xs and Os. The Senate is where this game is played out. This play (also known as the Byrd Rule after Senator Robert Byrd, the lawmaker that introduced it in 1985) requires only that a bill containing changes (reconciliations) made to a bill already passed be debated and voted on. Those changes are worked out in the Senate Finance and Health Committees who then send the measure on to the Budget Committee. At this stage, the changes are incorporated into a larger omnibus budget package. After the bill arrives on the floor, debate is limited to 20 hours. However, according to the former Parliamentarian of the Senate, Robert Dove, there would be [no limit to the number of amendments offered by senators](#).

This play is pretty attractive, but there are two [huge parliamentary problems](#): First, according to Senate (and House) rules, this strategy is only to be used to streamline the deliberations over a budget resolution, not a bill cut from a whole cloth that would create new entitlements and enact controversial public policy; and second, the House would first have to pass the Senate bill (and any accompanying alterations) via reconciliation to bypass the need for concurrent passage by a Senate super-majority.

Reconciliation and “deem and pass” are the two plays likely to be run by the Obamacare All-Stars. They are a sneaky lot and well acquainted with the full panoply of trick plays and parliamentary misdirection. The scuttlebutt from the bench indicates that the House Rules Committee is [drawing up the “deem and](#)



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[pass" play](#) and getting all the players ready for the whistle.

It all sounds so simple, and given how long and hard the Constitutional team has been on defense, they might be tempted to just walk down the court, give into the pre-game hype, and declare, "no harm, no foul."

Not so fast. There is a foul here, and it is a flagrant one, and there is something being harmed. And it's the timeworn target of all those who have for generations sought to throw away the traditional rules and force a new rulebook on the American public. It's the last few seconds of this latest scrimmage and it's time for constitutionalists to put their arms up high and stand firmly in defense of the Constitution. We must keep our heads in the game and let the offense know that we are on to their plan and we are ready for any and all of their trick plays.



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