THE ORIGINAL MEANING OF THE ORIGINATION CLAUSE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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THE ORIGINAL MEANING OF THE ORIGINATION CLAUSE

TUESDAY, APRIL 29, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:07 a.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Jordan, Chabot, King, Gohmert, DeSantis, Cohen, Nadler, Scott, and Johnson.

Staff present: (Majority) Zachary Somers, Counsel; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order. And without objection, the Chair is authorized to declare recesses of the Committee at any time.

I want to welcome all of you here today, the Members and the witnesses. And I especially want to welcome our new Ranking Member, Congressman Steve Cohen from Tennessee. He and I have served together for many years, and I have a great deal of respect and affection for Congressman Cohen and look forward to working with him. Welcome.

The first clause of Article 1, Section 7 of the United States Constitution 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." This clause, commonly referred to as the origination clause, was designed by the Constitution's framers to bring the power to tax closer to the people by giving them control over initiating revenue legislation to their immediate representatives, members of the House of Representatives, who are elected every 2 years.

The framers viewed the origination clause as critical protection against government abuses and the creation of an aristocracy in America. The power to tax is one of the most fundamental operations of a sovereign and one of the most dangerous to liberty. As Chief Justice John Marshall famously observed, "The power to tax involves the power to destroy."

Simply put, the origination of revenue bills is not a small or marginal issue. Indeed, the need for a just tax system was the moral justification for our entire War of Independence. Its importance was expressed through the Virginia House of Burgesses, the Stamp Act Congress, and the First Continental Congress, all of whom petitioned the Crown and the parliament in England for redress of their tax grievances.

It was with these realities in mind that the origination clause of our Constitution was written. The clause was, according to Massachusetts Convention delegate Elbridge Gerry, "the cornerstone of the accommodation" of the Great Compromise, 1787. Thus, without the origination clause at the core of the Great Compromise, the Constitution as we know it today would not have come into being at all.

When the framers wrote the Constitution, they knew it was vital that the power to raise and levy taxes originate in the people's House, whose Members are closest to the electorate with 2-year terms rather than in the Senate where the members sit unchallenged for 6-year terms, who do not proportionately represent the American population, and who already enjoy their own unique and separate Senate power granted to them in the Constitution. As George Mason observed during a debate in the Constitutional Convention, "Should the Senate have the power of giving away the people's money, they might soon forget the source from whence they received it. We might soon have an aristocracy."

I have called today's hearing to examine the roots of the origination clause, its original meaning and purpose, and to see where the origination clause stands today over 225 years after the Great Compromise. I am concerned that over time the original meaning of the clause has been set aside and the protections the clause affords to American taxpayers have been severely eroded.

Instead of a robust check on the powers of the Federal Government over the people, I am troubled that the clause has become a mere formality in practice, a formality that may be dispensed with as easily as the Senate taking any bill that originated in the House and striking the entire text of that bill and replacing it with a "bill for raising revenue," no matter how non-germane the Senate's amendment is to the original House-passed measure. Now, this sort of procedure ignores the framers' intent, and if allowed to stand, it renders the origination clause of our Constitution a dead letter.

And I look forward to the witnesses' testimony on this important subject. I hope it helps us all inform the members of this Congress and of the House more generally of the fundamental importance of the origination clause to our constitutional system. For the responsibility of enforcing the origination clause rests in the first instance right here in the House of Representatives.

If we as Members of the House, who took a solemn oath to support and defend the Constitution, including its origination clause, fail to defend this right and responsibility as the immediate representatives of the people and most accountable to them, we dishonor and fundamentally abrogate our sworn oath to support and defend the Constitution of the United States from all enemies foreign and domestic.

With that, I would now recognize the Ranking Member for an opening statement.

Mr. COHEN. Thank you, Mr. Chairman. It is indeed my first meeting as Ranking Member of this Subcommittee, and I am honored to serve in this position and honored to serve with you. And we had a good relationship as Chair and Ranking Member of the Subcommittee on Commercial and Administrative Law during the 111th Congress, and we will work together here.

Of course, this hearing is on the original meaning of the origination clause. It plays an important role in ensuring that the people's House has the first say when it comes to bills raising revenue. We are the House closest to the people and always have been, but not necessarily like it was when the framers framed the Constitution, and I think that is an issue that I do not think anybody touches on. And maybe I am wrong, but we will throw it out there.

The Constitution reflects a whole bunch of compromises to bring about the great document that served the original States and regions of our country which were mostly on this side of the Mississippi River. The makeup of the Congress itself, the House was 2-year terms, the Senate 6-year terms; the House closer to the people elected by population, the Senate by States. And the smaller States have got their clout in the Senate, and then the larger States have more representation obviously in the House where it is by population.

And the origination clause was a balancing of those interests to give the House, with its roots there with the people and origination, the opportunity to originate all these revenue bills. And that is great politics and great theory. It also gave the Senate in the balancing act the power to propose concurrent amendments as in all of the bills. You cannot get anything done without both Houses, the House and the Senate. So the Senate does get to vote and approve, et cetera, et cetera, et cetera.

But, of course, when this came around, this was all before the 17th Amendment, and the Senate was a bunch of guys that were—and they were all guys—that were picked by their State legislatures to basically be the voices of the powers that be in the State legislature, the governors, the speakers of the House and the Senate. So it made a lot of sense then really that these guys who were, in many ways, lackeys of the State house, were not to originate bills requiring people to fork out their money, their taxes, to fund the government.

But that has changed. It changed in the 20th century when we required the Senate to be elected by the people and took away the yoke of the State capitol from their necks, because that is all the senators were basically lackeys of the State legislative Capitol Hill gang in each State. They picked the guys. They were wealthy guys they liked and they wanted to give them an opportunity to go to Washington and have some say as a senator. They protected the interests of the State, but really they protected the interests of the State's interests—the speakers, the governors, the guys that ran the show, the Tammany Halls in Albany. They picked their own guys. And certainly they should not have the right to originate revenue bills because that would be almost like England, unelected people, because they were not elected. They were chosen. So you

have got to view all of this in that context, and we have performed it and changed it, and the senators are now human beings, not chattels of State capitols. Free will.

Some observers say that the origination clause is in peril. These observers, including some of our witnesses today, allege that Congress did an end run around the origination clause when it passed the Patient Protection and Affordable Care Act, and particularly the individual mandate and the shared responsibility payment. It will be made more evident during our discussion today, but neither the facts nor the law support this assertion, although people can argue such. And that is why we have cases, and that is why we have lawyers even on sides that are bound to lose.

Supreme Court precedent and congressional practice make clear that a bill with a primarily non-revenue purpose is not a bill for raising revenue within the origination clause's meaning even if the bill raises revenue so long as the revenue supports the government programs. So the Supreme Court precedent both for primarily non-revenue purpose—giving people healthcare and saving them from the final destination for some period of time—is not a bill just simply to raise revenue.

Here the Supreme Court concluded in 2012 in *National Federation of Independent Business v. Sebelius*—the late Sebelius—the Affordable Care Act had the primary purpose of, among other things, expanding health insurance coverage. And the individual mandate and shared responsibility payment was the key to meeting this goal. I should note for context purposes that it is a little over a week away from the U.S. Court of Appeals, the D.C. circuit, hearing of oral arguments in *Sissel v. HHS*, where the plaintiff, Sissel, challenges the constitutionality of the Affordable Care Act on origination clause grounds. And I question whether the best use of our resources right now—of course I am the Ranking Member so all I can do is question that—is to have a hearing on a matter that is not yet heard by the D.C. Circuit court. But we are here, and I look forward to the discussion.

It is interesting. I read a Juan Williams op-ed, and I cannot remember the man's name, but it was germane and central to the Romneycare proposal. And he said that the Affordable Care Act and Romneycare were really basically the same thing, and it is just all about messaging. And that it has been messaged that the Affordable Care Act has not been successful. The message was that Romneycare was successful.

And so, people kind of think Romneycare was successful and the Affordable Care Act maybe was not, but that if it was not for the messaging, everyone would have embraced it and liked it, and realized it was the same thing that the Republicans brought forward as an alternative to Hillarycare, and it was Romneycare. But the followers of Romney have vilified and attacked the Affordable Care Act. Interesting that the same subject matter could be viewed and messaged in different things, and this is a perpetuation, continuation, of that same messaging program.

With that, I yield back the rest of my time.

Mr. FRANKS. And I thank the gentleman. And without objection, the other Members' opening statements will be made part of the record.

So let me now introduce our witnesses. Our first witness is Nicholas Schmitz. Mr. Schmitz is a graduate of the United States Naval Academy and has a graduate degree in political theory and philosophy from Oxford University, where he studied as a Rhodes Scholar. Mr. Schmitz is currently pursuing his second graduate degree at Stanford University.

After graduating from Oxford, Mr. Schmitz served as an infantry officer in the United States Marines in Helmand Province in Afghanistan, before spending the last several years on the teaching faculty in the political science department at the Naval Academy. Mr. Schmitz is the author of the Law Review article "The Origination Clause: Meaning, Precedent, and Theory, from the 12th to the 21st century." We are glad you are here, sir.

The second witness is Paul Kamenar. Mr. Kamenar is an attorney with over 35 years' experience litigating cases in the U.S. Supreme Court and lower Federal courts raising important constitutional, statutory, and public interest issues. He is also a senior fellow of the Administrative Conference of the United States.

Mr. Kamenar was formerly a clinical professor of law at George Mason University School of Law, an adjunct professor at Georgetown University Law Center, and senior executive counsel at the Washington Legal Foundation where he represented over 250 Members of Congress in original amicus curiae litigation in dozens of cases, and testified before Congress on numerous occasions. Welcome, sir.

Our third witness is Joe Onek. Mr. Onek is a principal at the Raben Group. He has experience working in all three branches of government, including most recently as senior counsel to Speaker Nancy Pelosi. Additionally, Mr. Onek served as an associate director on the White House Domestic Policy Staff and later as the deputy counsel during the Carter Administration, and during the Clinton Administration as the senior coordinator for rule of law at the State Department, and principal deputy associate attorney general at the Department of Justice. After graduating from law school, he clerked for Justice William Brennan on the United States Supreme Court. Thank you, sir, for being here.

Our final witness is Todd Gaziano. Mr. Gaziano is executive director of the D.C. Center and senior fellow in constitutional law at the Pacific Legal Foundation. Prior to joining to Pacific Legal Foundation, he served in the Justice Department's Office of Legal Counsel where he provided advice to the White House and four attorneys general on constitutional matters. He was a Chief Subcommittee Counsel in the U.S. House of Representatives, and was the founding director of Heritage Foundation's Center for Legal and Judicial Studies. From early 2008 to December 2013, he served as an appointee of the House of Representatives on the U.S. Commission on Civil Rights. And thank you again for being here, Tom.

Now, each of the witnesses' written statements will be entered into the record in its entirety, and I would ask each witness to summarize his testimony in 5 minutes or less. And to help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witnesses' 5 minutes have expired.

And before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So if you would please stand.

[Witnesses sworn.]

Mr. FRANKS. Please be seated. Let the record reflect that the witnesses answered in the affirmative.

I would now recognize our first witness, Mr. Schmitz. Please turn your microphone on, Nicholas—Mr. Schmitz—before you speak there.

TESTIMONY OF NICHOLAS M. SCHMITZ, STANFORD UNIVERSITY, STANFORD, CA

Mr. SCHMITZ. Thank you. Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee. Thank you for the opportunity to testify today. I have submitted my written statement for the record and included a copy of my recently-published scholarly article in the British Journal of American Legal Studies titled "The Origination Clause: Meaning, Precedent, and Theory from the 12th to the 21st Century."* My research partner and co-author, Professor Priscilla Zotti, is the chairman of the political science department at the U.S. Naval Academy.

The origination clause requires 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. As explained in more detail in our journal article, its history reveals a deliberate procedural restraint on the taxing power that no branch of the government, except the direct representatives of the people, the House of Representatives, who are elected every 2 years, and who are most familiar with the circumstances of the people, can constitutionally propose new taxation.

The 1215 A.D. Magna Carta forced upon King John at Runnymede by his barons following their open insurrection contained among its 63 clauses no scutage or aid will be levied in our realm except by the common counsel of our realm. By 1678, the House of Commons required that all bills for the purpose of taxation or containing clauses imposing a tax must originate in the House of Commons and not in the House of Lords. Under American colonial charters during the time, new taxes typically required the "advice, assent, and approbation of the free men of the said province."

In 1764, the Virginia House of Burgesses sent its famous petition to the House of Commons explaining colonial opposition to the Sugar Act. "The Council of Burgesses conceive it essential to British liberty that laws imposing taxes on the people ought not to be made without the consent of the representatives chosen by themselves, who at the same time that they are acquainted with the circumstances of their constituents, sustain a proportion of the burden laid upon them."

The principle is echoed in the fundamental objection of the first act of the coordinated American government in the Stamp Act Congress. It was reiterated again by the First Continental Congress in October 1774. Following independence, the new States formed their own constitutions. Of the nine available State constitutions with bi-

*The material referred to is not reprinted in this hearing record but is available at: http://www.bcu.ac.uk/Download/Asset/acecfa6b-59c9-4f7b-a2cd-6a09a1bc281b.

cameral legislatures in 1790, seven had lower house origination clauses. Of the seven with origination clauses, six allowed upper house amendment to revenue raising bills.

When the Constitutional Convention opened on May 25th, 1787, the fundamental topic of disagreement between the delegates was over the nature of representation in the legislation branch. The small States insisted on retaining the equal representation they enjoyed under the Articles of Confederation, while the larger States wanted to shift the national legislation to be proportionately representative.

What it took for the Great Compromise was Benjamin Franklin's recognition that the fundamental disagreement was over property and taxation, and Elbridge Gerry's subsequent proceeding to "restrain the senatorial branch from originating money bills. The other branch was more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse strings." The origination clause was "the cornerstone of that accommodation."

The debate on the wisdom of the clause continued; however, the imperative for adding the Senate amending power was primarily to prevent the House from abusing the absence of an amending power by disingenuously tacking foreign matters onto money bills, and then claiming that the Senate could not amend out these non-germane clauses. The primary impetus for the clause was not to expand the Senate's influence over tax law, and certainly not to allow the Senate to effectively originate taxes.

Ultimately, the argument that seemed to prevail in the Constitution was purely pragmatic. "Taxation and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses. In short, the acceptance of this plan will inevitably fail if the Senate be not restrained from originating money bills."

I offer two notes on the meaning of the actual words of the clause that are very commonly misconstrued by contemporary legal analysis. First, the phrase "bill for raising revenue" did not connote only bills whose primary purpose or sole purpose was raising revenue. The vast weight of historical evidence from the phrases used in the Revolution, the Convention, the State constitutions from which the exact phrase was adopted, and the ratifying debates belie this common argument. The 'purposive" interpretation is not supported by the majority of historical evidence.

Second, the concept of incidental taxation is specified nowhere in the Constitution, and it was both discussed and rejected in the 1787 Convention. Such a distinction between "incidental revenue" and "revenue proper" does not appear to be historically justified, especially if the revenue comes from taxes rather than other revenue sources, such as user fees or sales of government assets. Ironically, Judge Joseph Story's often misconstrued passage on incidentally created revenue listed illustrate examples of the concept, none of which included actual taxes.

I thank you for your time, and I would be happy to elaborate further on all of these issues.

[The prepared statement of Mr. Schmitz follows:]

BEFORE THE U.S. HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE, SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

HEARING ON "THE ORIGINAL MEANING OF THE ORIGINATION CLAUSE"
APRIL 29, 2014

2141 RAYBURN HOUSE OFFICE BUILDING

TESTIMONY OF NICHOLAS M. SCHMITZ
COAUTHOR OF:
"THE ORIGINATION CLAUSE: MEANING, PRECEDENT, AND THEORY FROM THE 12TH TO 21ST CENTURY,"
3 *BRITISH JOURNAL OF AMERICAN LEGAL STUDIES*, 71-139 (2014)

TESTIMONY OF NICHOLAS M. SCHMITZ

Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee:

My name is Nicholas M. Schmitz. I am a graduate of the United States Naval Academy, and am currently pursuing my second graduate degree at Stanford University. My first graduate degree was in British Social Contract Theory and Political Philosophy at Oxford University as a Rhodes Scholar. I subsequently served as a Marine Infantry Officer in Helmand Province, Afghanistan, before spending the last several years on the teaching faculty with the U.S. Naval Academy's Political Science Department. Among other courses, I taught the undergraduate Midshipmen a required course titled, "U.S. Government and Constitutional Development" as they prepared to take their respective statutory oaths of office to "support and defend the Constitution of the United States against all enemies, foreign and domestic." Although I have since resigned my commission to pursue other career goals, I still feel bound by my oath to support and defend the Constitution. More relevant to the topic of this hearing, I am coauthor of the recently published scholarly article in the peer reviewed British Journal of American Legal Studies, titled "The Origination Clause: Meaning, Precedent, and Theory from the 12th to the 21st Century."[1] My research partner, Professor Priscilla H.M. Zotti, is chairman of the Political Science Department of the U.S. Naval Academy. I am grateful for the opportunity to present the results of our publication to this committee as our own personal and academic findings. The entire journal article is submitted for the record.[2]

The theme of my testimony today is that the history of the Origination Clause, which mandates 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,"[3] reveals a deliberate constitutional "check and

[1] Priscilla H.M. Zotti and Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 BR. J. AM. LEG. STUDIES, 71-139 (2014) (hereinafter Zotti-Schmitz).
[2] As indicated in the journal article itself, the views expressed in that article as well as in this testimony are my own and do not reflect the official policy or position of the Department of Defense or the U.S. Government.
[3] U.S. Const., Art. I, Sec. 7.

balance" under which nobody in the federal government except the direct representatives of the people in the House of Representatives, who are elected every two years and who are most familiar with the circumstances of the people, can constitutionally propose federal laws under the taxing power of Congress.[4]

Professor Zotti and I are aware of only a handful of scholarly publications on the Origination Clause since Justice Joseph Story wrote his often cited six-page reflection on it in his 1833 Commentaries. Only two other scholarly articles have been published since the Supreme Court last ruled on the issue 24 years ago. All of the other publications focus almost exclusively on the handful of cases comprising 20th Century Court precedent. As a result of our decidedly historical focus, our research's conclusions departed somewhat from the convention legal wisdom surrounding the purpose, role, and standing of the clause in our governmental system. I will largely contain my remarks to the pre-20th century period from Magna Carta to the Colonial tradition, through the Revolution, the 1787 Convention, the Ratification debates, and the early American understanding of the Clause.

The 1215AD Magna Carta forced upon King John at Runnymede by his Barons following their open insurrection, contained among its 63 clauses that, "*No scutage or aid is to be levied in our realm except by the common counsel of our realm. . . .*"[5] This "Great Charter" of 1215 then went into extensive details as to who composed the "common counsel of the realm," procedural restrictions on when and how they were to be convened, and what constituted their consent. The Crown repealed the

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[4] *See* U.S. Const., Art I, Sec. 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States"); *see also United States v. Butler*, 297 U.S. 1, 68-69 (1936) ("The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But *resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible*.").

[5] "And to obtain the common counsel of the realm for the assessment of an aid (except in the cases aforesaid) or scutage, we will have archbishops, bishops, abbots, earls, and greater barons summoned individually by our letters, and we shall have summoned generally through our sheriffs and bailiffs all those who hold of us in chief, for a fixed date, with at least forty days' notice, and at a fixed place; and in all letters of summons we will state the reason for the summons. And when the summons has thus been made, the business shall go forward on the day arranged according to the counsel of those present, even if not all those summoned have come." *See* J.C. HOLT, MAGNA CARTA 17 appendix 6, at 455 (2nd ed. 1992.)

origination clauses in the subsequent reissues of the Great Charter in 1216, 1217, and 1225, however, the early unicameral counsel refused to assent to various revenue measures in 1242 and 1255AD, insisting that despite its neglect and royal nullification, the restrictions of the original constitutional charter were still binding.[6] By 1295 representative of the several boroughs were allowed into the early parliament, and in 1341, the common representatives of the boroughs began meeting in a newly formed lower House of Commons separately from the more aristocratic parliamentary members. In this earliest British example of bicameral legislature, the Commons held little legislative power except that which they could obtain through their vigorously asserted prerogative to design and approve taxation and to impeach royal ministers. By Richard II's reign (1377-1399) it was customary that the "Commons granted with the assent of the Lords."[7] The principle remained for several hundred years, but was not firmly solidified against the claims of the Lords until the late 17th century. In 1671 a battle between the Commons and the Lords erupted when the Lords attempted to reduce a tax on sugar that the Commons had originated. The Lord's recognized the principle that the Commons exclusively originate new taxes, but the Lords reasoned in this case that they were reducing revenue vice raising it. On July 3rd, 1678, the Commons passed a resolution that the Lords had no power to amend revenue measures and that "all bills for the purpose of taxation, or containing clauses imposing a tax, must originate in the House of Commons and not in the House of Lords."[8] The Lords fought the Commons on this minor prerogative of

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[6] WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, Ch. 14 (1914).

[7] ROBERT LUCE, LEGISLATIVE PROBLEMS: DEVELOPMENT, STATUS, AND TREND OF THE TREATMENT AND EXERCISE OF LAWMAKING POWERS at 390 (Boston and New York, Houghton Mifflin Company, 1935) (hereinafter LUCE). For earlier assertions by Parliament in general of this taxation prerogative, *see* the 1627 "Petition of Right" against Charles the 1st, 3 Chas. 1 c.1 §8:

> "[T]hat no man hereafter be compelled to make or yield any gift loan benevolence tax or such like charge without common consent by Act of Parliament, and that none be called to make answer or take such oath or to give attendance or be confined or otherwise molested or disquieted concerning the same or for refusal thereof."

[8] Noel Sargent, *Bills for Raising Revenue under the Federal and State Constitutions*, 4 MINN. L.REV. 330 at 334 (1919-1920).

at least reducing revenue until the 1690s when the Commons effectively won the exclusive right to manage all revenues.[9]

During the 17th and 18th Centuries on the American side of the Atlantic, the colonies were experimenting with their own forms of representative government under the allowance of their Royal charters. Colonial charter's granted during the first half of the 17th century under King James I and Charles I, generally afforded colonial governors broader and less popularly constrained methods of taxation. After the decapitation of Charles I at the end of the 30 Years War, and after the restoration of the House of Stuart between the 1660s and 1690s, new or reissued Royal charters generally mandated some form of local, popular consent for taxation. For example, Carolina's (1663), Pennsylvania's (1681), New England's (1688), and Massachusetts's (1691) charters all required some variation of the "advice, assent and approbation of the freemen of the said province, or the greater part of them, or their delegates or deputies"[10] to legally impose taxes. However, even when origination requirements were not mandated in the Royal charters, many colonies simply wrote popular assembly origination requirements into their own governing laws. For example, after an open insurrection in the late 1640s in Maryland, the newly established bicameral legislature in Annapolis passed a law binding its upper council and governor in 1650 entitled "An ACT against raising of Money within this Province, without Consent of the Assembly." Under it, tax laws had to be "first had and declared in [the] General Assembly."[11] New Jersey likewise codified in 1681 that it was illegal "to levy or raise any sum or sums of money, or any other tax whatsoever, without the act, consent and concurrence of the General Free

[9] LUCE, *supra* note 7, at 390.
[10] The Charter of Carolina – 1663, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES PART II (Washington, GPO, 2d ed. 1878) (hereinafter GPO)
[11] FRANCIS BACON, THE LAWS OF MARYLAND VOL. 75, 37-38 (1765) (available at *Archives of Maryland Online*, http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000075/html/index.html).

Assembly."[12] By the 1760s, most colonies had a lower-house with some advantage over the upper-house on monetary and taxing matters either by constitutional mandate, statute, or common practice.

Prior to the 1760s the colonists had enjoyed not only the privilege of local ratification of any proposed taxing measures by the Crown and Parliament but more often than not the original design of the taxing measures themselves. The British Parliament attempted to levy the Sugar Act of 1764 for the purpose of "defraying the expenses of defending, protecting, and securing" the colonies. The Stamp Act of 1765 was subsequently passed for the purpose of reimbursing the British government for its expenses in the Seven Years War. Many colonists, and some Brits, disagreed with the constitutionality of such taxes. William Pitt ("the elder") protested in Parliament in 1765 on behalf of the colonists against the Stamp Act by arguing that:

> "[The] distinction between legislation and taxation is essentially necessary to liberty. . . . The Commons of America, represented in their several assemblies, have ever been in possession of the exercise of this their constitutional right of giving and granting their own money. They would have been slaves if they had not enjoyed it."[13]

In 1764, the Virginia House of Burgesses (along with separate petitions from ten other colonies) sent its famous petition to the House of Commons citing the colonial logic of opposition to the internal tax:

> "[T]he Council and Burgesses . . . in a respectful manner but with decent firmness, to remonstrate against such a measure . . . conceive it is essential to British liberty that laws imposing taxes on the people ought not to be made without the consent of representatives chosen by themselves; who, at the same time that they are acquainted with the circumstances of their constituents, sustain a proportion of the burden laid on them."[14]

The logic was echoed in the fundamental objection of the first act of coordinated American government in the Stamp Act Congress. It was reiterated again by the First Continental Congress in October of 1774. The opening line of that body's declaration of rights and grievances reads:

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[12] THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 424 (Aaron Learning & Jacob Spicer eds., 1881).

[13] William Pitt, *On an address to the Thrown, in which the right of taxing America is discussed*, Dec. 17, 1765 reprinted in THE TREASURY OF BRITISH ELOQUENCE 140-41 (Robert Cochrane, ed., London & Edinburgh, 1877).

[14] Virginia House of Burgesses, *Petition of the Virginia House of Burgesses to the House of Commons*, Dec. 18, 1764 (available at http://avalon.law.yale.edu/18th_century/petition_va_1764.asp).

> "Whereas, since the close of the last war, the British Parliament, claiming a power, of right, to bind the people of America by statutes in all cases whatsoever, hath in some acts expressly imposed taxes on them, and in others, under various pretenses, but in fact for the purpose of raising revenue, hath imposed rates and duties payable in these Colonies..."

Following independence, the new states formed their own constitutions. Of the eleven available state constitutions immediately following the American Revolution, eight established bicameral legislatures (nine by 1790 with PA, and 10 by 1863 with VT). Of those nine with bicameral legislatures by 1790, seven had lower house Origination Clauses (NY and NC had no Origination Clause; however, North Carolina had annual senatorial elections). Of the seven with Origination Clauses by 1790, six allowed upper-house amendments to revenue raising bills (VA prohibited senate amendments).[15] None of the state constitutions prior to 1787 made any mention of the concept of "incidental revenue" except for Maryland's:

> "no bill, imposing duties or customs for the mere regulation of commerce, or inflicting fines for the reformation of morals, or to enforce the execution of the laws, by which an incidental revenue may arise, shall be accounted a money bill: but every bill, assessing, levying, or applying taxes or supplies, for the support of government, or the current expenses of the State, or appropriating money in the treasury, shall be deemed a money bill."[16]

However, that same constitution required that the Legislature cannot "on any occasion, or under any presence annex to, or blend with a money bill, any matter, clause, or thing, not immediately relating to, and necessary for the imposing, assessing, levying, or applying the taxes or supplies, to be raised by the government, or the current expenses of the State."[17] This standard of the day of single purpose legislation removed many of the complexities of modern day Origination Clause jurisprudence. Finally, in Maryland's case, it is not even clear that the Senate could amend a money bill in the first place if it were classed as such.

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[15] Zotti-Schmitz, *supra* note 1, at 85-91.
[16] Maryland Constitution of 1776, *reprinted in* GPO, supra note 10, at 822.
[17] *Id.*

When the Constitutional Convention opened on May 25th 1787, the fundamental topic of disagreement between the delegates that threatened progress towards amending the Articles of Confederation was over the nature of representation in the legislative branch. The small states insisted on retaining the equal representation they had enjoyed under the Articles of Confederation, while the large states wanted to shift the national legislature to be proportionally representative of their populations. Delegates from the small states threatened retire from the convention and even to confederate with foreign nations rather than consent to a form of government that would give their state less than equal representation in the new legislature. Contrary to popular narrative, Roger Sherman's June 11th proposal of the now famous Great Compromise did not by itself convince the smaller states' delegates to consent to our modern bicameral legislature's method of representation. Sherman's proposal initially failed in Convention. What it took, was Benjamin Franklin's recognition that the fundamental disagreement was over property and taxation, and Elbridge Gerry's subsequent proposal to:

> "restrain the Senatorial branch from originating money bills. The other branch was more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings. If the Senate should be allowed to originate such bills, they would repeat the experiment, till chance should furnish a set of representatives in the other branch who will fall into their snares."[18]

On July 5th a committee assigned to the issue produced the first draft language of the clause which required "that all bills for raising or appropriating money, . . . shall originate in the 1st. branch of the Legislature, and shall not be altered or amended by the 2d. branch".[19] With this measure added, the larger states' representative on the committee had "assented conditionally" to an equality of votes in

[18] JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 113 (New York, Norton & Co. Inc., 1969) (hereinafter MADISON).
[19] *Id.* at 237.

the Senate, given that the "smaller States have conceded as to the constitution of the first branch, and as to money bills."[20]

While there was significant debate about the wisdom of the clause, according to Madison, the view that "generally prevail[ed]" was George Mason's argument that:

> "The consideration which weighted with the Committee was that the 1st branch would be the immediate representatives of the people, the 2nd would not. Should the latter have the power of giving away the people's money, they might soon forget the source from whence they received it. We might soon have an Aristocracy."[21]

At the end of the debate on July 6th, the first draft of the Origination Clause without Senate amending power was voted for in the affirmative (6-3 with Georgia, New York, and Massachusetts divided). The following day, on July 7th the vote to allow equality of representation in the Senate for the small states was finally passed (6-3 with Georgia and Massachusetts divided). It had taken a month of heated debate that threatened to dissolve the Convention and the Union between the time of the proposal of the Virginia Plan and the actual compromise mechanism proposed by Benjamin Franklin including the Origination Clause that made progress possible. Specifically, it took the adoption of a strict Origination Clause against the Senate to convince enough of the larger States to allow equal representation in the Senate. The Origination Clause was the "cornerstone of the accommodation."[22]

However, the vote to insert the strict form of the Origination Clause and allow for equal representation of states in the Senate and proportional representation in the House did not end the issue. The Clause was subsequently repealed and then reintroduced in the Convention with a limited Senate amending power requiring that "Bills for raising money for the *purpose of revenue* or for appropriating the same shall originate in the House of Representatives and shall not be amended or altered in the Senate as to increase or diminish the sum to be raised, or change the mode of levying it,

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[20] *Id.* at 242.
[21] *Id.* at 250.
[22] *Id.* at 290 (Delegate Elbridge Gerry in Convention indicating the centrality of the Clause to the Great Compromise).

or the objects of its appropriation."[23] George Mason explained that the logic for adding the emphasized phrase "for the purpose of revenue" was to remove the objection that all federal powers might have "some relation to money." However, this language was ultimately not adopted by the Convention,[24] and in the very same paragraph, Mason observed that:

> "The Senate did not represent the *people*, but the *States* in their political character. It was improper therefore that it should tax the people. . . . Again, the Senate is not like the H. of Representatives chosen frequently and obliged to return frequently among the people. They are chosen by the Sts for 6 years, will probably settle themselves at the seat of Government will pursue schemes for their aggrandizement – will be able by [wearying] out the H. of Rep. and taking advantage of their impatience at the close of a long Session, to extort measures for that purpose. . . . If the Senate can originate, they will in the recess of the Legislative Sessions, hatch their mischievous projects, for their own purposes, and have their money bills ready cut & dried, (to use a common phrase) for the meeting of the H. of Representatives. . . . the purse strings should be in the hands of the Representatives of the people."

The debate on the wisdom of the Clause continued. The imperative for adding the Senate amending power was primarily to prevent the House from abusing the absence of that privilege by disingenuously tacking foreign matters to money bills and claiming that the Senate could not amend them out. By adding the amending power, the Framers thought the Senate would be able to strip out non-germane clauses the House had smuggled into a revenue raising bill. Some of the delegates did seek to expand the Senate's involvement "perfecting" House originated revenue measures. Madison, himself, was early in the Convention one of these exceptions as he believed that the Senate should at least be allowed "to diminish the sum to be raised. Why should they [the Senate] be restrained from checking the extravagance of the other House."[25] However, the primary problem the Framers sought to address with the amending power was to prevent abuses witnessed by lower Houses under the British system, not to expand the Senate's influence on tax law, and certainly not to allow the Senate to effectively originate tax law. The amending power's was primarily a defensive measure for the Senate to guard its legitimate

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[23] *Id.* at 461 (August 15th in Convention).
[24] For a more detailed review of the Framer's debate over the phraseology "Bills for raising Revenue" as opposed to "bills for raising money for the purpose of revenue," see Zotti-Schmitz, *supra* note 1, at 122, note 181.
[25] MADISON, *supra* note 18, at 444.

prerogative over non-tax legislation in the face of an offensive House abusing a strict Origination Clause prerogative. Ultimately, the argument that seemed to prevail in the Convention was the more pragmatic issue and admission by the Framers that: "Taxation & representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses. In short the acceptance of the plan will inevitably fail, if the Senate be not restrained from originating Money bills."[26]

On September 8th, the last substantive working days of the Convention, the final language of the Clause was voted on: "On the question of the first part of the clause – 'All bills for raising revenue shall originate in the House of Representatives'." The measure on the first half of the Clause was passed (9-2), the second half of the Clause granting the Senate amending power was never officially voted on, but was signed to in the final draft by the Convention, and forwarded for ratification.

While there was significant theoretical debate about the wisdom of the Clause in the closed-door Convention, the public ratification debates were less divided on their understanding of its meanings. We find only one instance in the Documentary History of the Ratification of the Constitution in which an antifederalist speculated about the possibility of the Clause permitting a Senate substitute amendment. Madison himself was present during that debate in the Virginia legislature, and responded to the criticism of the Senate amending power by stating:

> "The criticism made by the Honorable Member, is, that there is an ambiguity in the words, and that it is not clearly ascertained where the origination of money bills may take place. I suppose the first part of the clause is sufficiently expressed to exclude all doubts..."[27]

There is some interpretive leeway in the historical evidence regarding the question of whether the Origination Clause was understood to apply to appropriations as well as taxation. However, the vast majority of the historical evidence from the ratification debates is heavily weighted to one side on the

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[26] *Id.* at 445.

[27] Virginia Convention Debates, 14 June 1788 *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Vol. 10, 1268 (hereinafter DHRC).

issue of the extent of the Senate's amending power. For example in Philadelphia it was argued that under the new Clause "They [the Senate] may restrain the profusion of errors of the house of representatives, but they cannot take the necessary measures to raise a national revenue."[28] In Pennsylvania, it was argued that "The two branches will serve as checks upon the other; they have the same legislative authorities, except in one instance. Money bills must originate in the House of Representatives."[29] And finally, in Virginia, it was interpreted as follows: "A revenue bill will now have a double chance of attaining to perfection. The House of Representatives will discuss, form and send it up – the Senate will have it in their power to deliberate, debate upon it, and propose amendments, if necessary; but they can go no further."[30] It may not be that surprising that no one apprehended a fear that the Senate would use the amending power to introduce non-germane (or even worse, substitute-) amendments containing their own taxing measures. At the time, the Continental Congress under the Articles of Confederation made such amendments illegal.[31] This may have been what the public had in mind for the limits on customary amendments when they ratified the words "but the Senate may propose or concur with Amendments as on other Bills." Legislative procedure at the time, and in most all American legislative bodies did not permit that sort of amendment.[32] Furthermore, in the extreme example of a substitute amendment, retaining the vestigial structure of the House Bill number would

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[28] An American Citizen II: On the Federal Government *Philadelphia Independent Gazetteer*, 28 Sept. 1787 *reprinted in* DHRC, supra note 27, V.13 at 265: Reprinted 21 Oct. 1787 under title: "On the safety of the people, from the restraints imposed on the Senate." V.2. at 143.

[29] The Pennsylvania Convention Debates, 1 Dec. 1787 *reprinted in* DHRC, *supra* note 27, V.2 at 451.

[30] Brutus *Virginia Journal*, 6 Dec. 1787 *reprinted in* DHRC, *supra* note 27, V.8 at 214-15.

[31] See ASHER CROSBY HINDS, PARLIAMENTARY PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, §1072 (U.S. Gov't Printing Office, 1899): In 1781, the Continental Congress passed this measure "No new motion or proposition shall be admitted under color of amendment as a substitute for a question or proposition under debate until it is postponed or disagreed to."

[32] *See* LUCE, *supra* note 7, at 429: After the early 1800s, the Senate became "almost if not quite the only parliamentary body in this country adhering in any degree to the English belief that an amendment need not be germane." Also *see* the Senate's own historical parliamentary rulings when judging the issue *reprinted in* U.S. Senate Proceedings, in Blair & Rives, 66 *The Congressional Globe*, May 8 1872, Part 4 at 3181-83: "Now the Chair desires to add to this that by the parliamentary law as practiced in the House of Representatives, which is the parliamentary law as generally understood by Legislatures and parliamentary bodies in the United States, this [non-germane] amendment would be totally out of order."

likely not satisfy the contemplated amendment procedures at the time as the bill numbering system was not even adopted until the early 19th century.[33]

The early courts and Senate largely abided by the original understanding of the Clause. However, at the end of the 19th century, the Supreme Court imported the concept of "incidentally create[d] revenue" to exempt certain bills from Origination Clause scrutiny. The authority the Court relied on in its 1875 decision in *United States v. Norton*[34] and again in its 1897 decision in *Twin City Bank v. Nebeker,*[35] was Judge Joseph Story's 1833 Commentaries on the Constitution. In those Commentaries, Story argued (in opposition to another scholar of his time) that a bill for establishing the Post Office need not have originated in the House of Representatives,

> "And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins..."[36]

While the concept of "incidentally create[d] revenue" is mentioned nowhere in the Constitution, to the early Court's credit, their application of Story's opinion in the 1875 *Norton* and 1897 *Nebeker* cases concerning "incidentally create[d] revenue" was at least consistent with the *context* of that authority's words. *Norton* concerned an act to "establish a postal money order system," and *Nebeker* concerned an act to regulate the value of currency (the National Banking Act of 1864). These were exactly the illustrative examples Story listed to give the concept context. I refer the Committee to my article discussing subsequent court cases interpreting the Origination Clause, but it is important to note

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[33] The number referencing system did not even exist until 1817 in the House and 1847 in the Senate. The House adopted a sequential numbering system in which bills were numbered consecutively for an entire Congress in the 15th Congress (1817), and the Senate began using the same numbering system in the 30th Congress (1847). Prior to that time, the Senate numbering system provided that sequential numbering started anew at the beginning of each congressional session. LexisNexis, "About Bills" (www.lexisnexis.com/help/cu/Serial_Set/About_Bills.htm).
[34] *United States v. Nartan*, 91 U.S. 566 (1875).
[35] *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897).
[36] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §877 at 343 (Boston, Hillard, Gray, and Co. 1833).

the context of Story's concept of "incidentally create[d] revenue." That context was in relation to bills which do not "levy taxes in the strict sense of the words," and where the generation of revenue is nearly accidental and unintended – a complete byproduct of the Senate legislation. If the various branches of the Federal Government were to extend Story's concept of "incidentally create[d] revenue" to bills where taxes are levied for the general expenses of government, without reference to Constitutionally enumerated Senate powers, then not only would they be in contravention of the original meaning of the Clause, but they would also be in contravention to the very authority most often cited to endorse the concept. Further, such an extension of the concept would render the origination clause wholly impotent.

The danger of the inevitable blurring of legislation and taxation was considered at length by the Framers in the Convention. One early draft of the Clause even proposed specifying "bills for raising money for the purpose of revenue." However, after much debate on the complexity of discerning congressional purpose,[37] the Framers instead imported the identical language used in most of the States' origination clauses, "Bills for raising Revenue." The connotation of that common phrase employed by many of the states at the time of Ratification was quite broad in that it encompassed nearly all legislation that levied strict taxes regardless of the purpose. Madison's explanation of the

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[37] *See* MADISON, *supra* note 18, at 445-46. When the draft version of the Origination Clause was introduced in Convention stating "Bills for raising money for the *purpose of revenue*", Madison foresaw the extraordinary ambiguity present in such language:

> "The word revenue was ambiguous. In many acts, particularly in the regulations of trade, the object would be twofold. The raising of revenue would be one of them. How could it be determined which was the primary or predominant one; or whether it was necessary that revenue should be the sole object, in exclusion even of other incidental effects. . . . Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled?"

See also STORY, *supra* note 37, § 1086:

> "If it be said, that the motive is not to collect revenue, what has that to do with the power? When an act is constitutional, as an exercise of a power, can it be unconstitutional from the motives with which it is passed? If it can, then the constitutionality of an act must depend, not upon the power, but upon the motives of the legislature.... No government on earth could rest for a moment on such a foundation. It would be a constitution of sand, heaped up and dissolved by the flux and reflux of every tide of opinion."

This was the same point made by Judge Hough in *Hubbard v. Lawe*, under the Origination Clause. See *Hubbard v. Lawe*, 226 F. 135 (S.D.N.Y. 1915), *appeal dismissed mem.*, 242 U.S. 654 (1916).

Clause to the ratifying public likewise comported with the public understanding of both the scope of legislation encompassed by the phrase "Bills for raising Revenue", and the extent of the Senate's amending power: "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government."[38]

In *Millard v. Roberts*, the Supreme Court in 1906 upheld the constitutionality of property taxes imposed to fund a railroad terminal in the District of Columbia.[39] The taxes, imposed to improve the rail system, were not levied to raise revenue but for the program put in place. Using the same logic as *Nebeker*, the Court ruled that the taxes were not for raising revenue but only for the stated purpose in the Act, hence those taxes did not raise questions under the Origination Clause. *Millard*, also a unanimous decision, relied heavily on the logic of *Nebeker*, as the Court quoted it extensively. *Millard* thus reaffirmed the understanding of the Origination Clause from *Norton* and *Nebeker*.[40]

The concept of incidental taxation is specified nowhere in the Constitution, and it was both discussed and rejected at the 1787 Convention. The Court's reliance on that concept in *Nebeker* and *Millard* can be traced back through Joseph Story's writings on the subject, through three usages of the term in the Constitutional Convention, and possibly back to Maryland's usage in its Origination Clause of 1776. Some might argue that there is a broad conceptual gulf between bills that intend solely to tax people, and bills that happen to tax people. Such a distinction between incidental revenue and revenue proper does not appear to be historically justified, especially if the revenue comes from "strict taxes" rather than other sources. To the populace paying the resulting taxes, the distinction may seem wholly irrelevant. Moreover, an exception for "incidental" taxes turns the Origination Clause into a "formal

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[38] THE FEDERALIST NO. 58 (James Madison).

[39] 202 U.S. 429 (1906).

[40] *Millard v. Roberts*, 202 U.S. 429 (1906). During the next decade, the Court acknowledged in two separate cases that the challenged tariff bills were revenue bills, but upheld the power of the Senate to amend them. *See Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Rainey v. United States*, 232 U.S. 310 (1914). Following *Millard* in 1906, the Court did not have occasion to follow the logic of *Nebeker* regarding incidental revenue until 1990, but that 1990 case did not involve any tax as had *Nebeker* and *Millard*. *See United States v. Munoz-Flores*, 495 U.S. 385 (1990) (monetary "special assessment" on persons convicted of a federal misdemeanor).

accounting" gimmick, because the Senate can always pair up taxing and spending provisions so as to avoid the Clause.[41]

As explained in the journal article I am submitting for the record, throughout the 20th century the Supreme Court has developed a historically narrow standard for what bills are considered "Bills for raising Revenue" within the context of the Origination Clause, and, if classed as a revenue raising bill, a standard that any Senate amendments must be germane to the subject matter of the House originated bill. While the somewhat passive evolution of this standard over the 20th century has survived as relatively uncontroversial given the small scale and the nature of the cases presented, the Supreme Court sooner or later will have to revisit this standard if broader challenges are presented in order to preserve any substantive meaning and effect in the Origination Clause and our theory of mixed legislatures. Otherwise, the Senate may continue to institutionalize creative legislative maneuvers for originating broader and more burdensome taxing measures in contravention of the Framer's fear that, "If the Senate can originate, they will in the recess of the Legislative Sessions, hatch their mischievous projects, for their own purposes, and have their money bills ready cut & dried, (to use a common phrase) for the meeting of the H. of Representatives."[42]

In conclusion, the history of the Origination Clause reveals a deliberate constitutional "check and balance" under which nobody in the federal government except the direct representatives of the people in this House of Representatives, who are elected every two years and who are most familiar with the circumstances of "We the People,"[43] can constitutionally propose federal laws under the taxing power of Congress.

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[41] *Munoz-Flores* at 407-408 (Stevens, J., concurring).
[42] MADISON, *supra* note 18, at 443.
[43] U.S. Const., Preamble.

Mr. FRANKS. Thank you, sir.

And I will now recognize Mr. Kamenar for 5 minutes.

TESTIMONY OF PAUL D. KAMENAR, ATTORNEY-AT-LAW, WASHINGTON, DC

Mr. KAMENAR. Thank you, Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee. Thank you for inviting me this morning to testify on the origination clause. I want to particularly thank you, Mr. Chairman and Congressman Gohmert, for the leadership you have shown on this issue and your fidelity to your oath of office to support and defend the Constitution by, one, introducing House Resolution 153 with 50 of your colleagues expressing the sense of the House that the Affordable Care Act violated the origination clause because it was a bill for raising revenue that originated in the Senate; two, by filing a friend of the court brief with your colleagues in the U.S. Court of Appeals in the *Sissel* case.

And I am honored to represent you and your colleagues as your counsel in your case, along with my co-counsel, Joseph Schmitz and Jackie Pick. And I have submitted a copy of the brief for the record;** and three, finally by holding these timely and, I believe, historic hearings to inform the American public and the House of the importance of the origination clause to the founding of this country, and the jeopardy that clause is in.

I am struck by canard constantly repeated that the Affordable Care Act was upheld by the law of the land, by the Supreme Court, so get over it. Well, first of all, the Court in NFIB struck down the Medicaid portion of the bill by a vote of 7 to 2 as a violation of the 10th Amendment's powers reserved to the States. Second, even though Justice Roberts upheld the mandate penalty as a tax and a novel ruling, at least he inserted this important caveat in his opinion: "Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution." In short, the Supreme Court did not consider the origination clause, but left it open.

I would like to briefly address the two parts of that clause. The first part, of course, is "All bills raising revenue shall originate in the House." The constitutional history, as you heard, is very broad on what raising revenue is. It is broad money bills. In the first case in 1875, the Federal Court said "Certain legislative measures are unmistakably bills for raising revenue. These impose taxes on the people either directly or indirectly." With respect to such bills, it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them. So any notion that the Affordable Care Act, which raises $500 billion in taxes, is not a revenue raising bill because its primary purpose is to promote healthcare is simply a false argument. There is simply no historical basis for this purpose test.

Turning to the jurisprudence of this case, the most recent being *United States v. Munoz*, as a preliminary matter, arguments are being made that the origination clause is such that it should not

**The material referred to is not reprinted in this hearing record but is available at: http://www.pacificlegal.org/document.doc?id=1322.

even be adjudicated in the courts, that the courts should defer to the legislative branch as to both the scope of the House's revenue raising power and the scope of the Senate's amending power. I think Justice Thurgood Marshall had it exactly right when he cited James Madison's Federalist 58, solemnly rejecting that argument and *Munoz-Flores* when he said, "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. A law passed in violation of the origination clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment."

Now, in reaching the merits, the *Munoz* court did conclude that the $25 assessment provision imposed on a criminal was not a bill for raising revenue for the general treasury, but stated, "The special assessment provision was passed as a part of a particular program to provide money for that program, the client victim's fund." Although any excess was to go to the treasury, there is no evidence that Congress contemplated the possibility of a substantial excess, nor did such excess in fact materialize. Any revenue for the general treasury that the provision created was thus "incidental" to the provision's primary purpose.

While we may disagree with this narrow ruling that these little user fees are not revenue raising, it is absurd to argue that that decision in any way is a precedent for upholding the Affordable Care Act in scope and content. One, $500 billion in taxes under the Affordable Care Act are not nominal special assessments or user fees. And two, more importantly, the billions of taxes in that Act go directly into the general treasury just like other taxes, and they are not placed in a separate fund for an account like they were in *Munoz*.

Finally, as to the second part of the origination clause governing the Senate's limited amending power, the concern during the constitutional debates was that if the Senate could not have any amendment power at all, the House would abuse its revenue raising power by attacking non-revenue raising measures and lock the Senate into either voting up or down on it. And, therefore, they wanted a limited provision to have some amendments on that.

Now, in *Stone v. Tracy*, the Supreme Court upheld this limited amendment of a major House tax bill when the Senate substituted a corporate tax provision for a House inheritance tax provision, but the Court noted that this one small amendment was germane to the House bill and did not raise any new revenue. So the notion that this limited amending power could include the unheard of and never before accepted attempt to gut a small House bill providing tax credits, which does not even raise taxes, as a shell bill and replaced it entirely with a non-germane 2,000-page bill raising $500 billion in tax, and then claim with a straight face that the bill originated in the House simply because the Senate pasted the House bill number atop the Senate healthcare bill is simply a shell game. If the courts allow this legislative sleight of hand, the limited amending power will swallow up the whole House's power to originate revenue bills contrary to the original meaning.

In conclusion, I note Professor Randy Barnett of Georgetown when he concluded in a recent Washington Post article, "Revenue bills shall originate in the House of Representatives, but the Affordable Care Act did not. As constitutional questions go, this is about as easy as it gets."

Thank you, and I would be glad to answer any questions.

[The prepared statement of Mr. Kamenar follows:]

BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE
OF THE U.S. HOUSE OF REPRESENTATIVES

HEARING ON
"THE ORIGINAL MEANING OF THE ORIGINATION CLAUSE"
APRIL 29, 2014

ROOM 2141, RAYBURN HOUSE OFFICE BUILDING

TESTIMONY OF PAUL D. KAMENAR, ESQ.

Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee:

My name is Paul Kamenar, a Washington D.C. lawyer and legal public policy advisor with over 35 years' experience litigating federal cases in the U.S. Supreme Court and lower federal courts raising important constitutional, statutory, and public interest issues. I am also a Senior Fellow of the Administrative Conference of the United States, and a member of its Judicial Review Committee. I am a frequent guest lecturer at the U.S. Naval Academy on Constitutional and National Security Law. I was also a Clinical Professor of Law at George Mason University Law School and Adjunct Professor at Georgetown University Law Center where I taught a separation of powers seminar. As the former Senior Executive Counsel of the Washington Legal Foundation, I represented over 250 Members of Congress in original and *amicus curiae* litigation in dozens of cases, testified before Congress numerous times, and participated in legal symposia and conferences on a variety of legal topics.

Of particular relevance to this hearing, I am co-counsel along with attorneys Joseph E. Schmitz and Jacki Pick to Chairman Trent Franks and some 42 other House Members as *amici curiae* in the Origination Clause case pending before the United States Court of Appeals for the District of Columbia Circuit, *Sissel v. HHS*, No.13-5202. That case, scheduled for oral argument on May 8, 2014, raises the issue of whether the Affordable Care Act – which has over 17 revenue raising provisions designed to raise approximately $500 billion in revenue – violates the Origination Clause inasmuch as it originated in the Senate as the "Senate Health Care Bill" instead of in the House. A similar case is pending before the Fifth Circuit in *Hotze v. Sebelius*, No. 14-20039. For the record, I am submitting a copy of our *amici* brief in *Sissel* to accompany my written statement. I am testifying today in my personal capacity and not on behalf of any other person or organization. My testimony will focus on the Origination Clause generally, but I will be glad to answer any questions about the pending litigation in either *Sissel* or *Hotze*.

Origination Clause: History and Interpretation[1]

The Origination Clause of the U.S. Constitution, Article I, section 7, clause 1, provides: "*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.*" Without its guarantee in the 1787 Convention and ensuing ratification debates, our Constitution would not exist, at least not in its present form: the restriction of the Senate from originating taxes was the "cornerstone of the accommodation" of the Great Compromise of 1787 which satisfied the necessary number of States to ratify the Constitution. [2]

Few clauses in our Constitution have such a rich and clear historical significance as the Origination Clause. With its origins in the *Magna Carta* of 1215 AD, the Commons of England fought to preserve and strengthen this right for 500 years before the principle was firmly solidified by the late 17th Century in English Parliamentary custom. No principle's neglect has been as responsible for undermining the legitimacy of English speaking governments as the neglect by kings, legislatures, and courts alike of the Origination principle: the principle of taxation only by the immediate representatives of the people. This principle was so firmly rooted in the English tradition that its implementation on the American side of the Atlantic was nearly universal in colonial and early state legislatures.

Our Founders were justifiably concerned that the power to raise and levy taxes should originate in the House of Representatives, also known as the "People's House," whose Members are closest to the electorate, with two-year terms. The Senators, by contrast, sit unchallenged for the better part of a decade, do not proportionally represent the American population, and already enjoy their own unique and separate Senate powers intentionally divided by the Founders between the two chambers. The "power of the purse" was unquestionably reposed by our Founders in the People's House, and it has remained in that chamber throughout our history.

At the 1787 Constitutional Convention, George Mason stated the reasons for the impropriety of Senate tax originations:

> The Senate did not represent the people, but the States in their political character. It was improper therefore that it should tax the people. . . . Again, the Senate is not like the H. of Representatives chosen frequently and obliged to return frequently among the people. They are chosen by the Sts for 6 years, will probably settle themselves at the seat of Govt. will pursue schemes for their aggrandizement – will be able by weary[ing] out the

[1] Our brief in *Sissel v. HHS* relies heavily upon the excellent historical research by Nicholas Schmitz and Professor Priscilla Zotti in their article, "The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century," 3 British Journal of American Legal Studies, 71-139 (2014).

[2] Delegate Elbridge Gerry, quoted in James Madison, Notes on the Debates in the Federal Convention of 1787, at 290 (New York, Norton & Company Inc., 1969) [hereinafter Madison]

> H. of Reps. and taking advantage of their impatience at the close of a long Session, to extort measures for that purpose.[3]

The Origination Clause thus embodies a foundational principle of American jurisprudence that offers a structural constitutional protection against abuses of power by the national government. The separation of powers "check" provided by the Origination Clause lets the American people know exactly who is responsible for proposing taxes and assures that these individuals are those subject to removal from office most frequently. Just as the vertical separation of powers between our federal and state governments is designed to preserve freedom as embodied in the Tenth Amendment , the horizontal separation of powers between the three branches of government is designed to preserve liberty and freedom. The intrabranch separation of powers between the House and Senate on revenue raising bills further ensures our liberty.

Original Meaning of "Bill for Raising Revenue"

The Origination Clause has two parts. The first or dominant one reposes only in the House the power to originate "Bills for raising Revenue." The second part of the clause grants the Senate a very limited right "to propose or concur with Amendments as on other Bills." In short, the Senate is forbidden from originating taxes or other "Bills for raising Revenue."

As for the scope of what constitutes a "Bill for raising Revenue," the Colonists thought that anything that taxed them for any reason was a "money bill" and thus subject to the restrictions of the Origination Clause. All but one of the first 13 States included an Origination Clause provision in their respective constitutions, and 11 of those did not have a "purposive" test as to the underlying purpose of the tax or revenue. The Massachusetts Constitution of 1780 was quite explicit and formed the basis of the imported final language of the Federal clause:

> [N]o subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, *under any pretext whatsoever*, without the consent of the people, or their representatives in the legislature. . . . [and] *all money-bills* shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.[4]

Early judicial opinions further demonstrate the Founders' broad meaning of "bills for raising revenue." For example, in *United States v James*, 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875), the court opined:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly. . . . In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.

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[3] Madison at 443 (James Madison arguing for the necessity of the clause at the Constitutional Convention on August 13, 1787). Madison at 445 (Delegate Elbridge Gerry arguing that the Convention delegates would not sign, and the states would not ratify any new federal Constitution that did not restrict the Senate from originating taxes).

[4] Massachusetts Const. (1780 (emphasis added).

Original Meaning of "Propose or Concur with Amendments as on Other Bills"

The House of Representatives has always recognized the principle that the Senate may not design new tax bills. Indeed, when the Framer's wrote the Origination Clause, it was clear that the scope of permissible amendments "as on other bills" – regardless of whether or not the bill was for raising revenue -- did not include amendments that were not germane to the subject matter of the bill.[5] This was the established standard when the Founders during the Constitutional Convention penned the words "the Senate may propose or concur with Amendments as on other Bills." In short, no non-germane substitute amendments at all were permitted in 1787 by the unicameral Continental Congress.

After the Constitution was ratified, under our newly established bicameral legislature, designed as it was to prevent creative usurpations of the House's right to "first ha[ve] and declare" all new tax laws, the House insisted that any Senate amendments altering new tax measures must be germane to the subject matter of the original house revenue bill, not just that the word "tax" appears somewhere in the House bill. Indeed, this is the most direct and logical method to ensure that the Senate does not usurp the House's taxing power. The House's definition of this standard as applied to all legislative amendments has historically been quite clear and practicable:

> When, therefore, it is objected that a proposed amendment is not in order because it is not germane, the meaning of the objection is simply that it (the proposed amendment) is a motion or proposition on a subject *different from that under consideration*. This is the test of admissibility prescribed by the express language of the rule.[6]

But when amendment practices are applied by the Senate to grant itself the power to effectively originate taxing provisions, the Constitution limits this practice – as much as it limits the Senate in transgressing any other constitutional limitations. To be sure, the Senate and the House each have the constitutional power to "determine the Rules of its Proceedings" (Art. I, sec. 5, cl. 2), but that does not mean the Senate can alter the original meaning "as on other Bills." In other words, while the Senate may adopt procedures on the scope of their amendment power regarding germaneness or amendments in the nature of a substitute with respect to regular legislation passed by the House, the Senate can only "amend" revenue raising bills from the House in the same manner that they could amend "other Bills" as was the practice *at the time of the ratification.*

Otherwise, if the Senate's rules of procedure allowed for the Senate to "amend" a House bill proposing a modest revenue measure by replacing it altogether with major tax provisions, the purpose of the Origination Clause would have been rendered a nullity. A Senate unrestricted

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[5] Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States §1072 (U.S.GPO, 1899) (quoting Continental Congress rule that "No new motion or question or proposition shall be admitted under color of amendment as a substitute for a [pending bill] until [the bill] is postponed or disagreed to.").

[6] Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States, §5825 (1907) (emphasis added).

from the confines of the Origination Clause would blur the fundamental separation of powers within the legislative branch. The power of the purse was unquestionably reposed in the People's House, and it has remained in that chamber throughout our history.

This practice may be admissible in the context of non-revenue raising bills, but the Constitution expressly prohibits this mischief whenever the Senate endeavors effectively to originate taxes. In other words, with regard to the Origination Clause's allowance of the Senate to make "amendments" to House revenue bills "as on other bills," that practice must be viewed in the light of how such amendments were made to those "other Bills" at that time of the Constitution's ratification.[7]

Judicial Interpretations of the Origination Clause

The jurisprudence on the Origination Clause is rather sparse, consisting of only a handful of cases, the most recent being *United States v. Munoz-Flores*, 495 U.S. 385 (1990).[8] As an initial matter, the question first arises as to whether the judiciary ought to adjudicate disputes involving the interpretation of the Origination Clause, or whether they should defer to the decisions of the Legislative Branch as to the scope of the House's revenue raising power and the Senate's amending power. Indeed, the Justice Department invokes the "political question doctrine," arguing that the courts lack jurisdiction under Article II to adjudicate Origination Clause disputes.

Associate Justice Thurgood Marshall, citing Federalist 58, soundly rejected this argument in *Munoz-Flores*:

> 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. . . . A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both

[7] To be sure, the House possesses the ability to "blue slip" a Senate bill that it believes violates the Origination Clause. *See* James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, Congressional Research Service 9-10 (March 15, 2011). But the success of any blue slip effort depends upon the Speaker of the House and the majority of its Members to vote and agree on the resolution. Moreover, the rush to enact the ACA precluded meaningful review. *See* Remarks of Speaker Nancy Pelosi to 2010 Legislative Conference for the National Association of Counties, "We have to pass the bill so you can find out what is in it,"(March 10, 2010). In any event, the House cannot "waive" its rights that it possesses under the Origination Clause. Moreover, Chairman Trent Franks and Representative Louie Gohmert have sponsored H.Res. 153, along with some 50 other Members of Congress, that expresses the Sense of the House of Representatives that the ACA "violates article 1, section 7, clause 1, of the U.S. Constitution because it was a 'Bill for raising Revenue' that did not originate in the House of Representatives." A copy of that resolution is appended to our *amicus* brief in *Sissel* submitted for the record with this testimony.

[8] The Supreme Court has decided only six substantive Origination Clause cases: *Rainey v. United States*, 232 U.S. 310 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Millard v. Roberts*, 202 U.S. 429 (1906); *Twin City Bank v. Nebecker*, 167 U.S. 196 (1897); *United States v. Norton*, 91 U.S. 566 (1875); and *United States v. Munoz-Flores*, 495 U.S. 385 (1990). Several other Supreme Court cases mention the Origination Clause, but only in passing. See, e.g. *Skinner v. Mid-America Pipeline Co.*, 490 U. S. 212 (1989), *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___ (2012) (Scalia, J., dissenting).

> Houses and signed by the President than would be a law passed in violation of the First Amendment. 495 U.S. at 395, 397 (1990).

To quote the judicial opinion of the last federal judge to strike down an Act of Congress under the Origination Clause, any Bill for raising Revenue that originates in the Senate "is not a law at all. . . . It is one of those legislative projects which, to be a law, must originate in the lower house." [9]

Justice Marshall dismissed the political question claims following the logic of *Baker v. Carr*. Courts are capable of crafting standards pertaining to bills for raising revenue and for where a bill originates:

> Surely a judicial system capable of determining when punishment is 'cruel and unusual' when bail is 'excessive' 'when searches are unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges.[10]

Thus, *Munoz* departed quite dramatically from the old Court standard regarding Origination Clause challenges expressed in *Field v Clark Boyd* (1892) that the judiciary is bound to respect Congress's indications of a Bill's origination source via its formally enrolled status.

In *Munoz-Flores*, the Court was considering a challenge to the $25 assessment levied on defendant convicted of federal immigration violation and whether that provision imposing the small assessment was a "Bill for raising revenue" under the Origination Clause. 495 U.S. at 385. The amounts so collected were to be deposited in a special Victims Fund that was capped, with residual funds, if any, to be deposited in the General Treasury.

In reaching the merits of the case, the Court concluded that the assessment provision was not a Bill for raising revenue for the General Treasury:

> As in *Nebeker* and *Millard*, then, the special assessment provision was passed as part of a particular program *to provide money for that program* -- the Crime Victims Fund. Although any excess was to go to the Treasury, there is no evidence that Congress contemplated the possibility of a substantial excess, *nor did such an excess in fact materialize*. Any revenue for the general Treasury that § 3013 creates is thus "incidenta[l]" to that provision's primary purpose.

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[9] *Hubbard v. Lowe*, 226 F. 135, 137, 141 (S.D.N.Y. 1915), *appeal dismissed mem.*, 242 U.S. 654 (1916). The law in question (the Cotton Futures Act) was reenacted following proper procedures under the Origination Clause on August 11, 1916. Solicitor General Davis therefore moved for dismissal of his appeal, and the Court obliged, calling the case "disposed of without consideration by the court." 242 U.S. 654 (1916).

[10] 495 U.S. at 396. Professor Randy Barnett of Georgetown University Law Center has forcefully argued that the judiciary should not "defer" to the Congress in determining whether the ACA violated the Origination Clause. http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/12/the-origination-clause-and-the-problem-of-double-deference/.

495 U.S. at 399 (emphasis added)

While one can take issue with the Supreme Court's conclusion that funds raised and deposited in an earmarked fund do not constitute "a bill for raising revenue," what is abundantly clear is that *Munoz-Flores* does not support arguments that revenue raising bills do not come within the purview of the Origination Clause if there is also a "purpose" for the revenue other than just a plain tax increase. Rather, this case fell squarely within the holdings of earlier cases of the Court, namely *Twin City Bank v. Nebecker*[11] and *Millard v. Roberts,*[12] that a statute that creates, and raises revenue to support, a particular governmental program, as opposed to a statute that raises revenue to support government generally, is not a 'Bill[] for raising Revenue'."[13]

The last time Supreme Court also addressed the Origination Clause before *Munoz-Flores* was 76 years earlier in *Flint v. Stone Tracy,* 220 U.S. 107 (1911). In that case, the Court concluded that the Senate's amendment to a House revenue raising bill that merely replaced just one clause (the inheritance tax) of the House bill among hundreds of other tax provisions in the Payne Aldrich Tariff Act with a corporate excise tax of equivalent revenue raising value was "germane to the subject-matter of the [House] bill and not beyond the power of the Senate to propose." *Id.* at 110.

The Senate's modest and germane amendment in *Flint* stands in sharp contrast, both qualitatively and quantitatively, from any situation where the Senate proposes to "gut and replace" a modest House bill with the Senate Bill loaded up billions of dollars in revenue raising provisions. Unfortunately, that is what happened in the case of the Affordable Care Act which is the subject of the pending appeals in *Sissel v. Sebelius* and *Hotze v. Sebelius*.

Sissel v. HHS*; *Hotze v. Sebelius

In *Sissel* and *Hotze*, the plaintiffs challenged the constitutionality of the Affordable Care Act under the Origination Clause, arguing that the law and its revenue raising measures originated in the Senate rather than the House. On October 8, 2009, the House of Representatives unanimously passed the six-page "Service Member's Home Ownership Tax Act" (SMHOTA), H.R. 3590, 111th Cong. (2009), which was intended to reduce taxes by providing a tax credit to certain veterans who purchased homes.

The Senate "amended" H.R. 3590 by deleting the entire text and substituting the 2,074 page "bill," which Senate Majority Leader Harry Reid referred to in two separate press releases as the "Senate Health Care Bill," and which included 17 specifically denominated revenue provisions, including the penalty or "tax" imposed on those non-exempt persons who fail to buy a government approved health insurance policy. 26 U.S.C. 5000A. The Congressional Budget Office estimated that the bill would increase revenue by $486 billion between 2010 and 2019, one of the largest tax increases in American history. The Senate returned the "Senate Health Care Bill" with the H.R. 3590 number affixed to it to the House, whereupon it was rushed into passage by the Democratic controlled House without a single Republican vote. On March 23,

[11] 167 U.S. 196 (1897).
[12] 292 U.S. 429 (1906).
[13] *Munoz-Flores*, 495 U.S. 385, 387 (1990).

2010, the President signed "The Patient Protection and Affordable Care Act," Pub. L. 111-148 (hereinafter "ACA").

Congressional *amici* argue that the ACA did not originate in the House despite the H.R. 3590 designator affixed to the Bill. Indeed, bill designators did not even exist in the early Congresses. Moreover, Senate rules and procedures provide that such "gut and replace" amendments are "in the nature of a substitute" and the Senate text constitutes "original text."[14]

But even if the ACA had originated in the House, the Senate's legerdemain of substituting the SMHOTA with the Senate Health Care Bill was not constitutional for two reasons: (1) SMHOTA was not a revenue raising measure to which the Senate might amend under the second prong of the Origination Clause and (2) even if it were, the total "gut and replace" Senate amendment was not germane to the subject matter of the House bill. Significantly, unlike the scenario in *Munoz-Flores* and similar cases where the revenue generated was earmarked for a specific fund or was in the nature of a user fee, the billions of dollars raised under the ACA go directly into the general treasury to fund all government operations.

When the Supreme Court upheld the individual mandate penalty as a constitutional "tax," Chief Justice Roberts issued this important caveat: "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax *must still comply with other requirements in the Constitution.*" 132 S. Ct. at 2598 (emphasis added). In other words, while Constitution gives Congress as a whole the power to "lay and collect taxes," any bill laying such taxes must originate in the House of Representatives under the Origination Clause. The Supreme Court has thus yet to address the Origination Clause issue presented in *Sissel* and in *Hotze*.

The district courts in both *Sissel* and in *Hotze* essentially held that as long as there is any revenue raising provision in the House bill, the Senate has *carte blanche* to originate massive new revenues as "amendments." With an understanding of the history of the germaneness rules preceding *Flint*, the "Senate Health Care Bill" amendment to H.R. 3590 was not "germane to" SMHOTA simply because both bills contained the word "tax." *Sissel* and *Hotze* as compared to *Flint v. Stone Tracy* stand as polar opposites on any conceivable spectrum of germaneness.

Conclusion

The argument that the Senate's amendments to House revenue bills need not be germane cannot possibly serve as the basis of the protection of the People's rights. It is totally at odds with normal Parliamentary procedure, both now and at the time that the Framers granted the Senate the power to amend "as on other bills." This practice may be admissible in the context of non-revenue raising bills, but the Constitution expressly prohibits this mischief whenever the Senate endeavors effectively to originate taxes.

Thank you for the opportunity to testify on this important issue. I will be glad to answer any questions that the Committee may have.

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[14] *See* Senate Rule XV; Christopher M. Davis, *The Amending Process in the Senate*, Congressional Research Service (March 15, 2013).

Mr. FRANKS. Thank you, Mr. Kamenar.

And, Mr. Onek, you are now recognized for 5 minutes, sir.

TESTIMONY OF JOSEPH ONEK, PRINCIPAL, THE RABEN GROUP, WASHINGTON, DC

Mr. ONEK. Thank you. Mr. Chairman, Mr. Ranking Member, Members of the Subcommittee, the reports of the death of the Origination Clause are greatly exaggerated. At this very moment, the Senate is refraining from sending its immigration bill to the House because the bill contains revenue provisions, and the Senate fears the House will decide that the bill violates the Origination Clause and will reject it with a blue slip resolution. The Origination Clause lives.

The call here to give courts a greater role in enforcing the Origination Clause strikes me as both ironic and misguided. The purpose of the Origination Clause, as Mr. Schmitz has so eloquently pointed out, is to bring decisions on tax and revenue policy closer to the people. But more extensive judicial intervention would have precisely the opposite effect. It would transfer power on tax and revenue issues from the most democratic branches of government to the least democratic branch, the courts. This is not what the framers of the Origination Clause had in mind.

The *Sissel* case in particular asks the courts to use the Origination Clause to strike down a central provision of the Affordable Care Act, the individual mandate. It claims that the individual mandate violates the clause because the mandate is a tax and did not originate in the House. The District Court correctly decided, based on Supreme Court precedent, that the clause does not apply here because the primary purpose of the individual mandate is not to raise revenue. Indeed, the government would be happiest if the mandate raised no money at all because everybody would get insurance.

The purpose of the individual mandate, as everyone here knows perfectly well, is to induce more people, and especially healthier people, to purchase health insurance. Now, it is still too early to tell whether the individual mandate is working as intended, but initial results are encouraging. Eight million Americans have enrolled in health insurance plans through the Affordable Care Act's exchanges. Five million more have enrolled directly in insurance plans that comply with the Act without going through the exchanges. Crucially, a substantial proportion of these enrollees are younger and presumably healthier individuals.

The District Court also concluded correctly that the individual mandate originated in the House within the meaning of the Origination Clause. The individual mandate was part of an amendment that the Senate made to a House bill that gave certain tax benefits to military personnel and imposed a small increase in corporate taxes. Now, the Origination Clause expressly provides that the Senate may propose amendments to House revenue bills as on other bills.

Sissel argues, however, that the Senate amendment was not germane to the House bill. But the Senate and the House themselves do not require that Senate amendments to a House revenue bill be germane to that bill. And there is nothing in the Constitution that

requires such germaneness. It would, therefore, be inconsistent with separation of power principles and with the specific directive of Article 1, Section 5 of the Constitution that each House may determine the rules of its proceedings for the courts to interfere with the policy of the House and the Senate to accept non-germane amendments.

Now, this position means that some Origination Clause issues are not reviewable by the courts. But that has always been the case. Whenever, for example, the House rejects and blue slips a Senate bill as violating the Origination Clause, that is not reviewable by the courts. And I do not think House Members would want it any other way.

Sissel also contends that the original House bill was itself not a bill for raising revenue, and that, therefore, the Senate was prohibited from adding a revenue amendment to it. But the tax imposed by the House bill clearly did raise revenue and, unlike the individual mandate, was not incidental to some other governmental purpose.

In conclusion, it is noteworthy that despite the contentiousness of the Affordable Care Act, the objections being raised by Sissel were not raised in either the House or the Senate. There was no blue slip resolution or Senate point of order. Instead, Sissel is pursuing this issue in the courts. But as I have noted earlier, transferring power on tax and revenue issues to the least democratic branch is not what the framers of the Origination Clause intended. Thank you.

[The prepared statement of Mr. Onek follows:]

Testimony of Joseph Onek on the Origination Clause and the Affordable Care Act
Committee on the Judiciary of the House of Representatives
Subcommittee on the Constitution and Civil Justice
April 29, 2014

My name is Joseph Onek and I am a principal at the Raben Group in Washington D.C. It is an honor for me to testify in my individual capacity on the Origination Clause of the Constitution.

During my career as a lawyer in Washington, I have had the privilege of working in all three branches of the federal government and in both the House and the Senate. I have frequently addressed problems that involve the relationships between the branches of government and the constitutional provisions defining those relationships. The Origination Clause is one of those provisions. It states 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."[1]

In his early commentary on the Constitution, Justice Story wrote that the Clause applies to "bills to levy taxes in the strict sense of the word" and not to "bills for other purposes, which may incidentally create revenue."[2] The Supreme Court has adopted this formulation and has ruled in several cases that the Clause only applies when the primary purpose of a tax is to raise revenue and not when the tax is simply incidental to some other governmental purpose. In these cases, the tax at issue was deemed incidental to the creation of a crimes victim fund,[3] the construction of a railroad system in the District of Columbia,[4] and the establishment of a national currency.[5]The Supreme Court has never invalidated legislation for violating the Origination Clause.[6]

This brings us to the Sissel case. Sissel has challenged the constitutionality of the individual mandate provision of the Affordable Care Act (ACA) on the grounds that it was enacted in violation of the Origination Clause. He argues that the individual mandate is a tax that raises revenue and that it did not originate in a House bill but in a Senate amendment to a House bill. The United States District Court of the District of Columbia reviewed Sissel's claim and correctly decided that the Origination Clause did not apply because the primary purpose of the individual mandate is not to raise revenue. The court explained that the purpose of the individual

[1] An excellent overview of the history and application of the clause is found at Evans, Michael W. *A Source of Frequent and Obstinate Altercations': The History and Application of the Origination Clause,* Taxhistory.org, http://www.taxhistory.org/thp/readings.nsf/ArtWeb/8149692C128846EF85256F5F000F3D67?OpenDocument [hereineafter "Evans"]; *See also,* Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause,* 91 WASH. U.L. REV (forthcoming 2014).
[2] Evans at 11-12, citing 1 Joseph Story, *Commentaries on the Constitution* 642-43 (1994 ed.).
[3] United States v. Munoz-Flores, 495 U.S. 385 (1990).
[4] Millard v. Roberts, 202 U.S. 429 (1906).
[5] Twin City Bank v. Nebeker, 167 U.S. 196 (1897).
[6] Sissel v. U.S. Dep't of Health & Human Servs., 951 F.Supp.2d 159, at 168 n. 11. (D.D.C. 2013).

mandate is to encourage everyone to purchase health insurance, not to raise revenues,[7] and indeed that the government's preference would be for the mandate to raise no revenues.

The role played by the individual mandate in the Affordable Care Act is even more crucial than the district court described. A central goal of the Act is to reform the health insurance system by prohibiting health insurance companies from refusing to provide coverage to persons with pre-existing conditions or persons incurring large medical bills. These are popular and highly beneficial changes, but they potentially create problems for the health insurance market. If health insurers provide wider coverage to sicker individuals, premiums will rise. When premiums rise, some healthier individuals will decide to forgo insurance. This will cause premiums to rise even more and induce other healthier individuals to forgo insurance, thus leading to still higher premiums. The ultimate result could be what experts call a "death spiral" in the insurance market.

The drafters of the Affordable Care Act believed that the individual mandate was a key mechanism for alleviating this problem because it would induce more individuals, including healthier individuals, to participate in the health insurance market. And although it is still too early to be certain whether the mandate is working as designed, the initial results are encouraging. Eight million Americans have enrolled in health insurance plans through the ACA's federal and state exchanges and five million more have enrolled directly in ACA-compliant plans without going through the exchanges. A substantial proportion of these enrollees are younger and presumably healthier individuals.[8] It thus appears that the Affordable Care Act is meeting its goal of providing insurance to millions of Americans, including the sickest Americans, without impairing the health insurance market.

Given the crucial substantive role that the individual mandate plays in the implementation of the Affordable Care Act, it is clearly not a provision whose primary purpose is "for raising revenue".[9] That should be the end of the Origination Clause inquiry and of Sissel's lawsuit. The district court, however, went on to analyze whether, assuming arguendo that the individual mandate is a provision for raising revenue, the provision violates the Origination Clause because it did not originate in the House. I will therefore address this issue as well.

The individual mandate provision was part of an amendment that the Senate made to H.R.3590, a House bill that gave certain tax benefits to military personnel and imposed a small increase in corporate taxes. The Origination Clause provides then when a bill for raising

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[7] *Id* at 169.

[8] President Obama, *8 Million People Have Signed Up for Private Health Coverage*, http://www.whitehouse.gov/blog/2014/04/17/president-obama-8-million-people-have-signed-private-health-coverage.

[9] As it happens, it appears that the individual mandate does not, on balance, raise revenue. In March of this year, the House passed a bill (H.R. 4118) to delay imposition of the individual mandate for one year. The Congressional Budget Office and the staff of the Joint Committee on Taxation estimated that enactment of H.R. 4118 would reduce federal deficits by roughly $10 billion over the 2014-2019 period. In other words, the individual mandate costs the government billions of dollars, presumably because many of the individuals it induces to purchase health insurance will receive premium subsidies under the Affordable Care Act. *Suspending the Individual Mandate Law Equals Fairness Act,* Congressional Budget Office Cost Estimate (Feb 28, 2014), http://www.cbo.gov/publication/45161.

revenue passes in the House "the Senate may propose or concur with Amendments as on other Bills." Therefore, a House revenue bill amended by the Senate remains a bill that originated in the House for purposes of the Clause. Furthermore, at the Constitutional Convention, the Framers rejected proposals that would have limited the scope of the Senate's amendments.[10] As the district court and other courts have noted, the Senate has often made extensive amendments to House revenue bills.[11]

Sissel claims, however, that his challenge to the individual mandate is special in several respects. He notes, for example, that the Senate amendment eliminated the House bill in its entirety.[12] But this is not an uncommon occurrence,[13] and, in any event, is not relevant to Sissel. Sissel's objection is to the individual mandate, which would have been in the Senate amendment even if the Senate had retained all or part of the House bill. Furthermore, Sissel's position would force the courts to determine how much of an original House bill has to be retained to meet the requirements of the Origination Clause. This is not a suitable inquiry for the courts and is inconsistent with the Framers' decision not to impose limits on the scope of Senate amendments.

Sissel argues relatedly that the Senate's amendment was not germane to the original House bill,but the Senate and House do not require that Senate amendments to a House revenue bill be germane to that bill. Evans at 27-28. And, as the district court explained, although one Supreme Court opinion has mentioned germaneness, there is no textual constitutional requirement binding the Senate to make only germane amendments to House revenue bills. It would therefore be inconsistent with separation of powers principles and the specific directive of Article I, section 5 of the Constitution that "Each House may determine the Rules of its Proceedings" for the courts to interfere with the policy of the House and Senate to accept non-germane amendments. As the Supreme Court stated in one leading case, "it is not for this Court to determine whether [the Senate] amendment was or was not outside the purposes of the original bill."[14]

Furthermore, the one Supreme Court case that mentioned germaneness,[15] found no problem with a Senate amendment that removed an inheritance tax and replaced it with a corporate income tax. In passing the Affordable Care Act, the Senate removed a tax on corporations and replaced it with, among other things, the individual mandate provision. Thus, even assuming the Origination Clause contains a germaneness requirement and that compliance with such a requirement is reviewable by the courts, the Senate's action passes muster.

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[10] Evans at 4-7.
[11] *See, e.g.* Armstrong v. United States, 759 F.2d 1378 (9th Cir. 1985).
[12] Appellant's Br. filed in the United States Court of Appeals for the District of Columbia Circuit., Dec. 20, 2013, at 16-17.
[13] *See* Armstrong v. United States at 1381-82.
[14] Rainey v. United States, 232 U.S. 310, 317 (1914).
[15] Flint v. Stone Tracey Co., 220 U.S. 107 (1911).

Sissel also contends that the original House bill, H.R. 3590, was itself not a bill for raising revenue, and that Senate rules[16] therefore prohibited the Senate from adding a revenue amendment. The basis for this contention is that the original house bill offset a homebuyer credit with "an unrelated corporate tax" and was "obviously designed to be revenue-neutral."[17] As the district court noted, Sissel's argument is self-defeating: if the original House bill, which increases corporate taxes, is not a bill for raising revenue, then certainly the individual mandate is not a provision for raising revenue. But, in addition, there is nothing about the unrelated corporate tax in H.R. 3590 to indicate that it is for a purpose other than raising revenue. The tax does not directly fund a specific government program such as a crimes victims fund.[18] And, unlike the individual mandate, the tax is not central to the substantive goals of a specific government program. Nor is it significant that H.R. 3590 was "designed" to be revenue neutral. Courts have recognized that such projections may not be accurate and, in part for that reason, have concluded that the term "Bill for raising Revenue" does not refer only to laws increasing taxes, but to all laws relating to taxes.[19] Furthermore, most bills increasing taxes could be said to be revenue neutral in the sense that the revenues they generate are entirely eaten up by the costs of the many programs they help fund. Such tax bills do not for that reason cease to be bills for raising revenue under the Origination Clause.

In short, the district court correctly concluded that, even assuming the individual mandate was a bill for raising revenue, that bill originated in the House as H.R. 3590 and was later duly amended by the Senate in a manner consistent with the Origination Clause. It is noteworthy that, despite the contentiousness of the Affordable Care Act, none of the arguments being advanced by Sissel were raised in either the House or the Senate. The House has traditionally defended its prerogatives under the Origination Clause through "blue slipping" -- returning an offending bill to the Senate through the passage of a House Resolution. Any Member of the House may offer a resolution seeking to invoke the Origination Clause, and, in the 111th Congress, such a resolution was used to return six Senate bills and amendments that the House considered improper.[20] But no resolution was offered with regard to H.R. 3590. Instead, Sissel is pursuing this issue in the courts; oral argument for his appeal to the D.C. Circuit is set for May 8.

In this or any other case, resorting to the courts to enforce compliance with the Origination Clause is likely to be futile and involves a certain irony. The purpose of the Origination Clause was to give a larger role on tax and revenue issues to the branch of government closest to the people. A successful court challenge under the Origination Clause would transfer power on tax and revenue issues from the most democratic branches of government to the least democratic branch. This is hardly what the Framers of the Origination Clause had in mind.

Thank you for giving me this opportunity to testify.

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[16] *See* Evans at 9-10.
[17] Appellant's Br. filed in the United States Court of Appeals for the District of Columbia Circuit., Dec. 20, 2013, at 17.
[18] *See* Munoz-Flores, 495 U.S. at 399.
[19] *See* Armstrong, 759 F.2d at 1381.
[20] *See* H.R. Res. 1653, 11th Cong. (2010); 156 Cong. Rec. H6904 (daily ed. Sep. 23, 2010).

Mr. FRANKS. Thank you, sir.

And, Mr. Gaziano, you are now recognized for 5 minutes, sir.

TESTIMONY OF TODD F. GAZIANO, EXECUTIVE DIRECTOR OF THE D.C. CENTER, PACIFIC LEGAL FOUNDATION, WASHINGTON, DC

Mr. GAZIANO. Good morning, Mr. Chairman and other distinguished Members of the Subcommittee. I am privileged to be part of the Pacific Legal Foundation that represents Matt Sissel in his constitutional challenge to Obamacare's individual mandate. And I am struck by the fact that Mr. Onek suggests that the courts should not be involved in that challenge. Yet the Ranking Member in his opening statement suggests that this House should not be involved in inquiring about this matter. If asked, I would be delighted to explain more in questioning why both the House and the courts need to be involved. And I will use the *Chadha* case as an important proof that our individual liberty requires that all branches of the Federal Government enforce our fundamental rights.

But let me begin this morning with the following hypothetical: A future House impeaches the Attorney General, let us say, for perjury before this body. The Senate then takes up that impeachment article, and through a very creative substitute tries and convicts a future justice, Richard Epstein, of multiple counts of bribery and other high crimes.

My question is, could this House ratify that conviction and remove Justice Epstein by passing a conforming article of impeachment after the Senate trial? Well, of course not. The impeachment of a particular officer must originate in this House, and the subsequent Senate trial must be limited to those counts and articles that originated in the House.

But why is that so? Did the 17th Amendment not change the nature of the Senate? Why should the world's most deliberative body over there in the Senate be confined to only hearing or trying impeachment on those people that this House first impeached and on those counts that this House originated? Is Justice Epstein's trial not germane to the articles of impeachment on the Attorney General? Both are officers. Both committed high crimes. What could be more germane than that? And did the need of the Senate to remove that loudmouth justice not justify this little legislative jujitsu?

Let us suppose that the House backdates the articles of impeachment after the Senate trial. Would that not take care of all the formalities involved? Surely no one outside Congress could complain. Well, if we think that the future Justice Richard Epstein, and hopefully he will not mind me using his name, would have a strong constitutional—a winning constitutional—claim to keep his seat, my question then is, why do "modern" thinkers treat the Origination Clause requirements differently? There could be several reasons for that, but I suspect one of them is a lack of reverence for the fundamental liberty protected by the Origination Clause.

This hearing and the *Sissel* case will help resolve whether that important check on our individual liberty can endure. Boiled down to one sentence, the only part of the Senate healthcare bill and its 17 or so historically large taxes in a 2,074-page bill that originated

in the House was the bill number. Putting other grounds for striking that down aside, one fact should convince us that that was invalid: the use of such House bill designations did not exist at the time of the Framing or for 30 years thereafter. Thus, the argument that it could be a constitutional amendment to strip everything out of a bill and just leave that number that did not exist at the time of the Framing and could not possibly have had any consequence to the Framers who ratified it, must be wrong.

An amendment may improve or augment the original, but it must retain some substantial portion of the original. And as my fellow panelist has already testified, the Framers discussed that and agreed. But ordinary English speakers in the 18th century or now would not think that a complete destruction of a house and the erection of a skyscraper on the same street address was an amendment to the house. They would not think that a novel with a particular card catalog number was an amendment to an earlier math workbook that used to have that card catalog number. Complete and unrelated substitutes are not "amendments" in any reasonable sense of the word.

The Chairman's point in his opening is absolutely critical and dispositive. If the Senate only had to wait for a House bill—let us even call it a revenue bill; it was not in the case that we are talking about in the D.C. Circuit—and if they could then constitutionally put any tax or 17 historic taxes in a 2,074-page bill, then there is nothing left of the Origination Clause. And constructions of constitutional clauses that render empty any particular clause that was debated at the time of the Framing are an insult to the Framing generation and any rationale legal system.

I am going to summarize here since I think I am over. But if questions permit, I would like to go to the ultimate question of how we also understand the term "originate" in the context of the Origination Clause. In the *Sissel* case, though, the Senate healthcare bill with all its historic taxes had nothing to do with the House bill for service members that lowered their taxes. As such, it was unconstitutional. Thank you.

[The prepared statement of Mr. Gaziano follows:]

Testimony Regarding

"The Original Meaning of the Constitution's Origination Clause."

Before the U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

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The Meaning and Requirements of the Constitution's Origination Clause[1]

Good morning Mr. Chairman and other distinguished Members of the Subcommittee. Thank you for inviting me to testify today on a structural limitation on Congress's taxing power that was absolutely essential to the signing and ratification of the U.S. Constitution, but which is sometimes treated as a trifling annoyance to be dispensed with by empty artifices by some today.

I am privileged to be a part of Pacific Legal Foundation (PLF). PLF represents Matt Sissel in his constitutional challenge to the individual mandate tax in the Obamacare law, which will be orally argued in the U.S. Court of Appeals for the DC Circuit on May 8, 2014.[2] As this Subcommittee knows, the case turns on the meaning of the Constitution's requirement that all "Bills for raising of Revenue" originate in this House.[3] Although today's hearing focuses on the Constitution's Origination Clause more broadly, I frequently reference the facts and the government's strained arguments in *Sissel* as a paradigm example of what the Clause rejects. The *Sissel* case also has the potential to establish a landmark ruling, further defining the requirements of that Clause, especially given the case's stark facts, the unprecedented legislation that seemingly required unconstitutional tactics to pass, and the able counsel and amici involved, including many members of this Subcommittee and House.

Although I am new to PLF (and not on the *Sissel* litigation team), I have been a legal scholar or public servant for more than 25 years, with much experience in separation of powers law. I have worked in all three branches of the federal government, including in the U.S. Department of Justice, Office of Legal Counsel, during three administrations, where I provided legal advice to the White House and four Attorneys General, especially on separation of powers and other structural constitutional matters. I also was honored to work as a chief subcommittee counsel in this House, primarily engaged in investigations and oversight of the executive branch, which was an exercise in separation of powers law and practice. In addition, I have published on separation of powers issues as a think tank scholar and testified previously before this Constitution Subcommittee and other congressional committees on this subject.

PLF's opening and reply briefs for Sissel in the D.C. Circuit, as well as three amicus briefs, including the one for Chairman Franks and 39 other Members of the House, provide an excellent explication of the original public meaning of the Origination Clause. Instead of trying to duplicate all that scholarship here, the cover pages and links to each of them are attached to this testimony in an appendix.[4] Below I summarize the most important points in those briefs,

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[1] I wish to thank Inez Feltscher for her research assistance as well as Eileen Dutra and Pamela Spring for their careful review and editorial work. PLF's litigation counsel for Matt Sissel (see note 2), Timothy Sandefur, Paul J. Beard II, and Daniel A. Himebaugh, not only provided substantive input into this testimony, but they also provided an enormous amount more through their years of research, court filings, and the production of the appellate briefs that were my primary introduction to the important arguments and source material for this testimony.

[2] *Sissel v. U.S. Dept. Health & Human Services, et al.*, No. 13-5202 (D.C. Cir. 2013) (*Sissel*).

[3] U.S. Const. art. I § 7, cl 1 (the Origination Clause).

[4] *See* Appellant's Opening Brief, *Sissel* (D.C. Cir. Oct. 23, 2013); Appellant's Reply Brief, *Sissel* (D.C. Cir. Dec. 20, 2013); Amicus Brief of Rep. Trent Franks, *et al.*, *Sissel* (D.C. Cir. Nov. 12, 2013); Amicus Brief of Center for Constitutional Jurisprudence, *Sissel* (D.C. Cir. Nov. 8, 2013); Amicus Brief of Association of American Physicians

and elaborate on some key interpretive issues with additional textual observations, hypotheticals, and constitutional arguments of my own.

To better appreciate the textual arguments, however, at least a basic understanding of the political philosophy of the founding generation and the particular constitutional history of the Origination Clause is important. Thus, my testimony begins with a short statement regarding the democratic theory that animated restraints on Congress's power generally and its taxing power in particular. I then address the original public meaning of the Origination Clause in general terms. Finally, the *Sissel* case debate provides the best vehicle to explain what the Origination Clause does, and does not, mean.

Democratic Theory and the Separation of Powers

There was likely no issue with more universal agreement among the Framers than the need to separate powers between the levels of government and the branches of the national government to prevent tyranny. The Framers all accepted Montesquieu's admonition that there could be no liberty where the legislative and executive powers are united in the same person. As Chairman Franks's amicus brief rightly notes, English constitutional history from the imposition of Magna Carta, through the tumultuous revolutions of 1649 and 1688, to the late colonial era had firmly established not only the necessity of some separation of powers, but also the essential principle of Anglo-American ordered liberty that the taxing power must be controlled by the people's house in the legislature.[5] Based on Enlightenment ideas, the practice of separating government power had begun to be implemented more systematically in the colonial governments and especially in the early state governments at the time of the framing of the United States Constitution.[6]

The separation of powers is expressed in various ways in the Constitution, including the structure of the Constitution and in several explicit provisions of it. Nevertheless, James Madison acknowledged a common fear regarding the plan for the national government when he noted in *Federalist 47* that: "The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced as the very definition of tyranny."[7] This formulation is an improvement on Montesquieu's, for it acknowledges the need for an independent judiciary. In several other *Federalist* Papers, Madison explained that citizens need not fear that the separation of powers was neglected in the new Constitution. In fact, he argued that the United States Constitution separated the powers much more effectively than the early state governments, and pitted "ambition against ambition" to keep the national government in check.

Madison's and Alexander Hamilton's writings in the *Federalist*, as well as the anti-Federalist writings, are also strong evidence that all sides emphatically agreed that a failure to properly separate and effectively cabin the national government's most dangerous powers would

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& Surgeons, *Sissel* (D.C. Cir. Nov. 8, 2013) These briefs may be found at http://www.pacificlegal.org/cases/Sissel-3-1374.

[5] Amicus Brief of Rep. Franks, *et al.*, at 6.

[6] *See* Benjamin W. Labaree, *America's Nation-Time 1607-1789*, at 228-32 (Norton Library, 1976).

[7] THE FEDERALIST NO. 47, at 244 (James Madison) (Bantam Classic ed., 1982).

have doomed the endeavor to ratify the Constitution. And as this Subcommittee knows, the purpose of the separation of powers was not to protect government officials' power for *their* sake, but to better protect individual liberty. Power was understood to be corrupting, and the Framers believed that powerful officials would seek to aggrandize ever greater power for themselves. Thus, the more power concentrated in one person or entity the correspondingly greater threat to liberty. It was for this reason that the Framers struggled to more effectively divide and separate the necessary powers of the government.

Yet the Framers of the U.S. Constitution did not simply adopt a model of complete separation that existed in several state constitutions. Based on his careful study of foreign and state governments, Madison explained that experience had shown that such "parchment barriers" were particularly ineffective in keeping government actors from aggrandizing power.[8] Thus, the precise form of separation, checks, and balances needed for the national government consumed the greatest amount of time and discussion during the Constitutional Convention and the state ratifying debates. Those careful, precise choices and compromises cannot be abandoned by any government actor or group of government actors, absent Article V amendment.

The Framers were especially concerned with tyranny by democracy's "most dangerous branch," the legislature.[9] This fear was heightened with regard to the proposed Congress for the new national government, because unlike the Articles of Confederation Congress, the proposed Congress would have an effective and compulsory power to tax. That awesome power of a national leviathan, though arguably necessary to correct a major weakness of the Articles government, would never have been agreed to without further checks and controls.

With regard to all congressional legislation (though notably not with certain issues of foreign and diplomatic policy left to the President and/or Senate), the Founders further divided the proposed Congress into two branches and required near-simultaneous agreement by both branches and the President in the Bicameralism and Presentment provisions of Article I. This was decidedly to make legislation particularly inefficient, and to increase the chance of friction that would kill many imprudent bills. They imposed other checks on legislation as well. This hearing and the *Sissel* litigation focus on whether one of those controls will endure.

The "One-House Veto" and Other Unconstitutional Ideas

The Progressive thinkers of the late Nineteenth and early Twentieth Centuries understood this anti-efficiency purpose of a limited enumeration and separation of powers very well, and resented it all the more. Although they succeed in enlisting the Supreme Court to unreasonably expand the scope of and undermine the limits on Congress's enumerated powers, they did not succeed in seriously weakening the Bicameralism and Presentment requirements, at least not yet.

Yet the congressional acceptance of the one-House veto and the High Court's eventual invalidation of it in *I.N.S. v. Chadha*, 462 U.S. 919 (1983) exposes a major fallacy propagated by modern progressives regarding what the constitutional separation of powers allows and what

[8] THE FEDERALIST NO. 48 AT 250 (JAMES MADISON)
[9] *See id.* at 251.

modern government requires. It also provides a helpful analogy regarding how Congress and the courts should respect the original meaning and text of the Origination Clause.

There is both a simple and somewhat more sophisticated form of the progressive fallacy. The simple form posits that: New arrangements between the branches or between the Houses of Congress satisfy the separation of powers as long as all the governmental parties agree. In other words, ordinary Americans should have no ground to object if the officials whose powers are at stake are all in agreement. The seemingly more sophisticated version of the fallacy is this: Modern arrangements agreed to by the branches or Houses of Congress satisfy the constitutional separation of powers so long as each entity's power endowment is roughly equivalent to the original distribution. Thus, if the President has supposedly grown too powerful, it's appropriate for Congress to augment its powers or dispense with some of the restraints on them. Some muddled thinkers, or perhaps just wishful ones, also suggest that any new accommodation that aids government efficiency satisfies separation of powers principles, which includes the efficiency that comes with specialization of government units.

The fundamental problem with either version is that it describes a "power sharing arrangement," not the actual separation of powers in our Constitution. Other power sharing arrangements may be a *kind* of separation but that's not the same as THE *constitutional* separation of powers in our fundamental charter of government. There are two reasons why.

The first is that the Framers and the Enlightenment thinkers they relied on were as concerned about the particular nature of each branch's power as they were about balancing them. They endowed each branch (or House) with particular powers that history had shown were necessary to protect our liberties. In short, they weren't concerned with "balance" for its own sake; they didn't care if three oligarchs in a frightful leviathan were equally powerful. Instead, they chose a particular arrangement, consistent with human nature to align the interest of the official with the liberties of the people, which would best protect our individual liberty. The second problem with the muddled thinkers is that government, particularly the legislative process, is not supposed to be efficient. As every school child learns, it is difficult to transform a bill into a law; this is by design.

Despite efforts to undermine the separation of powers, the courts have generally held firm in enforcing the Bicameralism and Presentment requirements against creative "modern" schemes to dispense with its strict requirements. Although there were over 163 purported laws enacted between 1970-75 that allowed one House or a particular committee of Congress to effectively reverse or "veto" an executive action,[10] the *Chadha* Court held that such "modern," supposedly necessary legislative devices were invalid under the Bicameralism and Presentment Clauses of the Constitution.[11] Instead, the Court stressed that "certain prescribed steps" were still necessary to provide "enduring checks on each branch and to protect the people from the improvident exercise of power."[12]

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[10] *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).
[11] *Id.* at 989.
[12] *Id.* at 957.

While the current congressional practice with regard to the Origination Clause is not perfect or without some debatable precedents, it has been generally respectful of the Origination Clause requirements on the whole and would not take much policing to reverse the practice established in PPACA and some other questionable precedents. Yet if the PPACA precedent were erroneously upheld, or for some reason the courts wrongly chose not to reach the merits of the challenge, it would be left to the House of Representatives to properly enforce the original public meaning of the Origination Clause until the courts returned to their senses.[13]

Origination Clause Background and Drafting History

With regard to the taxing power of the national government, the Framers were not content with the general plan to divide Congress into two parts, with the Houses having different constituencies and different electoral sequences, and still requiring bicameral agreement on all potential laws within a given Congressional cycle. The original Constitution imposes other limitations and prohibitions on this most destructive of domestic powers.[14] The authorization of an income tax with the adoption of the Sixteenth Amendment did not change these rules for the type of taxes previously regulated. Moreover, they remain textual evidence of the distrust the framing generation had for granting too free a hand to those who wielded the power to tax.

More importantly for today's hearing and the *Sissel* case, no one seriously argues that the Sixteenth Amendment affected the requirement that all "Bills for raising Revenue shall originate in the House," including income taxes authorized by it. As referenced above, the requirement that revenue bills originate in the People's House has a venerable parliamentary history, and the Americans were not shy about imposing that control even during the colonial period in their respective colonies.

Moreover, the American Revolution was triggered by a series of offensive taxes and the corollary to the rule that the People's House exercise control over taxation. That corollary was that the people being taxed must be directly represented in that House to make those taxes morally and constitutionally legitimate. It was also clear that, at least by 1776, a token amount of direct representation, as was being debated in England and existed for some of the British Caribbean colonies, would not do for the American rebels. The Continentals rejected the theory of "virtual representation" in all its forms; they wanted a direct, proportional representation—albeit for a certain class of free men thought to be responsible enough to exercise the franchise.[15]

The origination principle in the lower house was almost universally adopted in early state constitutions (seven of eight states with bicameral legislatures in 1790)[16] because the lower house remained more immediately accountable to the electorate. The greater electoral

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[13] One would not expect the U.S. Senate to exercise restraint. The Framers' genius included a healthy skepticism about public officials' exercise of self-restraint. They understood the tendency of every public official and every branch to aggrandize power whenever possible. Our generation would be foolish to think human nature was different.

[14] U.S. Const. art. I § 9, cl.4 (requiring taxes to be uniformly apportioned according to population); U.S. Const. art. I § 9, cl. 5 (prohibiting taxes on goods leaving a state).

[15] It is easy today to criticize the imperfection in the revolutionary-era ideal of voter equality, but that is not particularly relevant to understanding the original public meaning and requirements of the Origination Clause.

[16] *See* Amicus Brief of Center for Constitutional Jurisprudence at 9 and n.2.

responsiveness of delegates in the lower house to the people was the same rationale for requiring tax bills to originate in the "People's House" in Congress at the national level. Though U.S. Senators are no longer appointed by state legislatures, the frequency of House elections and smaller electoral districts was the very ground for expecting that U.S. Representatives would be more responsive to the liberties of the people.[17] (The negligible impact of the Seventeenth Amendment is discussed further in this testimony.)

As the amicus brief for Chairman Franks and other House Members notes, the state constitutional clauses in 1787 expressly rejected a "primary purpose" element (i.e., that the primary purpose of the revenue bill must be to raise revenue) in the great number of states with such a clause,[18] and Virginia prohibited any Senate amendments to House revenue bills whatsoever.[19] The drafting history of the Origination Clause provides strong evidence that a "primary purpose" element also was considered and rejected at the Constitutional Convention.

The original text of the Clause provided an arguable purpose element: "Bills for raising money *for the purpose of revenue* or for appropriating the same shall originate in the House of Representatives." (Emphasis added.) The final version deletes the phrase "for the purpose of revenue" making it clear that any bill that raises revenue is covered by the Clause. The final language is closest to the language of the Massachusetts Constitution of 1780, with the use of "all money-bills" instead of "Bills for raising Revenue" in the U.S. Constitution. The debates over this Clause in the Constitutional Convention and state ratification conventions show that the terms "money bills" and "revenue bills" were synonymous.

Moreover, nowhere in the debates at the Convention is there evidence that the Senate amendment power was understood to include the power to introduce complete substitutes that had no relation to the House revenue bill. Indeed, the notes from the Convention indicate that the delegates thought the Senate's power would be rather modest. Madison's notes quote Elbridge Gerry as arguing that the "plan [the draft Constitution] will inevitably fail, if the Senate be not restrained from originating Money bills."[20]

As telling as the drafting history and debates during the Convention are in rejecting a primary purpose element and an open-ended construction of what a permissible Senate "Amendment" to a House revenue bill would be, the state ratification debates are even more important in establishing the original public meaning of the Clause. The understanding of the people is reflected in the explanations by delegates to state conventions regarding the degree of security the Origination Clause would provide taxpayers and whether those statements were challenged by those who were opposed to ratification. George Mason, a major opponent of ratification in Virginia, is reported to have conceded previously that the Origination Clause only allowed minor changes to correct errors that would prevent Senate passage,[21] and as such, he

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[17] Amicus Brief of Rep. Franks, *et al.*, at 10-11 and n.20 (quoting Madison, Notes on the Debates in the Federal Convention of 1787, at 443 (New York, Norton & Co., Inc., 1969)).
[18] Amicus Brief of Rep. Franks, *et al.*, at 16.
[19] *See* Amicus Brief of Center for Constitutional Jurisprudence at 10 and n.3.
[20] Amicus Brief of Rep. Franks, *et al.*, at 8 and n.16 (quoting Madison, Notes on the Debates in the Federal Convention of 1787, at 445 (New York, Norton & Co., Inc., 1969)).
[21] Amicus Brief of Center for Constitutional Jurisprudence at 20 (citing Farland, 2 Records of Federal Convention 273 (Aug. 13, 1787)).

never raised the Senate's role in amending tax bills as a reason for concern with the Constitution. Tellingly, the government has cited no instance where anyone read the Senate's amendment power broadly.

Justice Joseph Story's Commentaries have also been accorded special deference by the courts in describing the original understanding of the Constitution by the founding generation. Among the more definitive statements on the scope of the Senate's amendment power to House revenue bills, was the following by Story: Such amendments would allow "slight[] modifications" as might be "required ... to make [the House bill] either palatable or just."[22] He also suggested that "an amendment of a single line might make it entirely acceptable to both Houses." *Id.* Thus, we have the founding era's most famous expositor of the Constitution explaining that the Senate's scope of permissible amendments to a House revenue bill was limited to "slight modifications" that might amount to "a single line of text," not the gut-and-complete-substitute of 2074 pages of text.

Allowing the Senate any role in amending revenue bills was somewhat of an anomaly, relating to the Great Compromise over representation generally, but the text and drafting history impose necessary, meaningful limits on the scope of a permissible Senate "Amendment" under the Origination Clause. As explained further below, a rule of construction that reads the exception narrowly is required by the original history and understanding of the Clause. A rule of construction that reads the exception expansively is illogical because it is destructive of the entire enterprise of adding it to the Constitution and the reliance delegates and ratifiers paid to its existence. But a rule of construction urged by the current administration removes any limitation on permissible Senate amendments and renders the Clause a dead letter for all practical purposes.

The Original Public Meaning of the Origination Clause and PPACA's Contrary Example

The preceding history and political philosophy of the framing era helps to highlight the violation of the Origination Clause with the purported enactment of the Obamacare law. A better name for it prior to signing would be the "Senate Health Care Bill" because that is how Senate Majority Leader Harry Reid proudly, and at least accurately, labeled it.[23] As this Subcommittee knows, the legislative history of the Senate healthcare legislation is as follows:

1. The House unanimously passed H.R. 3590, the Service Members Home Ownership Tax Act of 2009 (SMHOTA) and sent it to the Senate. It was six pages long. It included the word "tax" in the title and a few other places because it reduced taxes for certain people. It provided for no tax increases whatsoever. It had nothing remotely to do with health care; it provided for tax relief to certain military veterans and others who frequently have to move, making it difficult for them to take full advantage of existing tax credits.

2. The Senate gutted the entirety of H.R. 3590, except for the designation "H.R. 3590," and poured a completely new, 2074-page bill into the empty shell with 17 major tax increases, amounting to hundreds of billions of dollars in new taxes. One of those

[22] 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at 874 (Melville M. Bigelow ed., 5th ed. 1994), *quoted in* Amicus Brief of Center for Constitutional Jurisprudence at 20.
[23] Amicus Brief of Rep. Franks, *et al.*, at 2 and n.3.

revenue provisions was the individual mandate penalty, or the Shared Responsibility Payment (SRP), that the Supreme Court majority declared to be a tax in 2012.

3. The Senate passed and returned this Senate Health Care Bill to the House, which rushed it through an abbreviated process to secure a vote. This was the bill that then House Speaker Nancy Pelosi famously quipped Congress would have to pass first to find out what was in it.[24] It was narrowly approved without a single Republican vote and with many House members objecting to the process of consideration.

4. President Barack Obama signed the purported act on March 23, 2010, which received the erroneous designation "Pub. L. 111-148."

Boiled down to one sentence, the only part of the Senate Health Care Bill and its 17 or so historically-large tax increases that originated in the House is the House bill designation and number. There are two compelling reasons why even a somewhat closer case would be invalid under the Origination Clause, but Representatives and citizens alike should ponder one fact alone and conclude that such an artifice is invalid. The use of such House designations and bill numbers did not exist at the time of the Framing or for 30 years thereafter.[25]

As such, it should be apparent that something is seriously wrong with the government's theory of the case and the district court's ruling that both maintain that a legitimate "amendment" within the constitutional sense can retain nothing of the original bill but that numerical designation which did not exist and had no conceivable significance to those who ratified the 1787 Constitution. As any faithful textualist understands, words must be given their ordinary meaning. An "Amendment" may improve or augment the original, but it must retain some substantial portion of the original.

Ordinary English speakers would not think that the complete destruction of a house and the erection of a massive skyscraper on the same street address was an "amendment" to the house. They would not think that a later novel with the same library code as an unrelated earlier novel on a different subject was an "amendment" to the earlier novel. And they would not think that a racehorse in the Kentucky Derby which was given the same racing number as a horse that withdrew was an "amendment" to the earlier horse because of that number. Complete and unrelated substitutes are not "amendments" in any reasonable meaning of that term.

This simple fact should end the matter for the *Sissel* case, but this Subcommittee is interested in the subject more broadly, so it should also consider how the Origination Clause should operate in other contexts. The full text of the Clause provides:

All Bills for raising Revenue shall originate in the House of Representatives,

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[24] *See*, e.g., Marguerite Bowling, *Video of the Week: "We have to pass the bill so you can find out what is in it,"* THE FOUNDRY (Mar. 10, 2010), http://blog.heritage.org/2010/03/10/video-of-the-week-we-have-to-pass-the-bill-so-you-can-find-out-what-is-in-it/. Contrast the Senate Health Care Bill with the six-page SMHOTA that anyone could have read and no Member objected to.

[25] As the Library of Congress relates: "The sequential numbering of bills for each session of Congress began in the House with the 15th Congress (1817) and in the Senate with the 30th Congress (1847)." *Available at* http://memory.loc.gov/ammem/amlaw/lwhbsb.html. *See also* Amicus Brief of Rep. Franks, *et al.*, at 22.

but the Senate may propose or concur with Amendments as on other Bills.[26]

The PLF briefs in *Sissel* and the amicus briefs ably explain the following principles regarding the original public meaning of this Clause. Additional analysis of several of these principles is contained in the remaining sections of this testimony.

- "Bills for raising Revenue" was understood broadly to include all "money bills" or other legislation to raise money for the general treasury, regardless of whether it has other purposes as well. That phrase should be read coextensively with the government's power to tax, except to exclude legislation that lowers taxes and two other narrow categories under existing court precedents.

- Under existing court precedents, bills that create penalties or fines for the violation of a duty that Congress has a separate constitutional authority to impose, are not "Bills for raising Revenue." This is the right result under the original understanding of the Origination Clause, but is not a real exception to it. Those penalties simply are not taxes, so it is not an exception to the rule that tax bills must originate in the House.

- Under existing court precedents, bills that impose a special assessment, user fee, or similar monetary exaction that are used for a particular program or dedicated fund and are not deposited in the general treasury, are not "Bills for raising Revenue" within the meaning of the Origination Clause. The existing cases that fall under this exception probably reach the right result, but there is a better constitutional rationale than that in some of the older cases—and it's not related to the creation of special funding streams generally. A better justification for upholding those assessments is that they are necessary and proper to the execution of another enumerated power, or more than one enumerated power.[27]

- The applicable rationale for the two seeming "exceptions" will not affect Sissel's challenge of the individual mandate tax, since it can satisfy neither exception under any court precedent or other plausible rationale. First, the individual mandate tax goes into the general treasury and does not fund a special program. Second, the Supreme Court's majority in *NFIB* clearly established, and the government seems now to accept, that the individual mandate "tax" is not a constitutional penalty and is not authorized by any power of Congress apart from its power to tax.

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[26] U.S. Const. art. I § 7, cl. 1.

[27] This rationale would better explain the cases cited by the parties that seemingly fit this exception. In all such cases, there was a program authorized by an enumerated power other than the tax power. Thus, those cases that satisfy the "special program fund" exception also would be justified because the fund was necessary and proper to the execution of the constitutional program at issue. In *Twin City National Bank v. Nebecker*, 167 U.S. 196, 202 (1897), Congress's levy on bank notes funded the coinage of money and might also be justified under the Commerce Clause. In *Millard v. Roberts*, 202 U.S. 429, 437 (1906), Congress was taxing property in D.C. to finance a railroad pursuant to its exclusive jurisdiction over legislation in the District. In *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990), Congress imposed fees on defendants convicted of certain federal misdemeanors for a crime victim fund pursuant to its power to establish penalties for federal offenses. In contrast, the Supreme Court held that the individual mandate tax is not necessary and proper to any other power of Congress other than its power to tax.

- "Bills for raising Revenue" include *all* bills that raise revenue, regardless of whether doing so is their "primary purpose" or whether the bills are also regulatory in some sense, since almost all tax laws have regulatory purposes. Although the government misreads a passage from one case to reach a contrary conclusion, a "primary purpose" test was rejected by the delegates to the Constitutional Convention and expressly rejected by most states that ratified the Constitution in their state constitutions. It is inconceivable that the original public meaning of the Origination Clause could have included a "primary purpose" element. That would have rendered the Origination Clause inapplicable whenever Congress wanted to evade it simply by declaring another purpose more dear than raising taxes. Rather than a slight "parchment barrier," that would have created the effervescence of a "verbal barrier." The ratification debates and contemporary commentary establish that the founding generation did not think they had erected an optional limitation so easily defeated with the right incantation.[28]

- A revenue bill does not "originate" in the House if the only thing that originated in that body is a House bill number, followed by text that is unrelated to the bill that was enrolled by the House and transmitted to the Senate.

- A permissible amendment by the Senate to a House bill that raises revenue within the meaning of the Origination Clause must at least be germane to the original house bill. I think even more is required than mere germaneness, including that it be limited to a correction or change that does not alter the tax scheme it amends in significant ways, but that is a debatable point that is not yet established in the legal precedents.

- The issue of whether a Senate amendment is germane to an actual House bill that raises revenue is justiciable in the courts.

- Whether an amendment is germane to another bill or provision will sometimes involve close and difficult questions. There are various plausible presumptions or ways for the House or the courts to deal with close cases, ranging from those that create a presumption for liberty to those that are more deferential to Congress, but the Senate Health Care Bill gut-and-complete-substitute approach does not present a remotely close question. It is an extreme example of a non-germane "substitute" instead of a constitutional amendment.

The Service Members Home Ownership Tax Act Was Not a "Bill[] for raising Revenue" Within the Meaning of the Origination Clause

[28] The Amicus Brief for Rep. Franks, *et al.*, at 19-20, does an excellent job explaining how the government misreads the reasoning of the Court in *Munoz-Flores* to reach its "primary purpose" conclusion. The Court had held that the special assessment at issue was primarily for a dedicated fund, taking it out of the scope of the Origination Clause, and that any incidental payment to the general treasury was not the primary purpose of the act. That is very different from a bill that only generates revenue for the general treasury. No inquiry into that bill's purpose is required or appropriate, especially since almost every tax law will have some regulatory purpose in addition to raising revenue.

Before there can be a constitutional Senate amendment to a revenue bill, there must be an engrossed bill sent from the House that would "raise[] Revenue" within the meaning of the Origination Clause. The SMHOTA bill does not qualify. PLF has always raised this problem as one of two main arguments in Matt Sissel's challenge to the individual mandate tax.

In PLF's opening brief for Matt Sissel in the D.C. Circuit, however, my colleagues seemed to accept, perhaps for the sake of argument, that two sections of SMHOTA increased taxes to make the tax reductions in the main part of the bill budget neutral. Yet provisions that help with "budget neutrality" under congressional budget rules are not the same as whether the provisions at issue are taxes within the meaning of the Constitution. Upon closer reflection, and the suggestion from amici from this Subcommittee, we conclude that the assumption that some taxes were raised to offset tax reductions in PLF's opening brief was entirely unnecessary. This is because there is no provision of the SMHOTA bill that increases taxes.

The first four sections of SMHOTA include the title and tax reduction provisions. They would not raise revenue in any manner. The two sections of SMHOTA that help offset the tax reductions, and the only ones that could arguably be tax increases, are the last two provisions of the six-page bill amounting to about 10 lines of text. Section 5 increased filing penalties from $89 to $110 for corporations that failed to file certain tax returns. But that is plainly a penalty or fine, which is not a tax under the Supreme Court's construction of the Origination Clause.[29] Penalties for not filing tax returns are no different than penalties or fines for violating some other law Congress has the power to enact. In contrast, the individual mandate payment is the underlying tax—and the Supreme Court held it is not a constitutional penalty for anything else.

SMHOTA section six would have accelerated the amount of "estimated tax" that certain corporations have to pay. It may have a positive budgetary impact in a particular accounting period, offsetting tax cuts in other portions of the bill under congressional budget laws, but it is not an increase in the tax rate or total revenue. A helpful analogy in the House amicus brief is a bill changing the tax filing date from April 15 to April 1 for income tax earned in the previous calendar year.[30] That may have a positive budgetary impact for a particular accounting cycle and a negative one in another cycle, but it would not be a tax increase for the previous tax year for which taxes were due.

Thus, there is no reasonable ground to argue that SMHOTA was a bill to raise revenue, even if dedicated government lawyers are paid to advance unreasonable arguments. The unreasonable argument conflates positive budget impacts with what constitutes a tax. Such clever lawyering sometimes helps with judges who are understandably reluctant to overturn the central provision of the President's signature legislative achievement.

But if that were correct, then there would be no distinction between most bills that emerge from the House Budget Committee and those that emerge from the Ways and Means Committee for Origination Clause purposes. The elaborate jurisdictional distinctions that have developed between those committees over the decades would be without a constitutional significance. This Subcommittee knows otherwise. Budget bills can affect all sorts of

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[29] Appellant's Opening Brief, at 15 (and cases cited therein); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599 (2012) (*NFIB*).
[30] *See* Amicus Brief of Rep. Franks, *et al.*, at 24.

accounting formulas, but tax bills have a more direct impact on citizens outside the Beltway. And those tax bills that *increase* taxes raise special concerns. It is only those that originate in the House that the Senate can conceivably amend without running afoul of the Origination Clause.

Because SMHOTA was not a bill for raising revenue, the Senate could not constitutionally "amend" it, even with a germane amendment, to institute a single new tax. This fact independently renders the individual mandate tax unconstitutional.

Even If SMHOTA Were a Revenue Bill, the Senate Health Care Bill Is Not Remotely Germane to It, and Thus, Is Not a Constitutional Amendment to a House Passed Bill.

In *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1997), the Supreme Court recognized that a Senate "Amendment" must be germane to the revenue bill that originated in the House for it to be constitutional. That was a correct and necessary construction of the Origination Clause, without which the Clause would effectively be meaningless. The contrary construction of the Origination Clause (without a germaneness requirement) is analogous to expansive readings of the Commerce Clause that the Supreme Court rejected in *United States v. Morrison*, 529 U.S. 598 (2000) and *NFIB*. The Court in *Morrison* and *NFIB* properly dismissed an interpretation of the Commerce Clause that would render the enterprise of enumerated powers meaningless.[31]

If the Senate simply had to wait for any House bill, or even any House bill that actually raised revenue, and then could constitutionally substitute any tax bill of its imagination, then the Origination Clause would only be a waiting game. Even in the late Eighteenth Century, that wait would not have been very long. But in modern times, that interpretation of the Origination Clause would render it a dead letter. Constructions of constitutional clauses that render them empty, especially clauses that were actively discussed during the ratification debates, are an insult to the framing generation and any rational judicial system.

The government and the district court in the *Sissel* case seem to concede that a Senate "Amendment" creating new taxes must be germane to a House revenue bill, but their concept of germaneness renders it an empty semantic game. According to their reasoning, all that might be required is that both bills be about taxes, or perhaps both have the word "tax" in them. But that effectively is no different than eliminating the germaneness requirement altogether. There might be some House revenue bill that does not have the word "tax," but then the government would argue that both bills were about money or payments. This, too, would render the Clause a mere waiting game, and it is equally an insult to any legal system bound by a written Constitution.

The complete gut-and-substitute procedure employed by the Senate to pass the Senate Health Care Bill is not a constitutional "Amendment" within the meaning of the Origination Clause, even if any such gut-and-substitute device could be on other bills, because the complete substitute was not remotely germane to the House SMHOTA bill. Returning to the hypotheticals

[31] *See United States v. Morrison*, 529 U.S. 598, 610 (2000); *NFIB*, 132 S. Ct. at 2573.

in the previous section, how would any English speaker of the late Eighteenth Century to the present answer the ultimate question at issue in *Sissel* as applied to the following facts?

- If someone asked who "originated" the plan for the skyscraper on 222 Main Street, and especially the design of its innovative central support columns, no one would plausibly respond that it was the homeowner who transferred his property to the skyscraper developer if the original homeowner had no idea that his home was going to be gutted and replaced. Even if he knew it was a possibility his home would be destroyed, no one would say he originated the new plan of construction just because he somehow made it possible. But now imagine the homeowner knew that there was a restrictive covenant that ran with the property pursuant to which only modest modifications could be made to his existing (perhaps historic) structure. The former homeowner would rightly refute the notion that he originated the skyscraper construction in any sense just because he used to own 222 Main Street and his transfer of it made the unlawful skyscraper construction possible.

- If someone asked who "originated" the idea for the central plot developments in the novel with the card catalogue number E-3303, no one would plausibly respond that it was the author of the children's math workbook that previously was designated catalogue number E-3303, even if the same institution produced both books, and the novel was only made possible because of the termination of the math workbook.

The ultimate Origination Clause inquiry (assuming there is a House revenue bill) is a content-based one. What is fairly asked in the Origination Clause context and the above inquiry about the origination of a literary idea is based on the content of the text, not its binding or numeric designation. In sum, the inquiry is over who originated the basic elements of the text (or tax scheme) at issue. If one asks whether Shakespeare originated the central plot design of "West Side Story," the answer might be yes, unless one answers that Shakespeare borrowed it from an Italian story. That could present an interesting discussion, but it would be irrelevant to answer the content-based question by the semantic game of searching for books whose titles have "West Side Story" in them.

The Germaneness Requirement Is, and Must Be, Justiciable in the Courts.

The government's last, desperate line of defense for the unconstitutional individual mandate tax is to argue that the "germaneness" of a Senate Amendment to a House revenue raising bill (assuming SMHOTA was one, which it is not) is a political question that is committed to the political branches and would be improper for the courts to second-guess.

There are three problems with this last line of defense. First, the government misreads language from *Rainey v. United States*, 232 U.S. 310, 317 (1914) that cautions courts from entering the germaneness fray, perhaps for prudential reasons, as a constitutional barrier to judicial action. Lower courts after *Rainey* did not read that concern as a holding, prohibiting their consideration of the question. Indeed, many federal appellate courts have not only continued to examine the germaneness question but have expressly held it to be justiciable.[32]

[32] *See* Appellant's Opening Brief, at 23 (citing applicable cases).

Second, the government could advance an analogous "political question" argument in defense of a campaign-finance law the Congress thinks is not a restriction on free speech, and those First Amendment questions are a lot harder than the facts in *Sissel*. Like the guarantee of free speech, the Origination Clause guarantees a deeply-ingrained, *individual* right (which may rise to the level of a fundamental right that is essential to Anglo-American ordered liberty) and not just a political prerogative of House members to enforce or not as they choose. As the previous sections indicate, a bar on judicial enforcement of the germaneness question or even great deference to Congress would effectively render the Origination Clause an empty promise. In short, the text of the Origination Clause logically requires an examination as to whether the tax at issue truly "originated" in the House and whether the Senate's purported "Amendment" is in a form that was permissible "on other Bills" at the time of the Framing. Fortunately, the Supreme Court appears mindful of the Clause's nature in its later Origination Clause decisions—and in protecting analogous individual rights.

Third, even if the government's reading of *Rainey* were ever the law, the Supreme Court ruled in 1990 that the House cannot acquiesce in a violation of the Origination Clause; indeed, the courts have an obligation to resolve disputes about its violation.[33] The "non-justiciability" argument was forcefully advanced by the government in *Munoz-Florez*, particularly with regard to the germaneness of the Senate amendment. The High Court itself did not expressly address the germaneness issue because it upheld the assessment on other grounds (the special assessment was not a tax subject to the Clause), but it did not disturb the Ninth Circuit's holding that the germaneness issue was justiciable, and the rest of its opinion left little doubt that all issues relating to a violation of the Origination Clause were justiciable: "We conclude initially that this case does not present a political question and therefore reject the Government's argument that the case is not justiciable." *Id.* at 387.

As for the concern expressed in *Rainey*, most House and Senate rules are not proscribed by the Constitution and most don't directly affect the individual rights of the people, and thus, the House and Senate are free to amend those types of rules almost any way they choose, so long as they don't violate due process or some other constitutional guarantee. The content or operation of these types of rules is not justiciable in the courts, pursuant to the power of each House to determine their own internal rules of procedure[34] and political question doctrine.

Thus, the House and Senate are free to create committees to consider legislation, assign the proportion of members from each party to such committees, and decide the jurisdiction thereof, as well as other parliamentary matters concerning floor debate and privileged motions. However, the Supreme Court has made it clear, and rightfully so, that the House and Senate cannot vary from the "single, finely wrought and exhaustively considered, procedure" of bicameral passage and presentment to the President proscribed in Article I § 7, cls. 2-3.[35] A violation of those constitutional procedures for the passage of legislation is certainly justiciable.

Nor can the House or Senate engage in artifices to avoid those constitutional requirements, especially when they are related to the enactment of legislation. The House may

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[33] *United States v. Munoz-Flores*, 495 U.S. 385, 391, 393 (1990).
[34] U.S. Const. art. I § 5, cl. 2.
[35] *Chadha*, 462 U.S. at 951.

be able to pass a rule that dispenses with the third reading of a bill before floor debate or that "deems" it to have been so read, since that does not implicate any constitutional provision. It could even change the rules regarding germane amendments to non-revenue bills, departing from the long-standing precedents since the early republic. But the House could not pass a rule that "deems" a mere majority vote to be a 2/3 vote for purposes of overriding a presidential veto. Neither could the House pass a rule that allows only those members to vote on sustaining or overriding such a veto on their being in the majority of a "preliminary" voice vote. All kinds of evasions are possible, but the 2/3 requirement is a substantive one with a fixed constitutional meaning that can't be satisfied by fake formalisms. The courts must remain open to adjudicate a violation of a rule of procedure established in the Constitution, including an Origination Clause violation, if brought by a proper party.

Nevertheless, this House has a right and obligation to do so as well because the origination of money bills is *also* a prerogative of this body, and because it has a strong interest as the "People's House" to protect the liberties of the tax-paying public. Moreover, it will more acutely suffer the voters' rebuke if it does not enforce this protection of liberty. As Chairman Franks's amicus brief notes, the result of the 2010 congressional elections is a perfect example of how the voters will react if the Origination Clause is not followed. There was no more dramatic turnover of House control since the 1938 election, more than 70 years before. And the party that lost control and those overwhelming number of seats was the one that voted overwhelmingly for one of the nation's largest tax increases, in violation of at least the Origination Clause.

Yet, because the Origination Clause is ultimately, and primarily, a protection of individual liberty, it would not matter if the current House endorsed the Origination Clause violation or if it did so with regard to a petty bill that no significant number of voters would care deeply about. Any citizen adversely affected by the purported enactment of the bill by constitutional violation would have standing to sue, and the courts would be required to hear and decide the case. They should have no hesitation doing so in the face of vociferous arguments from the President and both Houses of Congress that the suit was "meddling" in their business.

In the *Sissel* case, the government is arguing that whether the 2074-page Senate Health Care Bill was germane to the six-page House bill that had nothing to do with healthcare is not a question that the courts could answer, lest irreparable damage to our constitutional order result. Ordinary Americans know the contrary is true, and when they hear such an argument they rightly suspect the administration has something to fear from careful and independent court review. If the courts cannot pass on the germaneness of the Senate's substitution of the PPACA for the six-page veterans' preference home tax credit bill, then the Origination Clause is a dead letter.

Under the Obama administration's and district court's view, all that is necessary is that the House bill have the word "tax" in it in order for the Senate to originate any tax imaginable. Under a broad application of this harmful "leave it to us to decide what our powers are" argument, the courts also could not determine if a House bill that exclusively lowers taxes was indeed a bill to "raise Revenue" under the Origination Clause or not. But even assuming the courts would be allowed to make the determination of whether the House bill raised revenue, the House Ways and Means Committee acts on several bills to raise taxes each session.

The reported statement from Senate Majority Leader Harry Reid's counsel[36] indicates how cavalierly some functionaries view the Origination Clause requirement. In her view, the Senate need only wait for the House to pass one tax measure and then anything goes: "[B]asically, we needed a non-controversial House revenue measure to proceed to, so that is why we used the Service Members Home Ownership Tax Act. It wasn't more complicated than that."[37] She seemed to think it would be easier to gut and strip a non-controversial tax bill. Yet hijacking a non-controversial bill is more offensive to the constitutional principles at stake, not less. But with due respect to Ms. Leone, it is more complicated than she believes it to be to circumvent the Constitution's protections of individual liberties. The courts and this House should ensure that is so.

Should the Courts Defer to Congress In Close Cases?

The gut-and-complete-substitute process used to strip everything from a six-page bill *lowering* taxes for service members and substituting a 2074-page bill that transforms American healthcare and creates 17 new taxes is not a close case under the Origination Clause. Yet even in much closer cases, it is not clear that courts should defer to the House's and Senate's presumed judgment regarding germaneness for several reasons. Yet there are at least three plausible standards of review the courts could adopt on the germaneness issue:

- The text and purpose of the Origination Clause suggests they should maintain a presumption in favor of individual liberty requiring the government to prove the constitutionality of the enactment that reasonably has been placed in doubt.
- The courts could show no deference or presumption either way.
- The courts could fashion a rule of deference in close cases, particularly if the matter was debated in the House and voted on by its Members who would suffer more direct injury for a violation of the Origination Clause.

This last option leaves minority interests unprotected should House Members conclude that they would be unlikely to suffer electoral consequences for "soaking the rich." Thus, I believe the first or second alternative would have a firmer constitutional foundation.

The Seventeenth Amendment Does Not Affect the Origination Clause

Even the government that is employing other meritless arguments and defenses for the unconstitutional taxes originated in the Senate, including the individual mandate tax, does not argue that Seventeenth Amendment affects the Origination Clause. There are several reasons why that is so. The main one is that there is no textual support for such a reading. Second, direct election of Senators every six years for much larger electoral districts (except in a few states where they are the same electoral size as a congressional district) does not alter the political reality that House members are more responsive to the people.

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[36] Amicus Brief of Rep. Franks, *et al.*, at 28-29 (quoting e-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid).

Finally, the Framers' assumption that the Senate would be made up of more "aristocratic" members appointed by state legislatures influenced other tasks and powers given to the Senate. No one would argue that the Seventeenth Amendment silently changed those provisions related to ratifying treaties or confirming judges, ambassadors, and other officers of the United States. But an analogy to the process of House impeachment and Senate trial is especially apt.

No one would seriously argue the passage of the Seventeenth Amendment altered the carefully proscribed procedures for House impeachment and Senate trial of appointed officials, even though the U.S. Senate assumed the role of the British House of Lords, a portion of which sometimes sat as England's highest court. Although U.S. Senators are now less "lordly," that does not change the carefully calibrated constitutional procedures for House impeachment and Senate trial.

Indeed, the Senate must await the articles of impeachment and House managers who will prosecute the impeachment, because the Senate is confined to the articles passed by the House. By analogy to a germane amendment to a House revenue bill, they may consider new evidence the House did not review, and they may vote down certain of the articles of impeachment, but they cannot introduce or consider new articles of impeachment for trial.

To take the analogy one step further, however, what the Senate did with the PPACA would be the equivalent of waiting for the House to introduce a single article of impeachment on an executive branch official (or perhaps even voting to impeach such official) for a petty crime and then take up the article, and through "amendment," try Judge Z on multiple articles of bribery, misappropriation of court funds, and other high crimes. No one would think that the House could "ratify" such a trial verdict by later enacting conforming articles of impeachment for Judge Z. The impeachment must originate in the House, and the trial on impeachment must be limited to those matters that originated in the House.

Conclusion

In Robert Bolt's play, *A Man for All Seasons*, St. Thomas More rebukes his son-in-law Roper for his willingness to bend the law for what he believes, and might even be, a just end. He explains to Roper that he should give the devil due process of law lest the thick forest of law be rendered a wasteland when the tables were turned and the devil came after him.[38]

Those who twisted the legislative process to pass the President's signature healthcare law violated the House origination requirement to achieve what they considered a great end. Even if their goal was noble, our written Constitution and the type of constitutional government it guarantees is far more important. We at PLF are grateful to Matt Sissel and our Foundation's private donors who make it possible to vindicate his fundamental rights. And we thank the Subcommittee for doing what it can to preserve, protect, and defend them as well.

[38] Robert Bolt, *A Man for All Seasons* (Bloomsbury, New York, 1960).

Exhibit A

Select Party and Amicus Briefs in
Sissel v. HHS (D.C. Cir.)
Oral Argument on May 8, 2014

All of the following briefs can be found at:
[http://www.pacificlegal.org/cases/Sissel-3-1374]

ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5202

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATT SISSEL,

Plantiff/Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as United States Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as United States Secretary of the Treasury,

Defendants/Appellees.

On Appeal from the United States District Court
for the District of Columbia
Honorable Beryl A. Howell, District Judge

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[ORAL ARGUMENT NOT YET SCHEDULED]
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IN THE
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Plaintiff-Appellant,
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Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Honorable Beryl A. Howell, District Judge

BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVES TRENT FRANKS, MICHELE BACHMANN, JOE BARTON, KERRY L. BENTIVOLIO, MARSHA BLACKBURN, JIM BRIDENSTINE, MO BROOKS, STEVE CHABOT, K. MICHAEL CONAWAY, JEFF DUNCAN, JOHN DUNCAN, JOHN FLEMING, BOB GIBBS, LOUIE GOHMERT, ANDY HARRIS, TIM HUELSKAMP, WALTER B. JONES, JR., STEVE KING, DOUG LAMALFA, DOUG LAMBORN, BOB LATTA, THOMAS MASSIE, MARK MEADOWS, RANDY NEUGEBAUER, STEVAN PEARCE, ROBERT PITTENGER, TREY RADEL, DAVID P. ROE, TODD ROKITA, MATT SALMON, MARK SANFORD, DAVID SCHWEIKERT, MARLIN A. STUTZMAN, LEE TERRY, TIM WALBERG, RANDY K. WEBER, SR., BRAD R. WENSTRUP, LYNE A. WESTMORELAND, ROB WITTMAN, AND TED S. YOHO, IN SUPPORT OF APPELLANT SEEKING REVERSAL

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NO. 13-5202

In the

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF HEALTH
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Defendants-Appellees.

On Appeal from the United States District Court
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Honorable Beryl A. Howell, District Judge

BRIEF OF AMICUS CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANT AND REVERSAL

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No. 13-5202

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MATT SISSEL,
Appellant,

v.

U.S. DEP'T OF HEALTH & HUMAN SERVICES, *ET AL.*
Appellees.

APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA, CIVIL CASE NO. 1:10-cv-01263-BAH,
HON. BERYL A. HOWELL

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Mr. FRANKS. Well, thank you, sir. And I will now proceed under the 5-minute rule with questions. And we will begin with recognizing myself for 5 minutes.

Mr. Schmitz, I will begin with you. First, I have to say in Mr. Onek's testimony in two places, he suggests that if the Supreme Court gets involved here somehow, I mean, they have to do one of two things. They have to let the bill stand or they have to strike it down. If they let it stand, it is the status quo. If they strike it down, his suggestion is that somehow that would take it farther away from the people, and I find that argument fundamentally preposterous because the effect of a decision striking this down would be to return to the people a greater say over their own taxation. And sometimes I do not know how these arguments are made in these impeccable auspices that are completely preposterous.

Mr. Kamenar, according to the Congressional Budget Office, the Affordable Care Act represents one of the largest tax increases in American history. However, in Mr. Onek's testimony, he argued that the Origination Clause did not apply to the Affordable Care Act. Could you please explain to the Committee as best you can why the Affordable Care Act's enactment was both required to satisfy the requires of the Origination Clause and, if so, why it did not satisfy those requires. I am sorry, this is to Mr. Kamenar. Let me ask that question to you.

Mr. KAMENAR. No, it is clear, as I said in my testimony, that the Affordable Care Act, which raises over $500 billion, is a revenue raising measure. It originated in the Senate. Senator Harry Reid even called it the Senate healthcare bill. It is on his website. It came over here. And all they did was take this tax credit provision, tore off the House bill number, and pasted it on the 2,000-page bill. It is clear that it originated in the Senate.

And with respect to Mr. Onek's provision that, well, the other half of the clause says it can amend as on any other bill. You have to look at that provision in terms of when that clause was written. Yes, the House and Senate have the power to make its rules, but they cannot make a rule that violates the Constitution.

As we said in our brief, the House of Representatives has always recognized the principle that the Senate may not design new tax bills. Indeed, when the Framers wrote the Origination Clause, it was clear that the scope of permissible amendments, as on other bills regardless of whether the bill was or not a bill for raising revenue, did not include amendments that were not germane to the subject matter of the bill. Therefore, the established practice by the founders during the Constitutional Convention who penned the words "the Senate may propose or concur with amendments as on other bills"—in short, no non-germane substitute amendments were permitted in 1787 by the unicameral Constitutional Convention. That is what they were familiar with.

And the only reason they allowed that was to take care of the British practice where if the Senate could not do anything, then they would be locked into a House revenue raising bill that might put in something about foreign affairs or other commerce, and the Senate could not amend it. So it is basically turning the clause upside down on its head the way it is being interpreted by the Senate.

Mr. FRANKS. Thank you, sir. Mr. Gaziano, it is your testimony that if the Senate can do as they did in the Affordable Care Act, that the Origination Clause is essentially vapor. So my question to you, is the House's concurrence in a Senate revenue amendment alone sufficient to satisfy the Origination Clause? In other words, is the Origination Clause intended to protect the House or is it intended to protect the individual liberty of Americans?

Mr. GAZIANO. That is really another central question, Mr. Chairman, and I appreciate the chance to elaborate. It is ultimately the individual right that the Framers had in mind when they required that the people's House originate any tax bills. But you also have an interest because you will feel the voters' wrath. And as the amicus brief that you and many of your fellow Members showed, that was the exact result in 2010 when this House violated the Origination Clause.

So ultimately the courts must enforce the individual right at issue because it is an individual right. The *Chadha* case is a great example. In the 1970's, Congress passed 160 one-house or Committee vetoes because it thought that it needed to check the imperial presidency of Nixon and Ford, and the strict constitutional requirements of bicameralism and presentment were interfering with their desires.

And their argument, of course, was that the Court should not interfere with accommodations between the President and Congress over these new innovations. Well, of course the Supreme Court struck down those 160 laws, 160 provisions, in the *Chadha* decision in 1983, pointing out that it was not just a matter between the political branches. The House or the Senate, they could have stopped that, too. They should have.

As you noted in your opening statement, every Member of Congress, every officer of the Federal Government takes an oath to defend the Constitution. And again, you all will suffer the voters' wrath. That was the plan, so you all have an interest in protecting our individual rights. But ultimately, you cannot concur in a violation of the Constitution in that way. You can change your own rules about Committee structure in Committee hearings like this, but you cannot change the constitutional rules. And it is ultimately up to the courts, like in the *Chadha* case, to enforce our individual liberties.

Mr. FRANKS. Thank you. And I would now recognize Mr. Cohen, the Ranking Member, for 5 minutes.

Mr. COHEN. Thank you. Mr. Onek, are you familiar with the *Sissel* case?

Mr. ONEK. I am indeed. Yes, I am.

Mr. COHEN. Tell me about the arguments that the folks opposing will make.

Mr. ONEK. Well, Mr. Sissel challenges the individual mandate. There are other taxes in the bill, of course, but he did not have standing to challenge those. So the case is about the individual mandate, although as a backdrop you have the other taxes. And he said, well, this is a tax, and it did not originate in the House. And the District court rejected both arguments.

On the issue of whether it is a tax, the language——

Mr. COHEN. The District Court rejected both the arguments?

Mr. ONEK. That Mr. Sissel made.

Mr. COHEN. That Mr. Sissel made. Okay. I am just kind of working because Mr. Kamenar, I think, said this is as easy as it gets, and they lost in the District Court.

Mr. ONEK. That is correct.

Mr. COHEN. It is a high burden that he is placing on himself, but go ahead. Yes, brief the case.

Mr. KAMENAR. The judge was wrong.

Mr. ONEK. And what the Court said is, and what everybody knows, the individual mandate is not for the purpose of raising revenue. In fact, the government would be delighted if it did not raise a dime, if every person bought insurance, in which case nobody would have to pay the mandate. Nobody.

Everybody knows that the purpose of the mandate is to induce people, and particularly healthier people, to purchase healthcare insurance. The government would have been very happy if it did not get a dime. I think the government would have been perfectly happy if it could have taken all the money and given it to charity. The government does not care about the revenue. What it wants is for people, and particularly healthy people, to purchase health insurance.

The second aspect is the aspect I think we could perhaps talk more about. What kind of amendments can the Senate make? And as I said earlier, the bill says the Senate can propose amendments as on all other bills. There is nothing in the Constitution which talks about germaneness or says that the Senate has to have a germane bill. And indeed on many occasions the Senate and the House have agreed to amendments which were not germane on many, many occasions throughout history for at least 150 years.

So if the Constitution says there can be amendments, if there is no requirement that there be germane amendments, how can the courts intervene? The separation of powers principles says the courts cannot intervene unless they have some standard to intervene on. And, in addition, we have a specific clause of the Constitution, which people here I am sure care a great deal about. Article 1, Section 5 says "Each house shall determine the rules of its proceedings," and, in my view, that includes rules and practices with respect to whether the Senate's bill has to be germane or not germane, or whether the House has or does not have the obligation to accept a germane amendment. That is up to the House. It is up to the Senate.

Now, the House has a blue slip procedure. The House, for those in the audience, the House attaches a blue slip of paper, which is why it is called a blue slip, on a resolution and says to the Senate what you have done violates the Origination Clause. We reject it. We return it. Goodbye. The House can always do that. It did not do it here, but it can always do it. So it is not as if the Court——

And by the way, once the House does it, there is no review by the courts. Nobody can go to the courts and say, oh, my gosh, the House rejected this immigration bill, this bill that I happen to approve of, by the way. It rejects this immigration bill that would improve the lives of millions of Americans. Let us challenge it. The Court would say you have no standing, get out of here.

What the House does is unreviewable. And what I am saying is what the Senate does, the amendments it makes as on all other bills, should not and is not reviewable by the Federal courts.

Mr. COHEN. Mr. Onek, let me ask you this, too. If a bill is not primarily for revenue purposes, it is not for raising revenue, then the courts have said it is okay. What was the primary purpose of the Affordable Care Act?

Mr. ONEK. Well, the primary purpose of the Affordable Care Act is to provide health insurance, security, and better healthcare to all Americans.

Mr. COHEN. Save people's lives.

Mr. ONEK. That certainly is a purpose.

Mr. COHEN. Lives are in the balance.

Mr. ONEK. That is correct. And the individual mandate has a sort of narrow primary purpose, which is to induce Americans to purchase the insurance, and everybody knows that purpose. There is nobody here who has not at one time or another given a speech against or for the mandate. They all know what the purpose is, but somehow we are expecting the courts to ignore that. Well, the District Court did not ignore it, correctly.

Mr. COHEN. Thank you, sir.

Mr. ONEK. Thank you.

Mr. FRANKS. I am going to go ahead and propose a new rule of the House of Representatives since we have total latitude in that regard that we make this Committee the absolute lawmaking body of the world, and it is unreviewable at any time. And with that, I am going to recognize Mr. Gohmert, who is someone who recognized this situation very early on, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman, and I appreciate the witnesses being here. And we had filed a bill last Congress. But I am curious, if we passed a bill in the House that says it is the sense of Congress that the Affordable Care Act, and it is really hard for me to use those words "affordable care act" because it has put constituents of mine out of work. It has taken some from full time to part time. It has taken away the insurance they liked. It has taken away their doctors they like. So it is anything but affordable. Nonetheless, we will use the misnomer that was used to name the bill.

If we say in our resolution and it passed that it is the sense of the House of Representatives that the Affordable Care Act did not originate in the House, is that not something that could be taken up and considered with judicial notice at any level of the proceedings?

Mr. ONEK. No. The answer is flatly no because the courts never look at post-hoc legislative history.

Mr. GOHMERT. All right. But——

Mr. KAMENAR. I disagree——

Mr. GOHMERT. All right. Let us hear your——

Mr. KAMENAR [continuing]. Because I argued one case that did.

Mr. GAZIANO. It would not be part of the legislative history of the act, so it would not be. But I do not think that it would be valuable for that purpose. It would be valuable for a very different purpose, and they ought to certainly pay attention to it. And that is because

it would discourage the Court from punting its responsibility and saying this is a political question.

Now, the Supreme Court in *Munoz-Flores* said they cannot do that anyway. And so, that is the more important reason why I think Mr. Onek's wish that the courts not examine this horrible act will fail.

Mr. GOHMERT. Okay. But let me hear from——

Mr. GAZIANO. The reason that they would care, in administrative law, if two agencies disagree on a matter, they do not defer to one or the other.

Mr. GOHMERT. Right.

Mr. GAZIANO. And so, it would be some proof that your reading of the rules is different than what happened in the last Congress.

Mr. GOHMERT. That there is a question of fact in this. So I was really surprised as a former judge and chief justice, I am just shocked that anybody that claims to have knowledge of the law would have such a quick answer of no. But, Mr. Kamenar——

Mr. KAMENAR. Yes. The Court would certainly look at a resolution passed by the House on this for this important purpose. Whether or not the members of the House could bring the case themselves and have standing, that might, in fact, give them additional what is called legislative standing. But now that we have a plantiff that is always with standing. By having this resolution passed, it gives the Court more impetus to look at this because now it is an institutional interest by the House that the Court cannot just simply just say, oh, this is just some plaintiff. Why should that plaintiff worry about the House's bill? They basically relented, et cetera.

So the blue slip procedure is an important procedure for the House to use. And Mr. Onek asked, well, why was it not used? Well, he was the counsel to Speaker Pelosi at the time, and he knows very well. The bill came over from the Senate. Speaker Pelosi said we have to pass the bill——

Mr. GOHMERT. Well, let me give you a little help there. Actually what had happened, the House had originated a bill——

Mr. KAMENAR. That is correct, a different bill.

Mr. GOHMERT [continuing]. An Obamacare bill, and it passed the House under Speaker Pelosi's leadership. And I have senators tell me that actually they were told that, look, we are passing the Senate bill, but everybody knows this is not going to be the final bill, so we know you have some objections. Do not worry about it. Just vote for it, and we will clean it up later. And then, Scott Brown got elected so there was not going to be a chance for the Senate to vote for the House bill that originated in the House. So the only way they could do it was to conspire to subvert the Constitution.

But my time is running out, and I have one more question to ask. Here is the original H.R. 3590, "Be it enacted by the Senate and House of Representatives of the United States of America and Congress assembled." That is the enactment clause. And then it talks about the Service Members Ownership Tax Act of 2009. This is the bill. These are the topics that, this three-page bill. And then this starts by saying strike out all after the enacting clause. Tell me where in this bill any of these topics in this bill were ever

found. Any witness that cares to tackle that, point me out anything in the new bill that was in the old bill. Mr. Schmitz?

Mr. SCHMITZ. I cannot speak necessarily to some of this, but I can say on the history of the clause, that sort of amending procedure was never contemplated by the public when they signed as on other bills when they ratified it. I can find the entire documentary history of the ratification of the Constitution where a member in the Virginia legislature, an Anti-Federalist, or in the debates contemplated the fact that the Senate might abuse the amending power by trying to turn it into an origination power.

And luckily, during that debate Madison just so happened to be there. And he responded to the criticism that the Senate might abuse this amending power and turn it into an origination power. And he said to the criticizing member, there is an ambiguity in the clause, and he said somewhat dismissively, he said, "the first half of the clause is sufficiently expressed as to exclude all doubt," i.e., all revenue raising bills will originate in the House of Representatives. That was the one time this was brought up among 34 different instances in the debates.

I researched it, and when it was brought up, Madison himself, who called this power the most complete and effectual power with which any Constitution can arm the immediate representatives of the people for obtaining a redress of grievances, he dismissed it and said the first half of the clause is sufficiently expressed to exclude all doubt. The ratifying public had no idea. They would never have expected that that amending procedure would have occurred and that they were consenting to that. And furthermore, it was illegal under the Continental Congress since 1781.

Mr. FRANKS. Thank you, Mr. Gohmert. Thank you, Mr. Schmitz.

Mr. GOHMERT. Mr. Chairman, I take it by the lack of the witnesses to be able to point out any topic in here that amended anything in our little 3590 bill, there is no such amending topic. And I yield back.

Mr. FRANKS. Thank you, sir. And I now recognize Mr. Nadler for 5 minutes. Sorry, I did not know which of you came in first.

Mr. COHEN. Well, he is the Ranking Member emeritus.

Mr. FRANKS. The Ranking Member emeritus.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, this frivolous hearing is just another misguided attempt by the majority to undermine and discredit the Affordable Care Act. Despite the best efforts to sabotage it by the majority across this country, implementation of the law carries on. And my friends on the other side of the aisle can no longer ignore the great good that the Affordable Care Act is doing for the American people.

The uninsured rate has now dropped to 15.6 percent. 8 million Americans have enrolled in comprehensive and affordable private health insurance coverage through the Federal exchange. 5 million more Americans have enrolled in private ACA compliant insurance plans. 3 million young adults gained coverage by being able to stay on their parents' plans. 3 million more people enrolled in Medicare and CHIP as of February compared to before the marketplaces opened. 129 million Americans with pre-existing health conditions, including up to 17 million children, no longer have to worry about being denied coverage or charged higher premiums due to their

health status. 108 million Americans have received free preventive services, and 7.9 million seniors in the donut hole have already saved $9.9 billion in their prescription drugs, an average savings of $1,265 per person.

So while I certainly appreciate as an academic exercise this abstruse lesson in the history of the Origination Clause, I speak for the millions of Americans benefitting from the law today in urging my colleagues to move on and address the real issues facing this country.

Constitutionally, this is a frivolous hearing. The three witnesses for the majority have cited no court cases. We hear very interesting testimony, and I am going to read more about the Origination Clause in the Constitutional Convention and the debates in the Federalist. I find it fascinating. But essentially, and let me ask Mr. Onek if I am right in saying that the three witnesses of the majority are asking us to ignore two centuries of Supreme Court rulings and precedents on these questions, all of which point to the fact that there is simply no real constitutional question here. Mr. Kamenar said that the judge was wrong. But the judge was ruling pursuant to every single case that has been decided that I am aware of in the last two centuries. Am I correct, Mr. Onek?

Mr. ONEK. That is correct. And Mr. Schmitz said, well, the Framers wanted to cover the raising of revenues. There was no primary purpose, nothing about incidental revenues. But of course, the three leading Supreme Court cases on that particular point have gone precisely the other way. They have said that certain taxes, which are taxes under the taxing power, are nevertheless not taxes for purposes of raising revenue within the meaning of the Origination Clause.

Mr. NADLER. And that is well established. It is also well established that the Senate can amend to its heart content, and that there is no germaneness requirement, correct, Mr. Onek?

Mr. ONEK. I believe that is absolutely correct.

Mr. NADLER. And despite the histrionics by Mr. Gohmert, is it not correct that the precise manner of amending a House bill used by the Senate has been used many times before and upheld by the courts?

Mr. ONEK. It has been used many times before——

Mr. GOHMERT. Nothing like this.

Mr. ONEK. It has been approved in other cases. There is no Supreme Court that specifically has looked at a situation like this. But I do think it is very, very clear when a constitutional provision says that the Senate can make amendments as on all other bills, then that is the answer.

Mr. Gohmert lifts up the big bill, but, in fact, if this was not a revenue bill, if this was some other kind of bill, the Senate could do it and does do it. And that is what the Constitution says, "as on other bills." There is nothing wrong with substituting and amending.

Mr. NADLER. Thank you. Let me ask either Mr. Schmitz, Mr. Kamenar, or Gaziano, have the Supreme Court and the Congress been simply misinterpreting the Origination Clause for the last 200 years? Should courts and Congress simply ignore more than a cen-

tury of precedent based on your interpretations of constitutional history?

Mr. GAZIANO. The Supreme Court's precedents are very clear that this is unconstitutional. The Supreme Court and no court has ever upheld the "gut-and-substitute" provision, nor could they ever. And the Supreme Court——

Mr. NADLER. Excuse me. Wait a minute. You said the Supreme Court had made clear this is unconstitutional. When has it done so?

Mr. GAZIANO. This type of amendment is unconstitutional. And in all of its decisions, it has explained that this type of non-germane amendment. And by the way, all of our testimony is full of all the cases that, Supreme Court and otherwise, that say that an amendment must be germane.

Mr. NADLER. Basically germane.

Mr. GAZIANO. But a non-germane amendment is unconstitutional.

Mr. NADLER. Mr. Onek, would you comment on the germaneness? In other words, Mr. Gaziano is saying that the Supreme Court has required germaneness for amendments.

Voice. They did require germaneness in——

Mr. NADLER. Mr. Onek, is that correct?

Mr. ONEK. No. There is one case that mentioned it in passing.

Mr. GAZIANO. The most recent one in——

Mr. NADLER. Excuse me. I asked Mr. Onek. Go ahead.

Mr. ONEK. No, they have not required germaneness, and how could they constitutionally?

Mr. NADLER. Because?

Mr. ONEK. Article 1, Section 5 says the House and Senate make their own rules. The Supreme Court cannot or the courts cannot tell the Senate whether it has to have germane rules or not. They cannot tell the House of Representatives whether they have to have germane——

Mr. NADLER. Thank you. Let me before my time expires say one sentence. I think that this is frivolous. I think the arguments are frivolous, but the Court will decide. Mr. Sissel is in court. Mr. Kamenar, I think, is representing him. That is the proper way to do it. The courts will decide. And we should in Congress be seeking to do the business of the American people instead of holding frivolous hearings and commenting on court decisions that are not going anywhere. I yield back.

Mr. FRANKS. Thank you. You know, I guess that my conclusion here is if the Senate can do what they did, then we can tear the Origination Clause out of the Constitution. And if it is frivolous for the Constitution Committee of the House of Representatives tries to prevent that, then count me frivolous. And with that, I would recognize Mr. King for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I appreciate you holding this hearing, and the frivolous remark is troubling to me as well. I was thinking about the language that comes out of the other side of the aisle from us and how they tend to shape themselves in defense of our President no matter what kind of a thing he might assert.

And I remember the statement he made to the public and reiterated in his last State of the Union Address when he said I have a pen and I have a cell phone, and if Congress does not act, I will. It is not so much what he said. It was all the Democrats stood up and applauded the constitutional authority that is granted to them in Article 1 being usurped by the President of the United States right in the very front of them in a State of the Union Address. So I am not very moved by the constitutional arguments that I hear from my colleagues these days having seen that demonstration of them leading the standing ovations.

However, I would turn to Mr. Onek, and I note some of the things in your testimony. The primary purpose of the individual mandate is not to raise revenue. I was also listening to the President in the passage debate period of time of Obamacare, and I, like, Mr. Gohmert have a lot of trouble saying "affordable care act." I think that is a misnomer, and I have said that George Washington could not have uttered those words.

But the primary purpose of it, as you said, was so that individuals will buy insurance. The President said I will not sign a bill that increases the deficit by one dime. So this needed to match the CBO score. It needed to match the actuarial figures. If it raised one dime, the fine, the penalty, the tax for the individual mandate, then that was a qualifier for the President to sign the bill. And do you have an estimate of how much revenue was raised or is projected to be raised, Mr. Onek?

Mr. ONEK. You mean by the mandate?

Mr. KING. Yes, by the individual mandate.

Mr. ONEK. Well, in fact, although I do not think it is relevant, it does not raise revenue. It loses money. Last March——

Mr. KING. Wait a minute. We are talking about revenue. We are not talking about a balance sheet here. And so, if you are going to force people to pay an IRS tax bill, that is raising revenue. I think we have to agree with that here.

Mr. ONEK. I believe——

Mr. KING. And so, can we agree that it raises more than dime?

Mr. ONEK. It does indeed, but, in fact——

Mr. KING. And so, we would agree that that helped fill the score sheet up so that the President could keep his word this time.

Mr. ONEK. No.

Mr. KING. Well, okay. I probably got in dangerous territory when I said the President would keep his word.

Let me move on. Each House shall determine the rules of its proceedings. And your statement is that the blue slip is not reviewable by the courts because each House determines the rules of its proceedings. Now, what is your resolution of this when the House and the Senate get into an impasse? Who then resolves that?

Mr. ONEK. It does not. If the House issues a blue slip, then the bill does not pass, and the people ultimately judge that decision.

Mr. KING. If the House determines by the rules of its proceedings that we simply, let us say, suspend the actions of the Senate and operate on our own. There are a number of hypotheticals. They are all in Mr. Gaziano's head. I heard them all stream out here.

I will turn to you, Mr. Gaziano. Can you imagine a scenario by which there would be a deadlock between the House and the Sen-

ate because the rules of the proceedings were in conflict with each other? How then would that be resolved if the courts cannot hear the case? And your testimony was that the Congress and the courts should be involved.

Mr. GAZIANO. Absolutely. And my bigger concern is what if the House is just in a particular mood and goes along with it? What if the House passes a rule that deems a majority to be two-thirds for overriding of a presidential veto? The House wants to override that veto. We all agree the courts would have to resolve that.

What if the House passed 160 one-house vetoes, and they were just loving it? Well, actually they did do that. And the Supreme Court said, your rules that we cannot review are your internal ones, but not the constitutional rules. The two-thirds-vote requirements, the Origination Clause, the Bicameralism and Presentment Clause, those are constitutional. The courts have to enforce those.

Mr. KING. So your testimony is both the courts and the Congress would be engaged in——

Mr. GAZIANO. Well, the Congress, if it does its job—I think Mr. Onek is right about one thing. If the House does its job, it will never ever create a case of a bill passed unconstitutionally. But the courts are around for bills that are unconstitutional. So the Obamacare act, for example, this body's desire to pass the law before you read it, that was just an illegal procedure. And the House cannot acquiesce in a violation of the Constitution of that nature.

Mr. KING. Thank you, Mr. Gaziano. Mr. Chairman, I appreciate it and yield back the balance of my time.

Mr. FRANKS. I thank the gentleman, and I will recognize Mr. Johnson for 5 minutes.

Mr. JOHNSON. Thank you. Mr. Onek is a graduate of the Harvard University, the Yale Law School. When he came out of law school, he clerked for a United States Supreme Court justice. He has served in high positions including the counsel to the President, I believe. And he has served in the legislative branch as a senior counsel to the Speaker of the House. Those are all high-level positions. Would you agree, Mr. Schmitz, that it would be in error to characterize the legal position of Mr. Onek's on this particular matter as preposterous? Would you disagree with that?

Mr. SCHMITZ. No, not based on what you said, Congressman.

Mr. JOHNSON. So in other words, his position is not preposterous, correct?

Mr. SCHMITZ. Not based off his past occupation.

Mr. JOHNSON. And would you agree with that, Mr. Kamenar? Would you agree that his position is not preposterous, yes or no?

Mr. KAMENAR. It is preposterous under the Constitution.

Mr. JOHNSON. All right. Okay.

Mr. KAMENAR. We are doing a reverse ad hominem.

Mr. JOHNSON. How about you, Mr. Gaziano?

Mr. GAZIANO. Much of what he says is very interesting, but the important parts are very preposterous.

Mr. JOHNSON. Preposterous, okay. All right. So we have got some guys who probably could not carry Mr. Onek's briefcase to the U.S. Supreme Court who say that his position is preposterous. And I think that is preposterous, and I salute you, Mr. Schmitz

Mr. GAZIANO. If I could clarify——

Mr. JOHNSON. I have got the floor, sir. Thank you. Now, listen, Mr. Kamenar, you said that Justice Roberts issued a novel opinion on the constitutionality of the Affordable Care Act because he found that it was a constitutional use of legislative authority under the taxing authority.

Mr. KAMENAR. Correct.

Mr. JOHNSON. Not the——

Mr. KAMENAR [continuing]. Commerce clause.

Mr. JOHNSON [continuing]. Commerce clause. But now you are arguing that this is a revenue raising bill, which is a part of the taxing authority.

Mr. KAMENAR. That is correct.

Mr. JOHNSON. Okay. Was there any issue raised during the legislative debate, which was at least a year—which was longer than a year—on the Affordable Care Act before it passed. Were there any senators on your side of the aisle who argued that the Affordable Care Act under the way that it was presented back to the House was a non-germane amendment?

Mr. KAMENAR. Was what kind of an amendment?

Mr. JOHNSON. Was the amendment of the House bill sent to the Senate and then sent back to the House as the Affordable Care Act——

Mr. KAMENAR. Right. Right.

Mr. JOHNSON [continuing]. Were there any objections raised by Republicans senators about germaneness?

Mr. KAMENAR. Well, they raised objections by not voting for it.

Mr. JOHNSON. Well, did they actually raise the objection?

Mr. KAMENAR. I am not aware of it, but——

Mr. JOHNSON. All right. Now, let me ask this question. Did anyone in the House of Representatives raise the germaneness issue?

Mr. GAZIANO. It was not thought to be a tax. The Senate said it was a penalty. The President said it was a penalty. Why would the House blue slip something that everyone thought was a penalty? I submit the Supreme Court still got it wrong. Chief Justice Roberts still got it wrong, but we are faced with the fact that now that is the opinion of the Supreme Court.

Mr. JOHNSON. Let me ask you this. Let me ask you this then. How would that wrongness be any more preposterous than failing to find that Congress had the power under its ability to regulate interstate commerce to legislate the Affordable Care Act? How is it any more preposterous than that?

Mr. GAZIANO. Well, the fact is it is either unconstitutional for one reason or it is unconstitutional for another. And given that the Supreme Court said it is only constitutional if it is a tax, we now have to do determine whether it is the type of tax that is constitutional or not, and it just is not.

Mr. JOHNSON. Last but not least, should the Court be the arbiter or whether or not an amendment to a House bill is germane or not, or should not that be the power of the legislative branch to do? Mr. Onek?

Mr. ONEK. I believe that clearly under the separation of powers doctrine and, more specifically, under Article 1, Section 5, the Senate and the House should make that decision. The House could have blue slipped this bill. Mr. Gaziano says, oh, they did not know

the mandate was a tax. But, of course, in their briefs they say there were a hundred taxes in the bill or whatever number. So there were plenty of other provisions they could have said were taxes. But they did not blue slip the bill.

Mr. KAMENAR. How can a minority blue slip?

Mr. JOHNSON. For me it is just simply another opportunity that the Republicans are taking to try to do away with the Affordable Care Act. And I will relinquish the balance of my time. Thank you, Mr. Chairman.

Mr. FRANKS. Thank you, sir. Just for the record, the Origination Clause that has been talked about here today was originally to make sure that the taxing power was closest to the people. That was its purpose. And if the Supreme Court enforces it and upholds that, it will return that taxing power closer to the people. My comments were that Mr. Onek's testimony was that if the Court got involved and did that, that it would take it away from the people. That is what I found preposterous, and I do not have the vocabulary to think of a word that more accurately reflects my conviction. So I stand by that.

And with that, I would now recognize Mr. DeSantis for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman. Thanks for the witnesses. Mr. Onek, when you started your testimony, you had made reference to the reason why the Senate had not sent over the Gang of Eight immigration bill. So do you acknowledge that the Gang of Eight immigration bill, because it has revenue raising measures, violates the Origination Clause of the Constitution?

Mr. ONEK. I am not an expert on the bill, so I do not know that. But at least it is my understanding that there is a concern in the Senate, and, therefore, that is why they have not sent it over. And based on that, it demonstrates that the Origination Clause lives. It lives.

Mr. King has left, but he is an expert on immigration. I am sure that if the bill came over, he would be leading the fight for the blue slip, and it shows the Origination Clause is not a dead letter. It lives. That is my point.

Mr. DESANTIS. All right. So bottom line is if there are taxes in there, you would acknowledge that that is an Origination Clause problem.

Mr. ONEK. I obviously would have to look at the particular taxes and so on, but in general if the Senate passes a bill with tax provisions——

Mr. DESANTIS. I think there are, like, tens of billions of dollars of different revenue.

Mr. ONEK [continuing]. That creates a——

Mr. DESANTIS. All right. Well, I just wanted to see that because, you know, obviously you were invited by the minority, but I think when those witnesses are able to acknowledge maybe some problems with some of the political platforms of those who brought them, I think it gives them a little more credibility.

Now, if the House were to pass a similar bill to what happened in 2009, say, a tax credit for veterans bill, could the Senate strip that entirely and substitute a 20 percent national vet tax, and would that be constitutional or would that violate the Origination

Clause? And I will let you go, Mr. Onek, but any witness. I mean, if you could kind of give me your take on that.

Mr. KAMENAR. I do not think it would, of course, but Mr. Onek said it would because they can amend as on any other bills. So your example, he would agree that you could take any House bill that raises a dime and throw in a $500 billion tax bill, a corporate tax, inheritance tax, Obamacare tax, whatever. That is the logic of their argument.

Mr. ONEK. And the logic is that the courts cannot intervene. Nothing, of course, would stop the House from simply not passing the Senate bill. It does not even need a blue slip. It can just not pass it. The House does not pass lots of Senate bills and vice versa. Or, more specifically, it could use the blue slip——

Mr. DESANTIS. But if it is controlled by the same party——

Mr. GAZIANO. But in every one of Mr. Onek's examples is as if the House did its job. The courts could not act, and I agree with that. But the question we have here is what if the House is controlled by a party that is interested in violating the Constitution—let us just take that as a hypothetical—and accepts a 2,074-page bill that was supposedly a complete "gut-and-strip" of its six-page unrelated bill, what happens then? Then of course the Supreme Court has said that the courts are obligated to take that case.

In *Munoz-Flores* in 1990—I should say earlier in *Flint v. Stone*—of course the Supreme Court said there is a germaneness requirement because the Origination Clause would be empty if there was no Origination Clause. It would be a dead letter if there was no germaneness test.

And so, in *Munoz-Flores*, the Supreme Court said we conclude initially that this case does not present a political question, and, therefore, reject the government's argument that the case is not justiciable. Then if they took your hypothetical, sir, they would have to strike it down because there was nothing in the original bill that was remotely germane to a 20 percent back tax.

Mr. DESANTIS. And I think part of the problem is that a lot of folks in this body I have found, and I was not here for the Obamacare debate, you know, when it comes to the Constitution they basically say, well, look, you know, we do what we want in Congress until the courts stop us. So they are kind of having it both ways in some of this, that they do not have an independent duty. I think we have an independent duty to follow the Constitution. If we have a bill that violates the Constitution, we are obligated to vote no on that.

Now, I think what happened here, and my response to Mr. Onek would be, the House did not have to pass Obamacare. I mean, after all there was the Senate bill. But the political context is very different. I mean, it originated a different bill in the House—and I was not in Congress then, but I was following this—that did not have the votes in the Senate. So then the Senate did their own bill, 60 votes, Christmas Eve, got something through. And they were going to try to merge them somehow and come up with something.

But Scott Brown got elected in Massachusetts. Wow. I mean, one of the most liberal States in the country, they elect a Republican to the U.S. Senate to fill Ted Kennedy's seat because they did not like what they were seeing with what was going on with what

would soon be Obamacare. So the House, and people like Nancy Pelosi——

I mean, look, this is a progressive thing that they wanted for decades. And so they are left with you either take the Senate bill or you lose. And the Origination Clause, I do not think that was even something they were worried about in the slightest. I think it was we have this here. We are going to pass it. Of course, they used budget reconciliation in the Senate to get the amendments through.

So the Origination Clause was just given shrift by the folks in the House. They chose doing this based on the politics of the moment. I think it was the wrong decision, but I do not think we had the lively debate that we should have. And I yield back.

Mr. FRANKS. Well, this has been certainly a very interesting discussion, to say the least. And I want to thank all of the Committee Members for attending, and I want to thank all of the panelists. Mr. Onek, regardless of my disagreement with you, sir, I genuinely respect and appreciate your presence here today.

Mr. ONEK. Thank you very much.

Mr. FRANKS. And with that, it does conclude today's hearing. And again, I thank you all for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And I do thank the witnesses again and thank the Members and the audience. And the hearing is adjourned.

Voice. Thank you.

[Whereupon, at 11:31 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice

This is my first hearing as Ranking Member of the Subcommittee on the Constitution and Civil Justice. I am honored to serve as Ranking Member and look forward to working with Chairman Trent Franks, who I had the pleasure of working with back in the 111th Congress when I was chairman of the Subcommittee on Commercial and Administrative Law and he was the Ranking Member.

Today's hearing is titled "The Original Meaning of the Origination Clause." We can all agree that the Origination Clause plays an important role in ensuring that the House of Representatives—the "People's House"—has the first say when it comes to bills related to revenue. As the chamber that most directly represents the people, this is as it should be.

But, we must also remember that the Constitution reflects a series of political compromises made by the Framers to ensure that the competing interests of various states and regions were addressed.

Foremost among these is the makeup of Congress itself. The structure of the House, with its proportional representation and two-year terms, favors states with large populations. Small-state interests, meanwhile, are protected by the structure of the Senate, where all states have equal representation regardless of size.

The Origination Clause, as currently drafted, reflects this balancing of interests. While giving the House exclusive authority to originate "Bills for raising Revenue," the clause also gives the Senate broad leeway to "propose or concur in amendments as on other Bills."

This balance has largely worked. Through more than a century of judicial and congressional interpretation and enforcement, the House's prerogative to originate not only revenue-raising bills, but all bills relating to revenue, is clearly established. At the same time, the Senate's broad authority to amend any revenue bill is also clearly established.

Some observers, however, believe that the Origination Clause is in peril. In particular, these observers, including some of our witnesses today, allege that Congress did an end-run around the Origination Clause when it passed the Patient Protection and Affordable Care Act and, in particular, its "individual mandate" and the related "shared responsibility payment."

As will be made more evident during our discussion today, neither the facts nor the law support that assertion. Supreme Court precedent and congressional practice make clear that a bill with a primarily non-revenue purpose is not a bill "for raising Revenue" within the Origination Clause's meaning, even if the bill raises revenue, so long as the revenue supports a government program.

Here, as the Supreme Court concluded in 2012 in *National Federation of Independent Business v. Sebelius,* the Affordable Care Act had the primary purpose of, among other things, expanding health insurance coverage.

And the individual mandate and shared responsibility payment was the key to meeting this goal.

I note that today's hearing is taking place a little over a week before the U.S. Court of Appeals for the District of Columbia Circuit hears oral arguments in *Sissel v. HHS,* where the plaintiff challenges the constitutionality of the Affordable Care Act on Origination Clause grounds. I question whether it is the best use of resources for this Subcommittee to be holding this hearing on a matter that is still pending before the federal courts.

Nonetheless, I look forward to our discussion and I thank the witnesses for their appearance today.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Although the official title of today's hearing is "The Original Meaning of the Origination Clause," the real objective of this hearing is to provide yet another opportunity for opponents of the Patient Protection and Affordable Care Act to attack this duly enacted law.

In fact, there already have been 54 attempts in the House to repeal the Act. This is *in addition* to the numerous hearings that various committees in this body have held on the same subject matter.

Today's hearing, which attacks the Act's individual mandate and related "shared responsibility payment" provisions on the basis that they violate the Constitution's Origination Clause, is a particularly fruitless undertaking for several reasons.

For example, let's begin with the fact that the Constitution's Origination Clause does not even apply to the Act.

The Clause requires that "Bills for raising Revenue shall be originated in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills."

But based on more than a century of judicial and Congressional precedents, it is absolutely clear that the Act's individual mandate requirement presents no Origination Clause problem.

This is because measures with primarily non-revenue purposes—even if they contain provisions that would raise revenue—simply are not "Bills for raising Revenue" within the meaning of the Clause, as the Supreme Court has made abundantly clear.

As recently as its 2012 decision upholding the constitutionality of the Act in *National Federation of Independent Business v. Sebelius,* the Court specifically held that the Act's individual mandate was *not* a "Bill[] for raising Revenue" under the Origination Clause.

It reasoned that Congress' taxing power "is often, very often, applied for other purposes, than revenue." The Court found that that the primary purpose of the Act's individual mandate and of the Act generally was, among other things, to expand health insurance coverage.

And, even if we were to assume that the Origination Clause somehow applies to the Affordable Care Act, the measure does not violate the Clause's requirements.

Even a cursory review of the legislative history of the Act establishes this fact.

The House measure that the Senate amended to add the text of its version of the Affordable Care Act was a revenue bill. As explicitly authorized by the Origination Clause, the Senate then had broad authority to replace the underlying House-originated revenue bill with its measure.

Not surprisingly, the District Court rejected an attack on the Act for purportedly violating the Origination Clause for these very same reasons.

Finally, rather than wasting time on yet futile another attack against the Affordable Care Act, this Committee should be focusing on the real, not imagined, problems that Americans desperately want addressed.

These include:

- fixing our Nation's broken immigration system;
- solving the problem of crushing student loan that results in virtual debt peonage for our young people; and
- creating more job opportunities by strengthening the competitiveness of our Nation's businesses.

Instead, we will spend this morning addressing phantom issues created by the Act's opponents in an effort to derail the law, this time under the guise of constitutional analysis.

I again urge my colleagues on the other side of the aisle to spend the remaining time left in this Congress to focus on real issues.

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