

**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”
JANUARY 13, 2016**

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 of 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 with Joseph E. Schmitz representing Chairman Trent Franks and some 45 other House Members in a brief *amici curiae* in the Origination Clause case supporting a petition for writ of certiorari pending before the United States Supreme Court in *Sissel v. HHS*, No.15-543. We also filed a similar brief when the case was before the U.S. Court of Appeals for the D.C. Circuit. I also testified before this Committee on April 29, 2014 on this same topic. Today’s hearing is all the more timely because the Supreme Court is scheduled to decide this Friday, January 15, 2016, whether or not they will hear this important constitutional case. That case 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. 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.

Origination Clause: History and Interpretation¹

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 Br. J. Am. Leg. Studies 71 (2014). A copy of that article is submitted for the record.

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 Reprs. 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 intrabranched separation of powers between the House and Senate on revenue raising bills further ensures our liberty as the Supreme Court has reminded us.

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

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).

reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.

Power of Senate to Amend Revenue Raising Bills

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” provided in the second part of that clause – 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 non-revenue raising 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*.⁷

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).

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*,

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. Worse still, the clause would be rendered a nullity if the Senate could propose legislation raising all manner of taxes and ascribe a legislative purpose for doing so, such as improving health care, and claim that the bill is not a bill *for* raising revenue, but a bill *for* improving health care. Remarkably, this specious “purposiveness” test was adopted by the D.C. Circuit in the *Sissel* case that is pending review in the Supreme Court. It would indeed come as a surprise to our Founders that what they regarded as this “paltry right of the Senate to propose alterations in money bills”⁸ has been elevated to major power that usurps the sole power of the House. A Senate thus unrestricted 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.

Judicial Interpretations of the Origination Clause

The Supreme Court 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).⁹ 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.

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, in July 2015, Chairman Trent Franks introduced, and Representative Louie Gohmert along with 15 other Members of Congress have co-sponsored, H. Res. 392 in July 2015, that expresses the Sense of the House of Representatives that the ACA “violates article I, 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.” This resolution is a functional equivalent of a blue slip.

⁸ Letter from James Madison to George Washington (Oct. 18, 1787), in 10 *The Papers of James Madison Digital Edition* 196 (J.C.A. Stagg ed., Univ. of Va. Press, 2010).

⁹ 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).

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 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.”¹⁰ 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. *Id.*¹¹

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.

¹⁰ *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).

¹¹ 495 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/>

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.

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*¹² and *Millard v. Roberts*¹³, 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 'Bil[l] for raising Revenue.'

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 appeal in *Sissel v. HHS*.

Sissel v. HHS

In *Sissel*, the plaintiffs challenged the constitutionality of the Affordable Care Act under the Origination Clause, arguing that the law and its revenue raising measures, including the individual mandate penalty that the Supreme Court ruled was a tax, originated in the Senate rather than the House. The legislative history of the ACA is rather simple. 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 as the "Senate Health Care Bill," which included 17 specifically denominated revenue provisions, including the penalty 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 this "gut and replace" bill would

¹² 167 U.S. 196 (1897).

¹³ 292 U.S. 429 (1906).

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 only the original H.R. 3590 number affixed to it back to the House, whereupon it was rushed into passage by the Democratic controlled House without a single Republican vote. On March 23, 2010, the President signed “The Patient Protection and Affordable Care Act,” Pub. L. 111-148 (hereinafter “ACA”), otherwise known as “Obamacare.”

Congressional *amici* argued in the D.C. Circuit that the ACA was a bill for raising revenue that 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” whereas the Senate text constitutes “original text.”¹⁴

But even if the ACA had originated in the House, the Senate’s legerdemain of substituting the House tax credit bill for veterans with the massive 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 since it provided for tax credits, and (2) even if it were a revenue raising measure, 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.*” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2598 (emphasis added). In other words, while the 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*.

In a remarkable decision by the three-judge panel of the D.C. Circuit in *Sissel*, that court held that the ACA, despite the \$500 billion in taxes, was not even a bill for raising revenue because the *purpose* of the ACA was to improve health care, not to raise taxes. 760 F.3d 1 (D.C. Cir. 2014). The panel’s concoction of its hitherto unknown ‘primary purpose’ test is not embodied in Supreme Court precedent as the panel mistakenly concluded. If allowed to stand, the Senate could easily circumvent the Origination Clause by ascribing another regulatory or legislative “purpose” to any revenue raising bill, thereby rendering the Origination Clause a dead letter.

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

As Circuit Judges Kavanaugh, Henderson, Brown, and Griffith noted in their dissent from the denial of *en banc* review of that decision, “[t]he panel opinion sets a constitutional precedent that is too important to let linger and metastasize.” 799 F.3d 1035 (D.C. Cir. 2015). These four judges properly observed that, “the Act imposed numerous taxes to raise revenue. Lots of revenue. \$473 billion in revenue over 10 years. It is difficult to say with a straight face that a bill raising \$473 billion in revenue is not a ‘Bill for raising Revenue.’ ” *Id.*

Having rightly concluded that the panel opinion’s primary purpose test “to exempt the \$473 billion Affordable Care Act from the Origination Clause is a textbook example of missing the forest for the trees,” the dissenting judges nonetheless wrongly concluded that “the relevant Supreme Court case law forecloses the germaneness requirement advanced by Sissel,” and, notwithstanding the Senate’s “gut and replace” amendment, the “Affordable Care Act originated in the House.” In short, the dissent would render the Origination Clause a nullity by allowing the Senate to use its “paltry right” to “amend” any House measure dealing with revenue by replacing it altogether with a massive tax bill having nothing to do with the original House bill.

In a rejoinder, the original panel, which ruled that the ACA was not even a bill for raising revenue, vigorously countered that the dissent’s position on the scope of the Senate’s amendment power would render the Origination Clause an “empty formalism.” In short, both the original panel and dissenters were both right and both wrong. The original panel was wrong to conclude that the ACA was not a bill for raising revenue but right to conclude that if it were, it could not “gut and replace” a House revenue bill. The dissenters were right to conclude that the ACA was indeed a bill for raising revenue, but wrong to conclude that the Senate could use its “paltry right” to amend House revenue raising bills to “gut and replace” the House bill with a non-germane substitute revenue bill raising \$500 billion in new taxes.

Conclusion

It is abundantly clear that the conflicting opinions by the circuit judges in *Sissel* on the meaning of both parts of the Origination Clause cry out for Supreme Court review. Unfortunately, many Court observers believe that the Court, having upheld the individual mandate penalty as a tax in *NFIB* and the subsidies for federally-run insurance exchanges in *King v. Burwell*, 135 S.Ct. 2180 (2015), will shirk its responsibility and deny review when it is scheduled to meet in conference this Friday. Regardless of one’s opinion of the merits of the case, it would be a tragic mistake for the Court to let the D.C. Circuit’s decision “linger and metastasize” as the dissenters put it.

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.