

Written Testimony for
“The Original Meaning of the Origination Clause”
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For the House of Representatives,
Committee on the Judiciary
Subcommittee on The Constitution and Civil Justice

Submitted by Joseph Onek
Principal at the Raben Group
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Testimony of Joseph Onek on the Origination Clause and the Affordable Care Act
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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> [hereinafter “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

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.

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 rules¹⁶ 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.

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).