RECENT CASES

CONSTITUTIONAL LAW — ORIGINATION CLAUSE — D.C. CIRCUIT REAFFIRMS THAT AFFORDABLE CARE ACT FALLS OUTSIDE SCOPE OF THE ORIGINATION CLAUSE BY DENYING PETITION FOR EN BANC REVIEW. — *Sissel v. United States Department of Health & Human Services*, 799 F.3d 1035 (D.C. Cir. 2015).

Article I, Section 7, Clause 1 of the Constitution, known as the Origination Clause, reads: "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] Recently, in *Sissel v. United States Department of Health & Human Services*,[2] the D.C. Circuit held that the Patient Protection and Affordable Care Act[3] (ACA) was not a bill "for raising Revenue" implicated by the Origination Clause.[4] In August 2015, the D.C. Circuit denied a petition to rehear the case en banc over a lengthy dissenting opinion from Judge Kavanaugh.[5] Judge Kavanaugh argued that the ACA was a bill "for raising Revenue" that lawfully originated in the House, even though the Senate took a House bill and amended it by striking its text in its entirety and inserting the ACA.[6] In rejecting Judge Kavanaugh's reasoning, due in part to worries that it would "be perceived as judicial endorsement of treating the Origination Clause as empty formalism,"[7] the judges of the original D.C. Circuit panel strongly suggested that the question of whether a bill originated in the House is justiciable — and hinted that the Origination Clause imposes *substantive* limitations on the Senate's ability to amend a bill without altering its origination in the House.

In an effort to expand individual access to healthcare, the ACA requires individuals to maintain health insurance (or else pay a shared-responsibility payment),[8] provides tax credits to low-earning households,[9] and expands Medicaid to households with incomes below 133 percent of the poverty line.[10] In order to offset the budgetary impact of these reforms, the ACA imposed not only the shared-responsibility

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[1] U.S. CONST. art. I, § 7, cl. 1.

[2] 760 F.3d 1 (D.C. Cir. 2014), *reh'g en banc denied*, 799 F.3d 1035 (D.C. Cir. 2015).

[3] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[4] *Sissel*, 760 F.3d at 10.

[5] *Sissel*, 799 F.3d 1035 (denying petition for rehearing en banc); *id.* at 1049–65 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[6] *Id.* at 1049 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[7] *Id.* at 1036 (Rogers, Pillard, and Wilkins, JJ., concurring in the denial of rehearing en banc).

[8] 26 U.S.C. § 5000A(a), (b)(1) (2012).

[9] *See id.* § 36B(a).

[10] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2012).

payment, but also a series of other taxes estimated to raise revenues of $473 billion over ten years.[11]

The ACA began as the Service Members Home Ownership Tax Act of 2009,[12] a bill introduced in the House of Representatives.[13] On October 8, 2009, the bill passed the House.[14] Upon receiving the bill, the Senate wholly replaced its contents with the ACA, which passed the Senate on December 24, 2009.[15]

Matt Sissel, an artist from Cedar Rapids, filed suit alleging, in relevant part, that the individual mandate of the ACA was unconstitutional under the Origination Clause.[16] The district court granted the government's motion to dismiss.[17] Judge Howell held that the individual mandate was not a bill "for raising Revenue" and therefore fell outside the scope of the Origination Clause.[18] Noting that the bill's purpose was critical to whether it was a revenue-raising bill, the court held that the ACA's primary aim was to encourage individuals to purchase health insurance, rather than to raise revenue to support government generally.[19] Although this determination was sufficient to decide the case, the district court additionally held that the ACA was an amendment to a bill that originated in the House and therefore would survive even if the ACA were an ordinary tax bill.[20] To reach this conclusion, Judge Howell relied upon a 1914 Supreme Court case, *Rainey v. United States*,[21] which rejected a requirement that Senate amendments be germane to the House-originated text.[22] Judge Howell

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[11] CONG. BUDGET OFFICE, SELECTED CBO PUBLICATIONS RELATED TO HEALTH CARE LEGISLATION, 2009–2010, at 21 tbl.2, 22 tbl.3 (2010). This figure excludes $52 billion raised as a result of the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, from the $525 billion raised in aggregate by both bills. CONG. BUDGET OFFICE, *supra*, at 22 tbl.3; *id.* at 21 tbl.2.

[12] H.R. 3590, 111th Cong. (as passed by the House of Representatives, Oct. 8, 2009).

[13] Sissel v. U.S. Dep't of Health & Human Servs., 951 F. Supp. 2d 159, 161 (D.D.C. 2013). That legislation sought to extend tax benefits to members of the military who are called to extend their duty and, independently, to increase the tax payments owed by corporations with assets in excess of $1 billion. *Id.*

[14] *Id.* The bill passed the House by a vote of 416 to 0. *Id.*

[15] *Id.* The bill passed the Senate by a vote of 60 to 39. *Id.* The House passed that version of the bill on March 21, 2010, by a vote of 220 to 211, and the bill was signed into law on March 23, 2010. *Id.*

[16] *Id.* at 161–62. Sissel also challenged the individual mandate on Commerce Clause grounds. *Id.* at 161. The district court held that this argument was foreclosed by *National Federation of Independent Business v. Sebelius*, *id.* at 166, and the D.C. Circuit panel reiterated this reasoning, Sissel v. U.S. Dep't of Health & Human Servs., 760 F.3d 1, 3 (D.C. Cir. 2014).

[17] *Sissel*, 951 F. Supp. 2d at 161.

[18] *Id.* at 169.

[19] *Id.* at 167–69.

[20] *Id.* at 169–70.

[21] 232 U.S. 310 (1914).

[22] *Sissel*, 951 F. Supp. 2d at 172 (citing *Rainey*, 232 U.S. at 317).

held that such a requirement would be satisfied even if it applied, because the original bill concerned revenue.[23]

The D.C. Circuit affirmed, albeit on narrower grounds. Writing for the panel, Judge Rogers[24] held that the bill was not "for raising Revenue,"[25] but did not reach the question of whether the ACA originated in the House. Judge Rogers also followed a purposive approach, relying upon *Twin City Bank v. Nebeker*.[26] *Nebeker*, a Supreme Court case from 1897, upheld the National Bank Act of 1864,[27] which imposed a tax on national banks in order to establish a national currency.[28] Most relevantly, *Nebeker* held "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue."[29] For additional support, the court cited *Millard v. Roberts*[30] and *United States v. Munoz-Flores*.[31] In both of those cases, the Supreme Court held that a tax to fund a particular program was not subject to the Origination Clause because the revenue raised was incidental to the bill's primary purpose.[32]

To apply the Court's purposive principle, Judge Rogers quoted *National Federation of Independent Business v. Sebelius*[33] (*NFIB*), in which the Court definitively noted that "[a]lthough the [shared responsibility] payment will raise considerable revenue, it is *plainly designed* to expand health insurance coverage."[34] Sissel also argued that the Origination Clause applied because the Court in *NFIB* upheld the individual mandate as an exercise of only the taxing power. Judge Rogers rejected this argument by challenging the assumption that all exercises of the taxing power are concerned with revenue generation.[35]

The D.C. Circuit subsequently denied a petition to rehear the case en banc[36] over a lengthy dissent written by Judge

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[23] *See id.* at 173.

[24] Judge Rogers was joined by Judges Pillard and Wilkins.

[25] *See* Sissel v. U.S. Dep't of Health & Human Servs., 760 F.3d 1, 10 (D.C. Cir. 2014).

[26] 167 U.S. 196 (1897).

[27] Ch. 106, 13 Stat. 99.

[28] *Sissel*, 760 F.3d at 7–8; *see also Nebeker*, 167 U.S. at 203.

[29] *Nebeker*, 167 U.S. at 203 (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 880, at 642 (5th ed. 1891)).

[30] 202 U.S. 429 (1906).

[31] 495 U.S. 385 (1990); *see Sissel*, 760 F.3d at 7–8.

[32] *See Munoz-Flores*, 495 U.S. at 399; *Millard*, 202 U.S. at 437. The tax in *Millard* raised revenue for construction of a railroad in Washington, D.C., *see id.* at 435, whereas *Munoz-Flores* addressed a special assessment paid by criminals to create a victims fund, *see* 495 U.S. at 398.

[33] 132 S. Ct. 2566 (2012).

[34] *Id.* at 2596 (emphasis added); *see Sissel*, 760 F.3d at 8.

[35] *See Sissel*, 760 F.3d at 9–10. Citing sin taxes as a counterexample, Judge Rogers noted that at least some exercises of the taxing power are aimed principally at influencing behavior rather than raising revenue. *Id.* at 9.

[36] *Sissel*, 799 F.3d at 1035.

Kavanaugh.[37] In a rare move, Judge Kavanaugh argued for rehearing despite agreeing with the outcome of the case, claiming that the ACA was subject to the Origination Clause, as a bill "for raising Revenue," but was constitutional nonetheless because the bill originated in the House.[38] The dissent challenged the panel's analysis of the ACA's purpose. It began by noting the many revenue-generating provisions of the ACA, characterizing the Act as, among other things, a "massive tax bill" projected to raise $473 billion in tax revenue over ten years.[39] These characteristics, according to the dissent, plainly made the ACA a bill "for raising Revenue."[40] More fundamentally, Judge Kavanaugh argued that the Origination Clause does not call for a primary-purpose inquiry.[41] Such an inquiry, he contended, would be futile, given the inherent difficulties in identifying a sole predominant purpose from a legislative process involving several hundred individuals.[42] The dissent then introduced an alternate interpretation of *Nebeker*, *Millard*, and *Munoz-Florez*: these cases represent an exception to the general principle that all bills that raise revenue are subject to the Origination Clause. Namely, laws that raise revenue designated for use in a specific program are exempt from the Origination Clause, whereas laws that raise revenue paid into the treasury available for general use are not.[43]

Ultimately, the dissent argued that the ACA is compliant with the Origination Clause since it originated in the House.[44] Judge Kavanaugh observed that the clause permits the Senate to "propose or concur with Amendments" to revenue bills just as it does "on other Bills," and since it is widely accepted that the Senate can generally amend House bills without regard to the germaneness of the amendment, the clause indicates that no germaneness requirement applies here either.[45] Most importantly, as the district court argued,[46] *Rainey* placed this particular question outside the purview of the court.[47]

The original panel — Judges Rogers, Pillard, and Wilkins — submitted a statement alongside Judge Kavanaugh's dissent defending their opinion and refuting the dissent's arguments. The statement argued that the dissent's designated-program principle misread the pre-

[37] Judge Kavanaugh was joined by Judges Henderson, Brown, and Griffith.

[38] *Sissel*, 799 F.3d at 1049 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[39] *Id.* at 1053.

[40] *See id.*

[41] *See id.* at 1054–55.

[42] *See id.*

[43] *Id.* at 1057–59.

[44] *Id.* at 1060.

[45] *See id.* at 1061 (quoting U.S. CONST. art. I, § 7, cl. 1).

[46] *See* Sissel v. U.S. Dep't of Health & Human Servs., 951 F. Supp. 2d 159, 172 (D.D.C. 2013).

[47] *Sissel*, 799 F.3d at 1062–63 (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also* Rainey v. United States, 232 U.S. 310, 317 (1914).

cedents: revenue designation is sufficient, but not necessary, to withstand Origination Clause scrutiny.[48] The panel also disputed the premises of Judge Kavanaugh's interpretation by explaining that the revenue raised in *Nebeker*, *Millard*, and *Munoz-Flores* did not raise funds exclusively for their respective tandem programs.[49] Finally, to decide the case by holding that the Origination Clause places no limit on the Senate's power to amend House-originated revenue bills "may be contrary to congressional practice or, relatedly, be perceived as judicial endorsement of treating the Origination Clause as empty formalism."[50]

On one level, *Sissel* sends a very strong message regarding the constitutionality of the ACA under the Origination Clause. Even the four dissenting judges reached the conclusion that the ACA is constitutional,[51] likely indicating unanimity across the D.C. Circuit. But the *manner* in which the case was decided may suggest consequences for future revenue-generating bills. In particular, the panel's deliberate avoidance of whether the bill originated in the House or Senate raises concern about the validity of shell bills.[52] And the panel's reluctance to be seen as treating the Origination Clause as "empty formalism" only underscores the implication that shell bills may become subject to substantive Origination Clause limitations.

Although Supreme Court precedent had firmly established that bills that only "incidentally create revenue" are exempt from the Origination Clause,[53] *Sissel* is the first case to determine that the clause does not apply to a piece of legislation that raises significant revenue for the general budget, and therefore the first case to unambiguously reject Judge Kavanaugh's plausible reading of relevant precedent.[54] In light of the D.C. Circuit's divided understanding of the scope of the Origination Clause, the *Sissel* court perhaps spoke most loudly

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[48] *See Sissel*, 799 F.3d at 1036–37 (Rogers, Pillard, and Wilkins, JJ., concurring in the denial of rehearing en banc).

[49] *Id.* at 1037–39.

[50] *Id.* at 1036.

[51] *See id.* at 1060 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[52] A "shell bill" is a bill that is introduced in the House in order to satisfy the Origination Clause's requirements, but whose entire content is later replaced in the Senate. *See, e.g.*, Rebecca M. Kysar, *The "Shell Bill" Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 661 & n.5 (2014).

[53] *See* Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897).

[54] In many ways, *Sissel* was a stylized vehicle for this doctrinal clarification. With the ACA's primary purpose already provided by *NFIB*, the court had no occasion to get into the weeds of identifying the primary purpose of revenue-generating legislation. *See* Sissel v. U.S. Dep't of Health & Human Servs., 760 F.3d 1, 8 (D.C. Cir. 2014). Given that "[e]very tax is in some measure regulatory," Sonzinsky v. United States, 300 U.S. 506, 513 (1937), and "taxes that seek to influence conduct are nothing new," *NFIB*, 132 S. Ct. 2566, 2596 (2012), there are certain to be much more difficult cases in the future.

through its approach. Recall that the district court decided the case on two independently sufficient grounds — that the bill was not "for raising Revenue" and that the bill originated in the House.[55] The panel, however, decided it was "clearest and narrowest" to decide that the bill was not "for raising Revenue" without reaching the latter question.[56] Given the controversial nature of the revenue-generation analysis, just how unclear and broad would the origination analysis have been? Particularly given that shell bills are so common,[57] the panel's decision not to simply provide a stamp of approval is best interpreted as placing the legislative practice on uneasy ground.

Although without formal significance, the *Sissel* panel's concern regarding turning the Origination Clause into an "empty formalism" may foreshadow unprecedented limits on the Senate amendment power over revenue-generating legislation. The Supreme Court has directly addressed this question only twice. In *Flint v. Stone Tracy Co.*,[58] the Court in 1911 held that a corporate tax, which began as an inheritance tax in the House, was constitutional.[59] As the *Flint* Court importantly noted, "[t]he amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose."[60] However, any specter of a germaneness requirement was called into question just three years later in *Rainey*. There, the Supreme Court held that, under similar circumstances, "the [tax] was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient. . . . [I]t is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill."[61] Although over 100 years old, *Rainey*'s direct prescription remains the latest word from the Supreme Court directly on the question, making the *Sissel* court's dance particularly noteworthy.[62]

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[55] Sissel v. U.S. Dep't of Health & Human Servs., 951 F. Supp. 2d 159, 174 (D.D.C. 2013).

[56] *See Sissel*, 799 F.3d at 1035–36.

[57] *See id.* at 1062 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (citing recent examples).

[58] 220 U.S. 107 (1911).

[59] *Id.* at 142–43.

[60] *Id.* at 143. The case failed to clarify whether this statement was necessary to the holding.

[61] *Id.* at 317 (quoting United States v. Billings, 190 F. 359, 371 (C.C.S.D.N.Y. 1911)).

[62] To further complicate the issue, in 1984 and 1985, a number of circuits denied Origination Clause challenges to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (codified as amended in scattered sections of 26 U.S.C.), which began as a tax-reduction bill in the House and was then replaced by tax-increasing legislation in the Senate. In contrast to Judge Howell and Judge Kavanaugh, each of these circuits relied on *Flint* to apply a lenient germaneness test but nonetheless uphold the Act, typically citing one another and never mentioning *Rainey*. *See* Tex. Ass'n of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 167 (5th Cir. 1985); Armstrong v. United States, 759 F.2d 1378, 1380–82 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203, 204–05 (8th Cir. 1985); Heitman v. United States, 753 F.2d 33, 35 (6th Cir.

The rationale behind the *Rainey* approach is similar to those principles served by the enrolled bill doctrine, first espoused in *Field v. Clark*.[63] There, the Supreme Court held that it would not examine congressional journals to confirm that a bill signed by the President was the same one to reach approval in both the Senate and the House.[64] Given the "respect due to coequal and independent departments," the judiciary was to take the word of the presiding congressional officers' attestations.[65] As Professor Rebecca Kysar argues, both *Field* and *Rainey* can be thought of as instances of a broader "legislative process avoidance doctrine," by which the Court defers to Congress on questions that would otherwise require searching inquiries into congressional procedure.[66] This doctrine can be understood, in part, as an extrapolation of the Rulemaking Clause[67] and is designed to serve separation of powers ends by recognizing the integral link between legislative procedure and lawmaking authority.[68]

However, to present the matter as settled law prior to *Sissel* would be overstating the matter, due to an antecedent holding in *Munoz-Flores*. Prior to the holding that the bill was not one "for raising Revenue," *Munoz-Flores* held that the Origination Clause challenge, including both the revenue and origination issues, was justiciable.[69] On this question, the *Munoz-Flores* Court held:

> [O]ne could argue that Congress explicitly determined that this bill originated in the House because it sent the bill to the President with an 'H.J. Res.' designation. Yet such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny . . . . [T]his Court has the duty to review the constitutionality of congressional enactments.[70]

The Court distinguished *Field* as a case in which a "constitutional provision" was not "implicated."[71]

Naturally, confusion abounded following *Munoz-Flores*. To begin, it is hard to see how *Field* did not implicate Article I, Section 7's requirements of bicameralism and presentment.[72] Further, what precise-

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1984); Rowe v. United States, 583 F. Supp. 1516, 1519 (D. Del.), *aff'd mem.*, 749 F.2d 27 (3d Cir. 1984).

[63] 143 U.S. 649 (1892).

[64] *Id.* at 672–73.

[65] *Id.* at 672.

[66] *See* Kysar, *supra* note 52, at 683, 698–714.

[67] U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

[68] *See* Kysar, *supra* note 52, at 700.

[69] United States v. Munoz-Flores, 495 U.S. 385, 396 (1990).

[70] *Id.* at 391 (citation omitted).

[71] *Id.* at 392 n.4.

[72] *See* U.S. CONST. art. I, § 7; Vikram David Amar, *Why the "Political Question Doctrine" Shouldn't Necessarily Prevent Courts from Asking Whether a Spending Bill Actually Passed Con-*

ly does it mean to hold the Origination Clause justiciable? The most natural interpretation, espoused by the district court as well as Judge Kavanaugh's dissent, is that *Munoz-Flores* did not specifically alter the substantive law regarding the bounds of the Senate's amendment power.[73] Although the question of origination is justiciable in the broad sense, there is no "constitutional provision" requiring Senate amendments to be germane. Therefore, courts may ensure that the bill formally originated in the House, but still have no occasion to determine whether the Senate strayed too far from the bill's original content in amending the bill.

Adopting such an interpretation would, of course, resolve *Sissel* in a paragraph, leaving all other questions aside, but the panel deliberately elected not to do so and even explicitly disavowed such an approach. What then to make of *Munoz-Flores*'s instructions for judicial inquiry into the origination of legislation and the panel's reluctance to do so, in order not to be perceived as treating the clause as "empty formalism"? At the very least, the D.C. Circuit finds the question problematic enough to avoid, even if it means addressing an alternate contentious issue. A first-order inference would be that the century-old precedent of *Rainey*, standing for the proposition that origination is a political question on which a court should defer absolutely, does not control the issue in an unqualified manner. And a second-order, and perhaps more tenuous, inference is that the D.C. Circuit believes there may exist *some* limit on the Senate amendment power of bills "for raising Revenue."

If this limit comes to fruition, judges will be tasked with nested open-ended inquiries: (1) whether the bill's primary purpose was revenue generation and, if so, (2) whether the bill's substance, to some to-be-defined degree,[74] originated in the House. This stands in great contrast to Judge Kavanaugh's bright-line rules on each of these questions, and grants considerably more discretion to the judiciary than Judge Kavanaugh's approach. For now, it is safe to say that, pending further elucidation, it will be difficult for lower courts to define the scope of the Senate amendment power on legislation "for raising Revenue" with complete confidence. Until then, shell bills will probably continue, but not without lingering doubt and perhaps more litigation.

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gress, FINDLAW (Apr. 13, 2006), http://writ.news.findlaw.com/amar/20060413.html [http://perma.cc/86L3-JDHW].

[73] *See Sissel*, 799 F.3d at 1063–65 (Kavanaugh, J., dissenting from the denial of rehearing en banc); Sissel v. U.S. Dep't of Health & Human Servs., 951 F. Supp. 2d 159, 172 (D.D.C. 2013).

[74] Judge Howell believed that the degree of any such substantive requirement was only that the original bill concern revenue. *See Sissel*, 951 F. Supp. 2d at 172–73. Because the D.C. Circuit panel declined to adopt this reasoning, the substantive requirement, if it exists, remains undefined.