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Tax Reconciliation: Scope of the Senate's Power Under the Constitution's Origination Clause to Amend Revenue Legislation

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Summary

The Origination Clause of the Constitution, Article I, Section 7, clause 1, 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." This report discusses opinions of the Supreme Court and some lower federal courts that have interpreted the text of the Clause and delineated the scope of the Senate's power to amend revenue legislation. It does not address parliamentary precedents of the House and Senate, which generally have interpreted the Clause more restrictively than the courts.

These cases have limited the phrase "bills for raising revenue" to those that levy taxes for the support of the government generally and not to those that raise revenue for specific programs. They have held that the Senate may attach amendments to raise revenue only to House bills that raise it under this limited interpretation and not to House bills that do not raise revenue. Lower courts have concluded that the Senate may amend a House bill to reduce revenue with Senate text that increases revenue.

This report will not be updated.

Contents

Tax Reconciliation: Scope of the Senate's Power Under the Constitution's Origination Clause to Amend Revenue Legislation

Introduction

This report discusses opinions of the Supreme Court and some lower courts that have elucidated the meaning of the Origination Clause of the Constitution and delineated the Senate's power to amend bills to raise revenue. It does not address parliamentary precedents of the House and Senate, which generally have interpreted the Clause more restrictively than the courts.[1]

Text and Purpose of the Origination Clause

Section 7, clause 1 of Article I of the United States Constitution, known as the Origination Clause, 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.

The framers of the Constitution drafted this provision because they believed that the Members of the House of Representatives, who are elected directly by the people for two year terms rather than six year terms like Senators, should be granted power to originate bills for raising revenue, but that the Senate should be able to amend them as on other bills. James Madison wrote in *The Federalist No. 58* that:

> . . . one branch of the legislature is a representation of the citizens, the other of the states: . . . The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government. They alone, in a word, hold the purse — that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and

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[1] *See* CRS Report RL31399, *The Origination Clause of the U.S. Constitution: Interpretations and Enforcement*, by James V. Saturno, for a review of parliamentary precedents and citations to sources of them, some Supreme Court interpretations, and development of the Origination Clause in the constitutional convention. *See also* Michael W. Evans, *'A Source of Frequent and Obstinate Altercations': The History and Application of the Origination Clause*, Tax History Project (2004), accessible at [http://www.taxhistory.org/thp/readings.nsf].

> finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. The power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.[2]

The Constitution as originally drafted did not provide for direct election of Senators. Until the Seventeenth Amendment was ratified in 1913, Senators were selected by state legislatures.

Court Interpretations Generally

The Supreme Court in *United States* v. *Munoz-Flores* [3] affirmed that "'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.'"[4] The Court added that it has interpreted this general rule to mean that a statute which creates a particular governmental program and raises revenue to support that program, and not the government generally, is not subject to the Origination Clause.[5]

Applying this rule, the Court held that a provision of the Victims of Crime Act of 1984, section 3013 of title 18 of the United States Code, which mandates that persons who are convicted of federal crimes should pay special assessments, was not a revenue provision covered by the Origination Clause and, consequently, that the Senate constitutionally could originate it.[6] Although amounts collected in excess of an annual cap were deposited in the general fund of the Treasury, the Court upheld the constitutionality of the provision because most of these assessments were deposited in the Crime Victims Fund to compensate and assist victims of crime.

The Court said that its conclusion was consistent with its earlier decisions which held that a statute which imposed an assessment to be used to create a currency and a statute which levied a property tax in the District of Columbia to support railroad projects were not subject to the Origination Clause because they raised revenue for specific programs as distinguished from general support of the government.[7]

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[2] James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, 348, 350 (Penguin Classics, I. Kramnick ed. 1987).

[3] 495 U.S. 385 (1990). *See Annotation: Supreme Court's Construction and Application of Federal Constitution's Origination Clause (Art. I, § 7, cl. 1)*, United States Supreme Court Reports, Lawyer's Edition, 109 L.Ed. 2d 819 (1992).

[4] *Id.* at 397 (1990), *quoting from* Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897), *citing* Joseph Story, 1 *Commentaries on the Constitution* § 880 (3d ed. 1858).

[5] *Id.* at 398.

[6] *Id.*

[7] *Id. citing* Twin City Bank v. Nebeker, 167 U.S. 196 (1897), and Millard v. Roberts, 202 (continued...)

In the *Munoz-Flores* case, the Court appears to have clarified some issues that had been raised in other Origination Clause cases. The Court held that an Origination Clause challenge of a statute is not a political question that should be settled only by the political branches and not appropriate for judicial resolution, i.e., it is justiciable. Although the Court in earlier cases implicitly rejected this assertion by virtue of reviewing these challenges, the Court in the *Munoz-Flores* case expressly affirmed that Origination Clause challenges are justiciable and explained the reason for rejecting it.

The United States argued that courts should decline to hear Origination Clause challenges because the House possesses the power to protect its institutional interests by refusing to pass a bill if it believes that the Clause has been violated. The Court responded:

> Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments. . . . Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review. . . . In short, the fact that one institution of government has mechanisms available to guard against incursions into its power does not require that the judiciary remove itself from the controversy by labeling the issue a political question.[8]

The six member Court majority did not accept a theory espoused by Justice Stevens in a concurring opinion joined by Justice O'Connor. Justice Stevens expressed the view that a bill which originated unconstitutionally nevertheless may become an enforceable law and should be upheld if it is passed by both Houses of Congress and signed by the President. To support this view he noted that the Clause does not specify what consequence should follow from an improper origination.[9] The majority responded that to survive Supreme Court scrutiny, a law must comply with all relevant constitutional limits. "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."[10]

The Court majority also appears to have rejected a view expressed by Justice Scalia in an opinion concurring in the judgment of the Court.[11] Justice Scalia argued that courts should apply what has been termed the "enrolled bill rule" in which they rely on the designation of origin, such as H.R. for a House bill or S. for a Senate bill, that Congress chooses to give to an enrolled bill rather than undertake an independent

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[7] (...continued)
U.S. 429 (1906), respectively.

[8] Munoz-Flores, 495 U.S. at 392 and 393.

[9] *Id.* at 401.

[10] *Id.* at 397.

[11] *Id.* at 392, n. 4.

inquiry into which chamber originated a particular provision.[12] In this case, although the Senate originated the special assessment provision, it appeared in a House joint resolution with the designation H.J.Res. If the Supreme Court had applied the enrolled bill rule, the issue of where the provision originated would not have arisen; the Court would have presumed that it had originated in the House. Instead, the Court either looked behind the designation or accepted statements by the parties that the Senate had originated the provision before addressing the merits of the case.

The Court did not accept an assertion raised by Mr. Munoz-Flores that any bill which provides for collecting funds is a revenue bill within the meaning of the Origination Clause unless it is designed to benefit the persons from whom the funds are collected. The Court said that some of its earlier cases, *Twin City Bank* v. *Nebeker* and *Millard* v. *Roberts*, did not state that a bill must benefit the payor to avoid classification as a revenue bill. Consequently, in those cases the beneficiaries of a bill were not relevant.[13] Observing that the case before it involved special assessments imposed on persons convicted of crime to be used to compensate and assist victims of crime, the Court said that, "A different case might be presented if the program funded were entirely unrelated to the persons paying for the program . . . . Whether a bill would be 'for raising revenue' where the connection between the payor and program is more attenuated is not now before us."[14]

Court Interpretations of the Senate's Power to Amend Revenue Legislation

As noted above, the text of the Origination Clause provides that all bills for raising revenue must originate in the House, ". . . but the Senate may propose or concur with amendments as on other bills." The Supreme Court and lower courts have heard some cases that questioned whether Senate amendments were within the scope of the Senate's power under the Origination Clause to amend revenue bills. These cases have held that the Origination Clause authorizes the Senate to attach an amendment to raise revenue to a House bill that raises revenue, but not to one that does not raise it. In *Flint* v. *Stone Tracy Co.*[15] the Supreme Court held that a Senate amendment which removed an inheritance tax that originated in the House and replaced it with a corporation tax did not contravene the Origination Clause. The Court said that, "The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the

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[12] *Id.* at 408.

[13] *Id.* at 400.

[14] *Id.* at 400, n. 7.

[15] 220 U.S. 107 (1911), *overruled on other grounds*, New York v. United States, 326 U.S. 572 (1946), *as stated in* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose."[16]

In *Rainey* v. *United States*[17] the Court rejected an assertion that a provision of a tariff act which imposed an excise tax on use of foreign-built pleasure yachts was invalid under the Clause because it had been proposed by the Senate as an amendment to a tariff bill that originated in the House of Representatives. The Court quoted with approval the following language from the lower court: "I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient."[18]

Lower courts also have considered challenges to a Senate amendment on the ground that it violated the Origination Clause. In 1982 Congress enacted the Tax Equity and Fiscal Responsibility Act (TEFRA), P.L. 97-248, 96 Stat. 324. As introduced in the House, the bill that eventually was enacted as TEFRA would have reduced total tax revenues by $1 billion between 1982 and 1986.[19] The Senate replaced the entire text of the House bill except for the enacting clause with a version that, as ultimately enacted, increased total revenue by about $100 billion between 1983 and 1985.[20]

In over 50 cases,[21] none of which was reviewed by the United States Supreme Court, plaintiffs challenged the constitutionality of TEFRA, contending that the Senate exceeded its authority under the Origination Clause to amend a House bill for *raising* revenue when it struck the entire text of a House bill to *reduce* revenue and replaced it with a Senate amendment that *increased* revenue. Under their interpretation of the Clause, the Senate was restricted in its authority to amend House bills; it could amend only House bills that *increased* revenue, not those that *related to* or *collected* revenue but did not increase it.

The U.S. Court of Appeals for the Ninth Circuit rejected this contention and elaborated on the reasons.

> We cannot accept this restrictive and strained reading of the Origination Clause. The term "bills for raising revenue" does not refer only to laws *increasing* taxes, but instead refers in general to all laws *relating to* taxes. *Wardell* v. *United States*, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam): *Black's Law Dictionary* (Rev. 5th ed. 1979) (defining "raise" in the revenue context to mean "to collect, to levy, as

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[16] *Id.* at 143.

[17] 232 U.S. 310 (1914).

[18] *Id.* at 317.

[19] *See* Armstrong v. United States, 759 F.2d 1378, 1380-1381 (9th Cir. 1985), *citing* H.Rept. No. 404, 97th Cong., 1st Sess. 38-41 (1981).

[20] *Id. citing* H.Rept. 760, 97th Cong., 2d Sess. 414-415 (1982)(conference report) and S.Rept. 494, 97th Cong., 2d Sess. 79 (1982), *reprinted in 1982 U.S. Code Cong. & Adm. News* 849.

[21] Thomas L. Jipping, *Comment: TEFRA and the Origination Clause*, 35 *Buffalo Law Review* 633, 635 (1986).

> to raise money by levying taxes"), *see also*, 2 A. Hinds, *Precedents of the House of Representatives of the United States* § 1489 at 949-53 (1907) (recounting an 1872 debate between the House and Senate concerning the proper interpretation of the Origination Clause).
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> Under Armstrong's interpretation, bills or amendments *raising* taxes would have to originate in the House, whereas bills or amendments *lowering* taxes could presumably be initiated in either the Senate or House. This interpretation raises several problems. First, it runs sharply contrary to past practice, since the Senate has never regarded itself as being empowered to initiate any sort of revenue bill, even one that lowers taxes. *See, e.g.*, 2 A. Hinds *Precedents of the House* § 1489 at 949-53. Second, it may well be impossible to implement, since members of Congress may differ over whether a proposed revenue bill or amendment will "increase" or "decrease" taxes overall, and since the same revenue bill may have varying effects upon the total taxes assessed in different years. Finally, Armstrong's interpretation would negate or sharply restrict the application of the final phrase of the Origination Clause, which authorizes the Senate to "propose or concur with amendments *as on other bills*," since it would prohibit the Senate from proposing amendments to revenue bills if their effect would be to transform revenue proposals lowering taxes into measures raising taxes. The Senate is not constrained from proposing amendments on any other types of legislation based upon the effect those amendments would have; it would be inconsistent and therefore contrary to the wording of the Origination Clause to limit the Senate's flexibility to a greater extent in the revenue context.
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> We therefore reject Armstrong's proposed interpretation of the Origination Clause, and conclude instead that in adopting that clause, the framers of the Constitution intended that *all* legislation relating to taxes (and not just bills *raising* taxes) must be initiated in the House. . . . However, we also conclude that once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform a proposal lowering taxes into one raising taxes. We therefore conclude that the Senate did not exceed its authority under the Origination Clause when it proposed the extensive amendment that ultimately became TEFRA.[22]

In reaching its conclusion, the Court of Appeals for the Ninth Circuit added that it joined courts in other judicial circuits that had rejected the contention of the plaintiffs[23] and that its decision was "strongly influenced, if not controlled, by the Supreme Court's decision in *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911)."[24] The court noted that the Supreme Court in the *Flint* case held that the Senate did not violate the Origination Clause when it deleted an inheritance tax that the House had proposed and substituted a corporate tax as a Senate amendment. The lower court also said that, "The [Supreme] Court was not swayed by the fact that the amended tax plan increased

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[22] *Id.* at 1381-1382 (emphasis in original).

[23] *Id. citing* Wardell v. United States, 757 F.2d 203 (8th Cir. 1985) (per curiam); Heitman v. United States, 753 F2d 33 (6th Cir. 1984); and Rowe v. 583 F. Supp. 1516 (D. Del. 1984), *aff'd. mem.*, 749 F.2d 27 (3d Cir. 1984). *See also* Texas Association of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 168 (5th Cir. 1985) , which stated that, "'Subject matter' appears to merely require that both the amendment and the amended portion address revenue collections."

[24] *Id.* at 1382.

taxes for corporations or that it might raise total taxes to a greater extent than the proposed House bill."[25]

In the portion of its opinion quoted above, the court cited a section from *Precedents of the House of Representatives*. This section reprinted the following language from an 1872 Senate committee report that addressed the meaning of the phrase "raising revenue" as used in the Origination Clause.

> Suppose the existing law lays a duty of 50 per cent upon iron. A bill repealing such law, and providing that after a certain day the duty upon iron shall be only 40 per cent, is still a bill for raising revenue because that is the end in contemplation. Less revenue will be raised than under the former law, still it is intended to raise revenue, and such a bill could not constitutionally originate in the Senate, nor could such provisions be ingrafted, by way of amendment upon any House bill which did not provide for raising — that is, collecting — revenue.[26]

Conclusion

This report has discussed opinions of the United States Supreme Court and some lower federal courts that have elucidated the meaning of the Origination Clause of the Constitution and delineated the scope of the Senate's power to amend revenue legislation. The Clause 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." The framers of the Constitution believed that Members of the House of Representatives, who are elected directly by the people for terms of two years, should have the power to originate bills to raise revenue, but that the Senate should be able to amend them as on other bills. Until the Seventeenth Amendment was ratified in 1913, Senators, who serve six year terms, were not elected directly by the people; they were selected by state legislatures.

The Supreme Court and lower courts have interpreted "bills for raising revenue" to apply only to those that raise revenue to support the government generally and not to those that incidentally may raise revenue to fund specific programs. They have held that the Senate does not violate the Origination Clause when it originates a bill to raise revenue for a specific program even if a portion of the proceeds is deposited in the general fund of the Treasury. Moreover, the Senate does not contravene the Clause when it amends a House bill for raising revenue under this restrictive interpretation with Senate text that raises revenue. These courts also have concluded that the Origination

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[25] *Id*. *See* John L. Hoffer, Jr., *The Origination Clause and Tax Legislation*, 2 *Boston University Journal of Tax Law* 1 (1984); and Thomas L. Jipping, *Comment: TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 Buffalo Law Rev. 633 (1986) for background information on TEFRA, which indicate that during consideration of TEFRA, the House tabled, i.e., rejected, a point of order charging that the Senate amendment contravened the Origination Clause.

[26] Asher Hinds, 2 *Precedents of the House of Representatives* § 1489 (1907), *quoting from* S.Rept. 146, 42d Cong., 2d Sess. (1872),

Clause denies the Senate power to amend a House bill that does not raise revenue with Senate text that raises revenue.

Some lower courts have expressly interpreted the phrase "bills for raising revenue" — which must originate in the House and which the Senate may amend — to encompass not only House bills that *increase* revenue, but also those that *relate to* or *collect* revenue. Consequently, they have held that Senate does not violate the Origination Clause if it amends a House bill to reduce revenue with Senate text to increase revenue. The Supreme Court does not appear expressly to have addressed this issue, but it has upheld the constitutionality of a Senate amendment that raised more revenue than the House bill which it amended.