No. 13-5202

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATT SISSEL, *Plaintiff/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 Judges

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BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS CORNYN AND CRUZ IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae United States Senators Cornyn and Cruz have an obvious interest in the constitutional limits on the exercise of congressional power. The procedural hurdles imposed by the Origination Clause protect liberty and serve as a well-needed reminder of the source of government money, hopefully instilling greater thoughtfulness in the Senate and in government as a whole.

ARGUMENT

I. THE PANEL DECISION DOES NOT COMPORT WITH THE ORIGINAL PUBLIC MEANING OF THE ORIGINATION CLAUSE, WHICH APPLIED TO ALL TAXES.

The Origination Clause, U.S. CONST. art. I, § 7, cl. 1, states, in relevant part, that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." Focusing on the "purpose" of the challenged ACA provision, the panel held the Origination Clause did not apply because revenue from that provision was "merely incidental to" and a "byproduct of [its] primary aim to induce participation in health insurance plans." Slip Op. at 12-13.

That holding lost sight of the background and original public meaning of the Origination Clause and so misconstrued Supreme Court precedent and Justice Story's Commentaries regarding the "purpose" of legislation as it relates to

[1] No person or entity other than *amici* or its counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing this brief.

revenue raising. References to money generated "incidental" to a non-revenue "purpose" describe a bill's exercise of a non-revenue *power* of Congress, not the policy goals or motives behind such a bill. Only where a provision in a bill is a legitimate regulation of commerce or has some other constitutional basis does a court characterize the income from such provision as merely incidental to its exercise of such non-revenue power. Where, however, Congress is exercising only its tax power, any such measure can only be a bill "for raising Revenue."

Here, the shared responsibility payment (reframed as a tax) does not validly exercise any other constitutional power. The only power being exercised in that provision is the power to tax. Such a tax thus cannot be *incidental* to any other constitutional objective and is a revenue measure regardless of the underlying motive for its adoption. In short, while a monetary exaction levied under some other power need not be a tax, every exaction levied under the tax power is, by definition, a bill "for raising Revenue." That is *why* it is constitutional.

The history of the Origination Clause demonstrates that all taxes constitute revenue-raising measures. In the late-1600s, the British House of Commons, after centuries of mixed progress, eventually secured "the exclusive right to manage all revenues." Priscilla H.M. Zotti & Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to the 21st Century*, 3 BRIT. J. AM. LEGAL STUD. 71, 78 & n. 21 (2014) ("all bills for purpose of taxation, or

containing clauses imposing a tax, must originate in the House of Commons and not in the House of Lords") (citations omitted). Britain's disregard of this hard-won right generated constant Colonial objections that "taxation" was among the revenue-raising activities which the Commons had a right to control.[2] Ultimately, Britain's "imposing taxes on us without our consent" was among the express bases for the Declaration of Independence. 1 Stat. 1, 2 (1776).

Following independence, most States adopted origination requirements relating to "money-bills," "bills for raising revenue," the "imposing, assessing, levying, or applying the taxes or supplies," or any "subsidy, charge, tax, impost, or duties … established, fixed, laid, or levied, under any pretext whatsoever." Zotti & Schmitz, 3 BRIT. J. AM. LEGAL STUD. at 85-89.

At the Constitutional Convention of 1787, the Origination Clause was central to the Great Compromise, through which the smaller States obtained equal representation in the Senate while the larger States obtained proportional

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[2] *See, e.g.*, 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., 1877) (the "distinction between legislation and *taxation* is essentially necessary to liberty. ... The Commons of America … [possess the] constitutional *right of giving and granting their own money*.") (emphasis added); 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) ("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").

representation in the House. Disagreement over equal representation in the Senate turned on the concern that smaller States would have disproportionate control over the greater property and tax contributions of the larger States. Elbridge Gerry proposed as a solution 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." James Madison, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, 113 (Norton & Co. 1969) ("NOTES ON DEBATES"). While there was certainly disagreement over that proposal, the Origination Clause was eventually approved.

The debates on the Origination Clause reflect a uniform concern over the power to *take* the people's money. According to George Mason, if the Senate, which would be more distant from the people, had "the power of giving away the people's money, they might soon forget the source from whence they received it." NOTES ON DEBATES at 250 (George Mason); *see also id*. at 445 ("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.") (Elbridge Gerry).

The delegates to the Convention affirmatively rejected a version of the Origination Clause limited by Congress' purpose or goal in raising money, as the

panel here would interpret the Clause. Edmund Randolph proposed limiting the Clause to "Bills for raising money for the *purpose of revenue* or for appropriating the same." *Id*. at 442. George Mason explained that the narrower version would no longer prevent Senate-initiated bills that might "incidentally raise revenue," thus answering Madison's objection that all federal powers have "some relation to money." *Id*. at 443 (Mason). But despite Mason's openness to preserving Senate prerogatives regarding other powers with incidental money effects, he adamantly opposed Senate origination of taxes: "It was improper therefore that [the Senate] should tax the people .... Again, the Senate is not like the H. of Representatives chosen frequently and obliged to return frequently among the people. … [T]he purse strings should be in the hands of the Representatives of the people." *Id*.

Madison also foresaw difficulty and ambiguity in the narrower Clause: "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." *Id*. at 445-46. Ultimately, the "for the purpose of revenue" language was removed and the current language adopted, demonstrating that the current Clause does not turn on Congress's aims or goals, but rather on its conduct. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more

compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

At a minimum, therefore, a bill that imposes a tax, *under the sole authority of the taxing power*, is necessarily a bill for raising revenue. Only when a measure is upheld pursuant to some other constitutional power is it warranted to characterize the money it may raise as "incidental" to another object or "purpose."

II. PRIOR PRECEDENT AND COMMENTARY MUST BE READ IN THE CONTEXT OF THE ORIGINAL PUBLIC MEANING OF THE ORIGINATION CLAUSE.

Given the history and original meaning of the Origination Clause, the more sensible reading of the cases and of Justice Story's Commentaries is that when they say bills for other purposes they mean bills enacted pursuant to other enumerated powers, which is how such powers were originally conceived. *See e.g. M'Culloch v. Maryland* 17 U.S. (4 Wheat.) 316, 423 (1819) ("[S]hould Congress, under the pretext of executing its powers, pass laws for the *accomplishment of objects* not intrusted to the Government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land"); James Madison, *Speech to House Proposing Bill of Rights*, June 8, 1789, 1 ANNALS OF CONGRESS 438 ("the powers of the general government are circumscribed; they are directed to particular objects"); *cf. In re Kollock*, 165 U.S. 526, 536 (1897) ("The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception … its primary object must be assumed to be the raising of revenue.").

Thus a bill for the "purpose" or object of regulating commerce is simply a means of describing a bill purporting to exercise the commerce power. Likewise with bills for building on federal land, providing for a post office, etc.

Were the motive or policy goals of a bill the touchstone, no revenue measure would ever be subject to the Origination Clause. *Amici*'s Senate colleagues surely could articulate a broader "purpose" in raising whatever funds they deem required. The income tax could easily (and largely truthfully) be characterized as a bill to provide for national defense and foreign diplomacy, or to facilitate any other federal program. No tax is levied to raise money for its own sake, and all monies raised are "incidental" to other government goals. Under the panel's approach, the Origination Clause would be toothless.

The panel decision is particularly troublesome when combined with its broad view that the taxing power may be exercised regardless of any regulatory purpose that may be beyond Congress' authority, and regardless whether the revenue purpose is secondary. Slip Op. at 15. This combination leads to a constitutional whipsaw whereby otherwise unconstitutional regulatory measures are deemed taxes yet are immunized from the Origination Clause, despite whatever revenue-raising function justified them as taxes for constitutional purposes.

Not only is such a Catch-22 contrary to the original meaning of the Origination Clause, neither does it fit the pattern of any prior case rejecting an

Origination Clause challenge. In every prior case there existed constitutional authority independent of the tax power to enact the monetary exaction that was upheld. In each case, those money-generating provisions were simply a means of implementing a separate Congressional power.

In this case, with an exclusive reliance on the taxing power, the shared responsibility penalty was constitutionally justified solely as a revenue-raising tax. Courts may not look behind the constitutional "object" or purpose for this measure to any other motives that Congress may have harbored. Congress may exact money for a variety of constitutional ends, but when it attempts to achieve these ends by using its power to tax the people, such a measure is a bill for raising revenue that must originate in the House.

CONCLUSION

For the above reasons, the petition for rehearing *en banc* should be granted.

Respectfully submitted,

s/ Erik S. Jaffe_____

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Dated: October 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of October, 2014, I caused the above Brief of *Amici Curiae* United States Senators Cornyn and Cruz in Support of Appellant's Petition for Rehearing *En Banc* to be served via the CM/ECF system on all participants in this case.

s/ Erik S. Jaffe_____
Erik S. Jaffe