

Why Obamacare Could be Heading to the Supreme Court (Again)

This past week, the United States Court of Appeals for the District of Columbia Circuit, over the vigorous dissent of four judges on that court, denied rehearing en banc (legalese for an entire court rather than just a panel of three judges) in the case of *Sissel v. United States Department of Health and Human Services*. *Sissel* is a case against Obamacare led by the Pacific Legal Foundation, arguing that Obamacare is invalid because it violated the Origination Clause. Now, the challengers have ninety days to file a writ of certiorari (an appeal) before the U.S. Supreme Court. This important case deals with the Origination Clause of the Constitution— which 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.

The Founders included this clause primarily to balance out the unique powers the Senate wields, and to ensure that the power of drawing revenue from the people by taxing them would be initiated by the branch that was closest to them (remember, at that time the Senate was elected by state legislatures, not by popular vote) and whose members would have to stand for re-election every two years. In the first major Obamacare decision, *NFIB v. Sibelius*, the Court upheld the law as a tax—something that surprised many people. But if it's a tax, shouldn't the bill have originated in the House? As it happens, Obamacare "originated" in the House in only a very formalistic sense. H.R. 3590, the bill that became Obamacare, was originally titled "Service Members Home Ownership Tax Act

of 2009” and had nothing to do with health care. But to secure passage of Obamacare, the Senate decided to take this bill, which *had* passed the House, and gut it entirely, replacing the entire text of that bill with the Obamacare title and text and keeping only the bill number. After it passed the Senate, the House then approved the new Senate-drafted bill through a reconciliation bill. The House made no changes to the text, which, because of the Senate’s obscure procedural rules, meant that when the bill went back to the Senate, it was not subject to a filibuster. This was significant because, in the interim, Sen. Ted Kennedy, D-Mass., had died and been replaced by Scott Brown, R-Mass., thereby depriving the Democrats of the 60 votes they would need to defeat an otherwise inevitable Republican filibuster. And thus was Obamacare born. The problem is that this doesn’t look like the bill “originated” in the House in any meaningful way. It was as though the Senate bulldozed a house and erected an entirely new structure, but said it was the same house because it had the same address. And so Pacific Legal Foundation has sued. Recently, they lost their challenge before a three-judge panel of the U.S. Court of Appeals for the District of Columbia. When this happens, plaintiffs have a chance to get the entire circuit to reassess the question. But just last week, the D.C. Circuit, unsurprisingly, declined to rehear the case *en banc*. Why unsurprisingly? Because it takes a majority on the court to revisit a case and you might recall that then-Senate Majority Leader Harry Reid, D-Nev., invoked the “nuclear option” to get more Obama appointees on the D.C. Circuit. All three of the judges rammed through by Reid voted to deny rehearing *en banc* last week: more importantly, Judge Nina Pillard took the rare step of penning a supporting statement for denial of rehearing. Her interesting statement was joined by other two judges on the original panel including Judge Robert Wilkins, who was also one of the judges confirmed as part of Senator Reid’s court packing plan. The decision is fundamentally flawed. Some, including Justice Antonin Scalia in his concurring opinion in *U.S. v. Munoz-Flores*, have argued

that the Origination Clause is a mere formalism and that, so long as a bill *attests* to having originated in the House, federal courts should not undertake an independent investigation to determine whether that bill *actually* originated in the House. This formalist reading is one reason James Madison opposed putting the Origination Clause in the Constitution. The statement by Pillard, however, goes much further. The Supreme Court, Pillard argues, has defined the Origination Clause as a “purposive” clause. In other words, the original three-judge panel contends that since the main purpose of Obamacare was to expand health insurance coverage, rather to raise revenue for the general treasury—well, then the law is not a bill to raise revenue (even if, as the Supreme Court stated in its NFIB decision, the legislation has the potential to raise “considerable revenue”). Under this precedent, the Senate could originate any tax bill, so long as some federal court was willing to hold that the “purpose” of the bill wasn’t primarily to raise tax revenue, but to do something else. If that is the case, so much for the protections provided by the Origination Clause. We will have to wait to see if the Supreme Court will hear this case. At this point, however, after two trips to the Supreme Court already, the Court might be too invested in Obamacare to seriously consider taking a third case and ruling based upon the law. As Scalia stated in his dissent in *King v. Burwell*, the second major Obamacare case:

[T}his Court’s two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed (“penalty” means tax ... “established by the State” means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.

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