PACIFIC LEGAL FOUNDATION

Rescuing Liberty from Coast to Coast

Litigation Backgrounder - Updated October, 2015

The ACA violates the constitutional procedures for imposing taxes

(*Sissel v. U.S. Dep't of Health & Human Servs., et al.*)

"The purse strings should be in the hands of the Representatives of the people."
—George Mason, at the Constitutional Convention[1]

In June, 2012, the United States Supreme Court decided *NFIB v. Sebelius*,[2] upholding the Individual Mandate provision of the Affordable Care Act (ACA)—the provision that forces Americans to buy a health insurance policy that the federal government deems "minimum essential coverage,"[3] and imposes a penalty on people who fail to do so. This penalty, the Court declared, is actually not a penalty, but a "tax on going without health insurance."[4]

One important constitutional issue went unmentioned in the *NFIB* decision, however: the Constitution declares that "all bills for raising revenue" must "originate in the House of Representatives." Yet the ACA, and its "tax on going without health insurance," originated in the Senate. Pacific Legal Foundation therefore challenged the constitutionality of the ACA under the Origination Clause, and is now asking the U.S. Supreme Court to take what two federal courts of appeals have called an especially important question.[5] This litigation backgrounder explains PLF's lawsuit and why the Supreme Court should take this case.

Matt Sissel: opposing the Individual Mandate

After serving eight years in the Iowa National Guard, including two years as a combat medic in Iraq, Matt Sissel set out on a new career as a professional artist. He finished his studies at the Toronto Academy of Realist Art in Canada, where he specialized in realistic painting and portraiture, and in August, 2010, returned home to Iowa City to

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produce and market his artwork. He now lives in Washington State, where he continues his art and remains in the National Guard Reserve.

Sissel is healthy and current on his medical expenses. He chose not to buy health insurance because he wanted to be free to invest in his own business instead; and costly insurance premiums aren't worth the money to him. Sissel says he wants the freedom and flexibility to do his own budgeting, including setting aside money for his medical needs as he chooses, without government oversight. "As a small business owner," Sissel says, "I don't need the government telling me how to manage my expenses; they can't even manage their own."

Indeed, the financial consequences of the Act are already being felt. The ACA has begun burdening businesses with "more government-mandated paper work, fewer choices in health plans for their employees, and no mechanism to control costs."[6] Millions of Americans have either lost their health insurance plans and been forced onto government alternatives such as Medicaid, or have been allowed to keep their plans only because of the White House's *ad hoc* decisions to withhold enforcement of key provisions of the ACA.[7] Employers have been forced to postpone hiring, or to reduce working hours or to hold off increasing them, in order to make ends meet.[8] And insurance premiums are on the rise nationwide.[9]

Yet Sissel's objection to the individual mandate is about more than dollars and cents. He believes he should be free to live his life without the federal government meddling in his most personal affairs. "I object to being conscripted into a federal health care program," he says. Sissel's fundamental opposition to the individual mandate is rooted in the Constitution's principles of limited government: "My principles, I believe, are the same ones held by our Founding Fathers," says Sissel. "To defend individual freedom, they tried to limit the size of the federal government and what it could do. They could not have conceived of the degree of federal entanglement in people's personal, private choices that the Act represents."

Shortly after the ACA was enacted, PLF attorneys filed suit challenging its constitutionality on Sissel's behalf,[10] arguing that the Individual Mandate violated the Commerce Clause. That case was stayed by the trial court while the Supreme Court took up the *NFIB* case (in which PLF participated as a "friend of the court"). The Court decided that case on June 28, 2012, ruling that the Individual Mandate did exceed the Commerce Clause power, but upholding the Mandate as an exercise of Congress's power to tax, instead.

The Individual Mandate as a tax on going without insurance

When it was enacted in 2010, the Individual Mandate represented "an unprecedented form of federal action," giving the federal government expansive control over the health care sector.[11] The Act declared that beginning in 2014, every American must maintain "minimum essential" health insurance coverage.[12] Individuals who do not maintain such coverage are subject to hundreds or thousands of dollars in penalties assessed by the Internal Revenue Service.[13] Thus, anyone without health insurance coverage must either purchase it, or qualify for a government health insurance plan, or pay the tax.

In the *NFIB* case, Chief Justice John Roberts, joined by the Court's four liberal justices, upheld the Mandate under what Chief Justice Roberts called a "saving construction." He chose "to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product."[14] Requiring people to pay a tax if they do not purchase insurance was different, he wrote, than forcing them to buy it. This was for three reasons. First, while the Commerce Clause only allows Congress to regulate activity, the tax power can be used to tax *inactivity*.[15] Second, Roberts and the four liberal justices viewed the amount of the tax at issue as too insubstantial to amount to compulsion: although in some cases "the penalizing features of [a] so-called tax" might become so severe that it is transformed from a tax into "a mere penalty with the characteristics of regulation and punishment,"[16] the Court ruled that the ACA did not go so far.

Finally, the justices believed that "[t]he taxing power does not give Congress the same degree of control over individual behavior" as the Commerce Clause,[17] because "imposition of a tax nonetheless leaves an individual with *a lawful choice to do or not do a certain act,* so long as he is willing to pay a tax levied on that choice."[18] Under the taxing power, Congress cannot command behavior, but only the payment of money—and so long as the amount is not so extreme as to really qualify as compulsion, this rule would protect the individual's freedom of choice: "If a tax is properly paid, the Government has *no power to compel or punish individuals* subject to it."[19]

In short, the portion of Chief Justice Roberts' opinion that garnered the support of the four liberal justices upheld the constitutionality of the Act only by reading it to "do [nothing] more than impose a tax."[20] Although Roberts admitted that this was not "[t]he most straightforward reading of the mandate," it was what the majority of justices resolved.

If the PPACA imposes a "tax," is that constitutional?

But one point Chief Justice Roberts's opinion never addressed was the fact that under the Constitution, "all bills for raising revenue" must "originate in the House of Representatives." Yet the ACA—including its monetary penalties for failing to purchase health insurance—originated in the Senate.

The founding fathers viewed the Origination Clause as a crucial protection for American freedom.[21] They thought it important that the power to tax be kept as close as possible to the people's representatives—members of the House, who are elected every two years by local districts.[22] This would give the voting public the strongest possible control over the taxing power, which the founders knew was prone to dangerous abuse.

But as it was drafting the ACA in 2010, Congress chose not to follow the constitutional rule. Instead, it used a procedural maneuver called "gut and replace," in which the Senate took a bill on an entirely different subject that had already been passed by the House, and "amended" it by erasing all of its language and replacing it with new language. The bill—H.B. 3590—began as the "Service Members Home Ownership Act of 2009," introduced in September, 2009.[23] That bill, only six pages long, had nothing to do with health insurance. It would have provided certain benefits to members of the military buying their first homes, and made other minor changes to the law. It was passed by the House and sent to the Senate in October, 2009. But as the Senate began the process of crafting the ACA, Senate Majority Leader Harry Reid chose not to introduce a new bill. Instead, he submitted an "amendment" that replaced the House's wording with the 2074 pages of what became the ACA.[24] That Act contains 17 separate revenue provisions, including a dozen new taxes estimated to increase federal revenue by $486 billion by 2019.[25] The Individual Mandate tax was one of the many taxes that was originated in the Senate in this manner.

On September 11, 2012, PLF attorneys amended the complaint in Matt Sissel's case to raise this new issue in light of the *NFIB* decision.[26] Specifically, PLF argued that the ACA violated the Origination Clause, and that the Senate's "gut and replace" procedure exceeded its authority under the Constitution.

Enforcing the Origination Clause

Federal courts have considered Origination Clause cases only a handful of times. But

none has ever involved such an extreme example of the "gut and replace" trick as this case involves.

In 1911, in *Flint v. Stone Tracy Co.*,[27] the Court upheld the constitutionality of a law in which the Senate added a tax increase through an amendment to a House bill that had originally eliminated an inheritance tax. The Court reasoned that this change to the original House bill was proper because the Constitution allows the senate to "propose or concur in amendments" to revenue bills the House passes, and because the Senate's amendment was "was germane to the subject-matter of the bill" that the House had passed, no impropriety had occurred.[28] Other than *Flint*, the Supreme Court has never issued a ruling on whether the Senate may use the "gut and replace" procedure with regard to revenue bills. But what is a "bill for raising revenue" subject to the Origination Clause?

The most in-depth Supreme Court decision on the Origination Clause is 1990's *United States v. Munoz-Flores*.[29] That case involved a law that required certain convicted criminals to pay into a fund to compensate crime victims. The government argued that the Supreme Court should not even consider the case–that the Origination Clause should be left to Congress, not the courts, to enforce. In a decision by Justice Thurgood Marshall, the Court rejected that view, holding that like any other constitutional rule, the Origination Clause should be enforced by judges. But the Court also concluded that the victim-restitution law was not a "bill for raising revenue," and therefore not subject to the Origination Clause. Marshall explained that, rather than levying a tax to fund the general treasury, the law required convicts to pay into a specific, earmarked fund to finance a discrete government program. Citing two earlier decisions that nvolved fees funding specific programs instead of the general treasury,[30] the *Munoz-Flores* Court declared the crime victims fund exempt from the rule requiring origination in the House.

On June 28, 2013, the federal trial court dismissed Sissel's case.[31] He appealed, with supporting briefs by 38 members of Congress. The D.C. Circuit Court of Appeals heard arguments on May 8, 2014.

On July 29, 2014, a three-judge panel of the D.C. Circuit—Judges Judith Rogers, Nina Pillard, and Robert Wilkins—ruled against Sissel. They declared that while the Individual Mandate is a tax, it is not a "bill for raising revenue," and therefore did not have to originate in the House.[32] They found that the ACA existed for the purpose of overhauling the nation's health insurance systems, and that Congress had not meant it as a revenue-raising measure: "Successful operation of the Act would mean *less* revenue," they declared,

"not more."[33] Because they found that the ACA was not subject to the Origination Clause, the judges did not address the question of whether the "gut and replace" procedure was constitutional.

PLF filed a motion for rehearing en banc—a procedure whereby all of the D.C. Circuit's judges will reconsider a case. PLF argued that the three-judge panel had misapplied the *Munoz-Flores* precedent. That case declared that only levies that are earmarked for a specific program are exempt from the Origination Clause, but the Individual Mandate tax is not earmarked for any specific fund. Instead, money paid under the ACA goes into the general federal treasury for Congress to spend at will. Therefore, Sissel argued, the *Munoz-Flores* exception should not apply. The question was not whether the tax was meant to advance some other goal, but simply whether the ACA imposed a tax. If so, it should have originated in the House.

Worse, Sissel argued, the panel's holding—that a tax is exempt from the Origination Clause whenever it serves some broader purpose—would make it easy for the Senate to violate the Constitution by creating taxes and saying that they are meant to serve some other goal. The Senate could originate a gas tax by saying it is meant to encourage the development of fuel-efficient cars, or a tax on cigarettes by saying it was designed to discourage smoking.

On August 7, 2015, the D.C. Circuit rejected Sissel's motion for rehearing, over a dissenting opinion by four judges. The dissenting judges—Brett Kavanaugh, Karen Henderson, Janice Rogers Brown, and Thomas Griffith—agreed with Sissel that under the D.C. Circuit's ruling, "most taxes would escape the Origination Clause."[34] They believed the "gut and replace" procedure was constitutional, but they warned that the court's ruling that the ACA is not a "bill for raising revenue" was "faulty"[35] and "flawed,"[36] and that it would "alter[] the longstanding balance of power between the House and Senate, and ultimately affect[] individual liberty."[37]

> Imagine a simple gas tax bill introduced in the Senate. Suppose that the bill is combined with a major national security bill also introduced in the Senate. Does that render the combined Senate bill exempt from the Origination Clause because the national security purposes predominate? Of course not. If it were otherwise, the Senate could systematically evade the Origination Clause by tacking Senate-originated revenue provisions onto other Senate-originated bills.... [N]o case or precedent of which I am aware has said

> that a regulatory tax—that is, a tax that seeks in some way to influence conduct—is exempt from the Origination Clause merely because such a tax also has a purpose of encouraging or discouraging certain behavior.[38]

The next step is to file a petition asking the Supreme Court to take the case. Sissel's lawsuit is not the only case to challenge the ACA on Origination Clause grounds, but it is the first to reach the Supreme Court. In April, 2015, the Fifth Circuit Court of Appeals rejected a lawsuit on the grounds that the plaintiff lacked standing, but noted that the case "present[s] issues of exceptional importance."[39] PLF is hopeful that the Supreme Court will agree to consider these important questions.

Pacific Legal Foundation litigates across the nation to enforce constitutional protections

Matt Sissel is represented by PLF attorneys Timothy Sandefur and Anastasia Boden. The petition for certiorari was filed on October 26, 2015.

PLF (www.pacificlegal.org) is the largest and oldest public interest law firm dedicated to individual liberty, private property rights, and limited government. Established in 1973, PLF is headquartered in Sacramento, California, and maintains offices in Washington State, Florida, and Washington, D.C.

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Notes:

1. 2 *Records of the Federal Convention* 274 (M. Farrand, ed. 1911).

2. 132 S. Ct. 2566 (2012).

3. 26 U.S.C. § 5000A.

4. 132 S. Ct. at 2599.

5. *Hotze v. Burwell*, 784 F.3d 984, 999 (5th Cir. 2015); *Sissel v. U.S. Dep't of Health & Human Servs.*, 2015 WL 5157032, at *16 (D.C. Cir. Aug. 7, 2015) (Kavanaugh, Henderson, Brown, Griffith, JJ., dissenting from denial of rehearing en banc) ("The panel opinion sets a constitutional precedent that is too important to let linger and metastasize.").

6. Roger Stark, MD, *The Impact of the National Health Care Law on Businesses in Washington State* 4, Washington Policy Center, Policy Note (June 2010).

7. Scott Gottlieb, "How Many People Has Obamacare Really Insured?" *Forbes,* May 14, 2015, http://www.forbes.com/sites/scottgottlieb/2015/05/14/how-many-people-has-obamacare-really-insured/

8. Ben Casselman, "Yes, Some Companies Are Cutting Hours in Repsonse to 'Obamacare,'" *Five Thirty Eight*, Jan. 13, 2015, http://fivethirtyeight.com/features/yes-some-companies-are-cutting-hours-in-response-to-obamacare/; Bailey Williams, "Businesses Balk at Obamacare Definition of Full-Time Work," *U.S. News & World Report,* Mar 3, 2015, http://www.usnews.com/news/articles/2015/03/03/businesses-balk-at-obamacare-definition-of-full-time-work

9. Cynthia Cox, *et al.*, "Analysis of 2016 Premium Changes and Insurer Participation in the Affordable Care Act's Health Insurance Marketplaces," Kaiser Family Foundation, June 24, 2015 http://kff.org/health-reform/issue-brief/analysis-of-2016-premium-changes-and-insurer-participation-in-the-affordable-care-acts-health-insurance-marketplaces/; Tami Luhby, "Obamacare Sticker Shock: Big Rate Hikes Proposed for 2016," CNN, June 2, 2015, http://money.cnn.com/2015/06/02/news/economy/obamacare-rates/

10. PLF filed Sissel's complaint on July 26, 2010. A copy is available on PLF's website at: http://community.pacificlegal.org/Document.Doc?id=458.

11. Michael F. Cannon, *All the President's Mandates: Compulsory Health Insurance Is a Government Takeover*, Cato Institute, Briefing Paper No. 114 (Sept. 23, 2009), *available at* http://www.cato.org/pubs/bp/bp114.pdf (quoting U.S. Congressional Budget Office, "The Budgetary Treatment of an Individual Mandate to Buy Health Insurance," *CBO Memorandum* 1 (Aug. 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/ doc38.pdf. (last visited Sept. 13, 2010)).

12. 26 U.S.C. § 5000A (2010).

13. *Id.*

14. 132 S. Ct. at 2593 (opn. of the Court).

15. *Id.* at 2599 (opn. of the Court).

16. *Id*. at 2600 (opn. of the Court) (quoting *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994)).

17. *Id.* (opn. of the Court).

18. *Id*. (opn. of the Court) (emphasis added).

19. *Id.* (opn. of the Court) (emphasis added).

20. *Id*. at 2598 (opn. of the Court).

21. James v. Saturno, *The Origination Clause of The U.S. Constitution: Interpretation and Enforcement*, Congressional Research Service, Mar. 15, 2011, *available at* http://www.fas.org/sgp/crs/misc/RL31399.pdf.

22. Before the Seventeenth Amendment was passed, Senators were not elected by the people at all, but by state legislatures (or by the people as a matter of state law).

23. The original bill can be read at http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590ih/ pdf/BILLS-111hr3590ih.pdf.

24. The amended bill can be read at https://www.congress.gov/111/bills/hr3590/BILLS-111hr3590as.pdf.

25. Letter from Congressional Budget Office to Sen. Harry Reed, Nov. 18, 2009, *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_ 11_18_09.pdf.

26. The amended complaint can be read at http://blog.pacificlegal.org/wordpress/wp-content/uploads/2012/09/Amended-Complaint-9-10-12.pdf.

27. 220 U.S. 107 (1911).

28. *Id*. at 143.

29. 495 U.S. 385 (1990).

30. *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897), and *Millard v. Roberts*, 202 U.S. 429 (1906).

31. 951 F.Supp.2d 159 (D.D.C. 2013).

32. 760 F.3d 1 (D.C. Cir. 2014).

33. *Id*. at 9.

34. 2015 WL 5157032, at *20.

35. *Id.* at *16.

36. *Id.* at *30.

37. *Id*. at *31.

38. *Id.* at *20.

39. *Hotze v. Burwell*, 784 F.3d 984, 999 (5th Cir. 2015).