

ISSUE BRIEF

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Senate Immigration Bill May Violate the Origination Clause

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The Senate immigration bill, S. 744,¹ has a major constitutional flaw that should send immigration reform advocates back to the drawing board: The bill appears to violate the Origination Clause of the Constitution.

This is such a serious problem that Representative Dave Camp (R-MI), chairman of the House Ways and Means Committee, issued a news release outlining five sections of the bill that he believes violate the Origination Clause.² The following is Heritage's detailed analysis.

The Origination Clause. Article I, Section VII, Clause I of the Constitution states:

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 mandatory language raises three distinct questions. First, what is a “bill for raising revenue”? Second, what does it mean for a bill to “originate” in the House of Representatives, and what is the scope of the Senate’s amendment power? Finally, what is

the role of the courts in enforcing this constitutional provision?

“*All Bills for Raising Revenue.*” The House of Representatives is the primary enforcer of the Origination Clause and has a body of precedent broadly interpreting the Origination Clause: Any bill that has the potential to affect revenue must originate in the House. This would include not only changes in taxation but changes in import restrictions (which could affect tariff revenues) and, in fact, any bill that would put money into or take money out of the general funds. When the House receives a bill originating in the Senate that fits any of these criteria, it typically sends the bill right back in a rejection process known as “blue slipping.”

Chairman Camp has identified five sections of the Senate bill that he believes affect revenue. Sections 6 and 5105 arguably draw from or pour into the general fund on a regular basis rather than tying fees to services provided, which would affect the federal deficit in unforeseeable ways. Sections 2211, 2309, and 2232 affect the availability of tax credits. Finally, Section 4104 requires employers to pay a fee that is redistributed to states for various expenses. Since this section makes no attempt to relate the fee to a service provided by the government, it is arguably a simple revenue-raising “tax.”

These surcharges, fees, and changes in taxation all appear to be classic cases of revenue proposals historically blue-slipped by the House.³ In fact, the Senate itself sustains points of order against bills that the Senate feels violate the Origination Clause prerogatives of the House. While Senate precedent would have likely sustained such a point of order with respect to S. 744, no such objection was made.⁴

This paper, in its entirety, can be found at <http://report.heritage.org/ib4013>

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“Shall Originate in the House of Representatives; but the Senate May Propose or Concur with Amendments as on Other Bills.” Determining whether a duly-enacted statute “originates” in the House is often difficult. There is no question that the Senate immigration bill did not originate in the House of Representatives. There are a number of House immigration proposals, any of which could be passed by the House. Formally, these bills “originate” in the House and are distinct from the Senate bill.

However, as Representative Mark Sanford (R-SC) has argued, if the House passes one of its own bills, the House and Senate could conference on the competing immigration bills.⁵ The final version the conference agrees to may be substantially the original Senate version. As one congressional aide told *Politico*,⁶ all the House has to do to comply with the Origination Clause is “simply rename and renumber the Senate legislation...as a House bill.” On this view, the violation would occur only if the House passes some version of the Senate bill without renaming it.

Conversely, when the House really does originate a bill, could the Senate simply amend the bill entirely? Is the Origination Clause a simple formality? These questions are still unsettled and will have to be resolved by courts.

Enforcement of the Origination Clause. In addition to the House and Senate policing the Origination Clause, the President can veto bills that violate it. Further, the Supreme Court of the United States has held that the Origination Clause is judicially enforceable. In *United States v. Munoz-Flores*, 495 U.S. 385 (1990), an individual ordered to pay

a “special assessment” pursuant to the Victims of Crime Act of 1984 challenged that assessment on the grounds that the statute was a revenue bill that originated in the Senate. The Solicitor General objected to the Origination Clause claim on the grounds that it was a nonjusticiable political question.

The Court held that, even though House procedure can effectively police the Origination Clause, that does not mean that federal courts have no responsibility to consider such constitutional challenges to bills:

In many cases involving claimed separation of powers violations, the branch whose power has allegedly been appropriated has both the incentive to protect its prerogatives and institutional mechanisms to help it do so. Nevertheless, the Court adjudicates those separation of powers claims, often without suggesting that they might raise political questions.

The remedy, according to the Supreme Court, is simple: “[T]he principle that the courts will strike down a law when Congress has passed it in violation of [the Origination Clause is] well settled.”

The problem lies in whether one views the Origination Clause as a formal or substantive check on the lawmaking power of Congress. If it is a substantive check, then courts could be granted sweeping powers to scrutinize acts of Congress, seeking to determine whether a law *really* originated in the House. Such a position could lead to piles of lawsuits challenging laws that involved plenary amendment

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1. The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.744> (accessed August 12, 2013).
 2. News release, “Senate Bill Is Unconstitutional,” Representative Dave Camp (R-MI), July 11, 2013, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=342249> (accessed August 9, 2013).
 3. For an excellent discussion of congressional prerogatives and the Origination Clause, including relevant precedent for both House and Senate, see James V. Saturno, “The Origination Clause of the U.S. Constitution: Interpretation and Enforcement,” Congressional Research Service Report for Congress, March 15, 2011, <http://www.fas.org/sgp/crs/misc/RL31399.pdf> (accessed August 9, 2013).
 4. The Senate has previously sustained a point of order against a bill that included fees to be placed into the general revenue. See *Cannon’s Precedents*, sec. 316, <http://www.gpo.gov/fdsys/pkg/GPO-HPREC-CANNONS-V6/html/GPO-HPREC-CANNONS-V6-33.htm> (accessed August 9, 2013). Compare this, for example, with S. 744’s trust fund, which transfers funds into and out of the general fund.
 5. Daniel Strauss, “Rep. Sanford: Senate Bill Likely to ‘Prevail’ over House Immigration Proposals,” *Politico*, July 16, 2013, <http://thehill.com/blogs/blog-briefing-room/news/311413-rep-sanford-senate-bill-likely-to-prevail-over-house-immigration-proposals> (accessed August 9, 2013). A more likely scenario at this point is that the House passes a package of bills that will be approved entirely by the Senate. Tripp Baird, “Amnesty: Dangers of (Skipping) Conference,” *The Heritage Foundation, The Forge*, <http://heritageaction.com/2013/08/amnesty-dangers-of-skipping-conference/>.
 6. Lauren French, “GOP Points to Taxes in Rejecting Immigration Bill,” *Politico*, July 11, 2013, http://www.politico.com/story/2013/07/immigration-bill-2013-republicans-taxes-94044.html?hp=t3_3 (accessed August 9, 2013).

of a House bill, removing all the operative language of a bill marked “H.R.” and replacing it entirely with Senate language. Worse, courts might begin seeking to investigate the origin of ideas found in law and invalidating laws whose ideas originated in the Senate or in the public. This seems clearly wrong.

Conversely, however, if the Origination Clause is simply a formal check, then Congress can circumvent its purpose in absurd ways. As noted above, the House can receive a Senate tax bill and simply relabel it as a House bill. Justice Scalia’s concurrence in *Munoz-Flores* indicates that he thinks this is all the Origination Clause requires. (“The designation ‘H.J. Res.’...attests that the legislation originated in the House.”) Similarly, under this view, the House could pass a tax bill and the Senate could then amend the bill entirely. This view also seems to be wrong.

As it stands, therefore, the Supreme Court has noted that the federal courts *must* police the Origination Clause but has not provided any standards for lower courts to apply. What is known is that individuals adversely affected by statutes that they believe violate the Origination Clause (such as the immigration bill) can sue in federal court and will have their claims adjudicated on the merits, so

this is a live area of law. Constitutional bicameralism concerns do have implications for individual rights, and if the Senate immigration bill becomes law in violation of the Origination Clause, anyone aggrieved by the law would have a serious constitutional claim to bring in federal court.

Constitutional Responsibilities. Yet while the precise role for the courts is unclear, it is certainly clear that both houses of Congress, and in particular the House of Representatives, should police the Origination Clause. Simply because the courts can, in theory, sort out the unconstitutional actions of Congress or the President does not mean that Congress or the President should abdicate their independent constitutional duties.

The House in particular should not willingly cede its constitutional prerogatives due to political expediency. Whatever the popularity or unpopularity of any given piece of legislation, the government has a duty to comply with the Constitution in considering that legislation.

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