UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MATT SISSEL, Plaintiff, 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; and TIMOTHY GEITHNER, in his official capacity as United States Secretary of the Treasury, Defendants.	Case No. 1:10-cv-01263 (BAH)

[PROPOSED] BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT

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INTEREST OF AMICUS

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *N.F.I.B. v. Sebelius*, __ U.S. __, 132 S.Ct. 2566 (2012) (*NFIB*); *Christopher v. SmithKline Beecham Corp.*, __ U.S. __, 132 S.Ct. 2156 (2012); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before the Court in this matter is one of special importance to the principle of maintaining the structural limits imposed by Article I of the Constitution upon the separate branches of Congress. These structural limits were key to equalizing power between the three branches of government and include the limitation that revenue measures originate in the House of Representatives.

SUMMARY OF ARGUMENT

To create a government of separated powers, the Framers recognized that they needed to build in structural provisions that also equalize the powers between branches. To this end, the Constitution imposes specific structural limitations on the exercise of power by Congress. These limitations include a division of powers between the House of Representatives and the Senate intended to provide internal checks on the exercise of those powers. *See e.g., The Federalist No.*

51, at 320-25 (James Madison) (Clinton Rossiter ed., 1961); *The Federalist No. 63*, *supra* at 382-390 (James Madison).

These structural limits include the Origination Clause, which states, "All Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. Art. I, § 7, cl. 1. While the Senate was designed for stability, with longer terms and limited turn-over at each election, the House was designed to answer directly to the people. Every member of the House must answer to the electorate every two years. Since revenue bills directly impact the economic livelihood of the electorate, the Founders insisted that they originate in the branch of Congress most directly answerable to the voters. That is not what happened with the law at issue in this case, however.

The House of Representatives initially originated a tax measure imposing an "individual mandate" but that measure was ultimately rejected. Affordable Health Care for America Act, H.R. 3962, 111th Congress, 1st Session, 501 (2009); America's Health Future Act of 2009, S. 1796, 111th Congress, 1st Session, 1301. The measure at issue in this case began as House Resolution 3590 ("H.R. 3590"), which called for an amendment to the Internal Revenue Code to modify the first-time homebuyers credit for armed forces members and certain other federal employees, by a vote of 416 to zero. 155 Cong. Rec. H9729-01 (Sept. 17, 2009); 155 Cong. Rec. H11126-01 (Oct. 8, 2009). H.R. 3590 passed the House and was placed on the Senate calendar. 155 Cong. Rec. S10333-06 (Oct. 13, 2009). The Senate, however, took no action on this measure. Instead, all of the provisions that were voted on by the House were deleted – only the bill number was retained. In place of the House-originated proposal for tax credits for veterans—not a bill "raising revenue"—the Senate inserted the Senate-originated tax measure styled as the Patient Protection and Affordable Care Act. 155 Cong. Rec. S11607-03 (Nov. 19, 2009). The

Senate's actions were placed in the record as, "Strike out all after the enacting clause and insert: [the entire Act]." *Id.* (Senate amend. 2786). Nothing of this tax measure originated in the House of Representatives.

The central feature of the Senate-originated measure is a tax imposed on individuals who decline to purchase health insurance. 26 U.S.C. § 5000A. There is no debate that this tax, sometimes referred to as the "individual mandate," was the controlling purpose of the Senate proposal. Pub. L. No. 111-148 § 1501(2)(C) (expressing the "individual mandate" tax as the key feature of the law); *NFIB*, 132 S. Ct. at 2580. This was, by no means, the only tax provision in the Senate's proposal. The Senate-originated measure includes a number of new or increased taxes resulting in an estimated nearly $500 billion revenue increases. *See e.g.*, Pub. L. No. 111-148 §§ 1513, 9001-9017.

ARGUMENT

I. THE CONSTITUTION PROTECTS INDIVIDUAL LIBERTY BY SEPARATING AND EQUALIZING POWER BETWEEN THE BRANCHES OF GOVERNMENT

If there was any point of agreement on the shape of government during the ratification debates it was that Montesquieu's warning about the need for separation of powers must be heeded. *Brutus I*, New York Journal, October 18, 1787, reprinted in (New York No. 1) The Documentary History of the Ratification of the Constitution at 110, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, (Univ. of Virginia Press, 2009) (Documentary History), *Alexander Hamilton*, Convention Debates, July 12, 1788, reprinted in (New York No. 4) Documentary History *supra* at 2158; *Brutus*, Virginia Independent Chronicle, May 14, reprinted in (Virginia No. 2) Documentary History *supra* at 799. The problem confronting the Founders was the recognition that in a republic the legislature wielded the greatest power. *The Federalist No. 51*, *supra* at 322 (James Madison). To equalize

power between legislative and executive branches, the new Constitution divided the legislature into two branches, imposed different terms of office for the members of each branch, and gave distinctly different powers to each branch. This division effectively "[rendered the separate branches], by different modes of election and different principles of action, as little connected with each other as the nature of their common functions…will admit." *Id.* at 322-323. Thus, the House has exclusive power of impeachment, but only the Senate may hold the trial and vote to convict. *Compare* U.S. Const. Art. I, § 2, cl. 5, *with* § 3, cl. 6. Similarly "[t]he exclusive privilege of originating money bills [belongs] to the house of representatives." *The Federalist No. 66*, *supra* (Alexander Hamilton). Each of these provisions was designed to check power in order to protect liberty. While the Senate was given a sufficient permanency to tend to those matters as required ongoing attention, *The Federalist No. 63*, *supra* (James Madison) at 384, the House was designed to be closer to the people with short terms and proportional representation. *The Federalist No. 53*, *supra* (James Madison).

Our Constitution contains "explicit and unambiguous provisions [that] prescribe and define the respective functions of the Congress … in the legislative process." *I.N.S. v. Chadha*, 462 U.S. 919, 945 (1983). The bicameral requirement that Congress be separated into two distinct branches was imposed to provide "enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps." *Id.* at 957. If the authority granted to the Legislature is not restrained, "there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches." *Id.* at 949 (quoting James Wilson from the records of the Federal Constitutional Convention) (citation omitted).

A key point in creating a bicameral legislature was to avoid what the drafters of the Constitution had just revolted against, an accumulation of power in a non-representative entity. *See The Federalist No. 22*, *supra* at 143-152 (Alexander Hamilton) (explaining that one legislative body would create a tyranny antithetical to the purposes of the Constitution). Concerns about this system were spiritedly debated by the delegates at the Federal Convention, and the eventual compromise that the House was representative of the people and the Senate was representative of the States lends itself to the Founders' belief in the constitutional function of the bicameral requirement. *See Chadha*, 462 U.S. at 950-51. The bicameral system, and its attendant division of power between the branches, is evidence of the greater scheme deliberately and painstakingly devised by the Founders' that the legislative process in Congress is "exercised in accord with a single, finely wrought and exhaustively considered procedure." *Id.* at 951.

A. Origination Clause Debate in the Federal Convention

The language of the Origination Clause played a significant part in the Great Compromise of representative apportionment within the legislative branches. Initially it was proposed that the House of Representatives possess sole control over the origination of money bills, because, "Taxation and 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." James V. Saturno, Cong. Research Serv., RL31399, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* at 2 (2011) (citation omitted). While, this restriction upon the Senate was initially rejected, it was ultimately approved as part of the grand compromise apportioning representation in the House based on population, but in the Senate based on the equal representation of the States. *Id.* This compromise benefitted the larger, more populated States

by allowing the House to have the power of the purse, but also allayed the fears of the smaller, less populated States that their voices would be drowned out by the majority.

As a result of this debate and compromise, the Origination Clause protects the people's immediate interests to control the representatives proposing new and increased taxes, and provided a check by the Senate through the power to make amendments. As for the originating power resting solely in the House, James Madison stated:

> The principal reason why the Constitution had made this distinction was, because they were chosen by the people, and supposed to be the best acquainted with their interest and ability. In order to make them more particularly acquainted with these objects, the democratic branch of the legislature consisted of a greater number, and were chosen for a shorter period; that so they might revert more frequently to the mass of the people.

The Founders' Constitution, vol. 2 at 385 (Phillip B. Kurland and Ralph Lerner, eds., Univ. Chicago Press 1981). And for granting the Senate the power to make amendments, Madison argued in the State of Virginia's Ratifying Convention that to give the Senate no voice in the legislation of revenue bills forces the ultimate rejection of such bills until a version from the House satisfies the Senate. *Id.* at 384. Thus each branch was assigned a specific role to play in the legislation of revenue bills that suited the overall structure commanded by Article I.

These arguments were well understood by those ratifying the new Constitution. There was no question that the Origination Clause was meant to vest power in the House and deny it to the Senate. *See Valerius*, Virginia Independent Chronicle, January 23, 1788, reprinted in 8 Documentary History, *supra* (Virginia No. 1) at 316 ("The senate has the power of originating all bills, except revenue bills"); *Cassius IV*, Massachusetts Gazette, December 18, reprinted in 5 Documentary History, *supra*, (Massachusetts No. 2) at 480 ("Here again must the anti-federalists appear weak and contemptible in their assertions, that the senate will have it in their power to establish themselves a complete aristocratick body; for this clause fully evinces, that if their in-

clinations were ever so great to effect such an establishment, it would answer no end, for being unable to levy taxes, or collect a revenue, is a sufficient check upon every attempt of such a nature."); *Albany Federal Committee: An Impartial Address*, April 20, 1788, reprinted in 21 Documentary History, *supra*, (New York, No. 3) at 1391, *Judge Sumner, Massachusetts Convention Debate*, January 22, 1788, reprinted in 6 Documentary History, *supra*, (Massachusetts No. 3) at 1298 ("*Obj*. The power to lay poll taxes, duties, imposts and other taxes. *Ans*. All Governments must have the right of taxation; which power, including that of laying a poll tax, is now vested in our state Government; but we have every security that reasonable beings can possibly ask, as by the Constitution no tax or revenue law can be passed in Congress, but what must originate or have its beginning in the lower House, who are elected by the people at large.").

B. Structure of Article I

An examination of Article I reveals the detailed plan for dividing the legislative power – first between two branches, and then by assigning separate functions as the exclusive realm of a particular branch. As already noted, the House of Representatives is designed to be directly representative of the people, with small districts and frequent elections. U.S. Const. Art. I, § 2. To counteract the potential for abuse of the legislative power in favor of the more populous States, each State was given equal representation in the Senate. U.S. Const. Art. I, § 3, cl. 1. Each branch of Congress was given a specific role to play in the creation of the new republic as part of the overall separation of powers scheme because "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

The *entire* House of Representatives must run for reelection biennially. U.S. Const. Art I, § 2, cl. 1. This frequency of elections affords the voters an ultimate check on the actions of its representatives. James Madison wrote that because a common interest between the people and the government was essential to protect liberty, it was just as essential that the House should be immediately dependent upon the people, and "[f]requent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." *The Federalist No. 52, supra* at 327 (James Madison). It was, and still is, important for Representatives to have an intimate knowledge and acquaintance with their constituents, and one of those areas which most requires local knowledge is taxation. *The Federalist No. 56, supra* at 346-47 (James Madison). Representatives derive their power from the people through popular election and owe their constituents duty, gratitude, interest, and the ambition to retain the favor of the people. *See The Federalist No. 57, supra* at 353 (James Madison). By checking the power to originate new or increased taxes with the combined the frequency of elections and the intimate relationship of the people and its Representatives, the Founders created a system which "nourishes freedom and in return is nourished by it." *Id.*

Senators, however, hold longer terms of office at six years and are reelected on a staggered basis so that only one third of the Senate seats are open every two years. U.S. Const. Art. I, § 3, cl. 2; U.S. Const. amend. XVII. Senators sit for longer terms in order to provide a check on the House and avoid the pitfalls of a unicameral system. *See The Federalist No. 62, supra* at 378 (James Madison) ("Another advantage accruing from this ingredient in the constitution of the senate, is the additional impediment it must prove against improper acts of legislation."). Longer terms also allowed for a greater development of the skills necessary to public policy. *Id.* at 379. Further, the Senate, as part of a bicameral system, was supposed to portray stability to

the outside world in addition to the internal stability provided by a bicameral check on the House. Externally, instability "forfeits the respect and confidence of other nations, and all the advantages connected with national character." *Id.* at 380. This, along with the provision that the Senate was given the power to advise and consent on treaties, is evidence that the Senate was initially seen as the branch of Congress better suited to oversee those portions of running a government further removed from the people. *See* U.S. Const. Art. II, § 3, cl. 2; *see also The Federalist No. 64, supra* at 390-96 (John Jay) (illustrating the need for stability in foreign policy making and the role a longer tenured Senate plays in that policy).

As former Supreme Court Justice and Pennsylvania delegate at the Federal Convention James Wilson said to the Pennsylvania Ratifying Convention, "[t]he two branches will serve as checks upon each other; they have the same legislative authorities, except in one instance. ***Money bills must originate in the House of Representatives.***" *Founders' Constitution*, *supra*, vol. 2 at 397. The judgment of the Constitution is that the Senate cannot have the power to originate revenue measures because it is so insulated from the people. Congress and the President have no power to change this structure on their own. Just as they cannot agree to give Congress power to veto executive decisions or control expenditures after the appropriation has been approved, they cannot agree to dispense with the Origination Clause. *Chadha*, 462 U.S. at 955, *Bowsher v. Synar*, 475 U.S. 714, 733-34 (1986). Each branch of government "must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Chadha*, 462 U.S. at 955.

II. THIS IS A BILL FOR RAISING REVENUE

The Supreme Court ruled that the key feature of this Senate-originated measure is constitutional *only* if it was enacted pursuant to Congress' taxing power enumerated in Art. I, § 8, cl. 1. In finding that this Senate-originated tax met the requirements of the Taxing Power, the Court

also noted that "any tax must still comply with other requirements in the Constitution." *NFIB*, 132 S. Ct. at 2598, 2600. This tax meets none of the exceptions that the Supreme Court has created from the clear command of the Origination Clause. For instance, the taxes imposed here are for general revenue and not tied to any specific new program. *Cf. United States v. Munoz-Flores*, 495 U.S. 385, 397-401 (1990); *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906); *Twin City Nat'l Bank of New Brighton v. Nebeker*, 167 U.S. 196, 202-03 (1897).

Unlike in *Munoz-Flores*, where the funds raised were to be paid into a specific fund, the individual mandate tax and other tax increases are deposited directly in the Treasury – there are no restrictions on expenditures or special fund limitations. *Compare Munoz-Flores*, 495 U.S. at 398-99, *with* Pub. Law. No. 111-148, §§ 9001-17. Likewise, the "individual mandate" tax is paid into the Treasury by individuals when they file their tax returns and is enforced by the IRS "in the same manner as taxes." *NFIB*, 132 S. Ct. at 2594. The funds are not dedicated to health care, health insurance, or any specific purpose. The Senate-originated "individual mandate" tax law constitutes the "essential feature" of a tax because, the Court held, it ***generates revenue for the Government***. *Id*. (emphasis added).

The "individual mandate" tax alone in this Senate-originated measure is estimated to generate $4 billion per year by 2017. *Id.* at 2594; Congressional Budget Office, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Apr. 30, 2010). The total tax take from all of the new taxes was estimated at nearly $500 billion over the period of 2010-19. Letter from Congressional Budget Office to Senator Harry Reid dated November 18, 2009, at 6 (available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_11_18_09.pdf). The Senate plan was for revenue to exceed the total

cost of the any changes enacted by the new law. The planned-for additional revenue, described as deficit reduction, totaled $130 billion. *Id*. at 1.

The Senate measure did not impose a fee for a special fund or merely seek to cover the cost of new program. This law, at its heart, is therefore a revenue measure designed to raise nearly one-half trillion dollars over the next decade and generate a net increase in tax collections over entitlement and service payments of $130 billion. This is precisely the type of significant new tax burden that the Constitution requires to be originated in the House of Representatives.

CONCLUSION

That defendant in this matter disagrees with the purpose of the Origination Clause is of no moment. This provision, like the other structural provisions set out a design of separated powers that the Founders believed would best protect individual liberty. These structural protections of liberty cannot be undone by parliamentary maneuvering, bare political majorities, or presidential fiat. If Congress and the President are dissatisfied with structural provisions of the Constitution, their remedy is to go to the people with an amendment. Simply ignoring the Constitution is not an option.

Dated: December 3, 2012

Respectfully submitted,

/s/ Erik S. Jaffe

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