

# Congress of the United States

Washington, D.C. 20515

February 11, 2009

The Honorable John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Jerrold Nadler  
Chairman  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairmen Conyers and Nadler:

The most popular legislative proposals to combat climate change involve establishing a new government bureaucracy known as Cap and Trade. These programs should be called “Cap and Tax” because their ultimate effect will be to establish a Federal tax on carbon emissions.

Avoiding the word “tax” has obvious political advantages for proponents of Cap and Tax legislation. But legally, the bill’s function, not its title, will dictate its treatment. If Congress passes Cap and Tax legislation, and courts determine that the legislation is a Revenue Bill under the U.S. Constitution, the courts could overturn the bill if Congress has not handled it appropriately.

Section 7 clause 1 of the U.S. Constitution requires that “All Bills for raising Revenue shall originate in the House of Representatives.” This requirement is important. As James Madison argued in the Federalist No. 58, the House is more accountable to the people than the Senate and should have the primary role in raising revenue. Madison wrote, “This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people.” The Federalist No. 58, p. 359 (C. Rossiter ed. 1961). At its core, the purpose of the Origination Clause is to protect individual rights. *Id.*; see also *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990).

In *United States v. Munoz-Flores*, the Supreme Court found that Revenue Bills that do not originate in the House of Representatives should be invalidated:

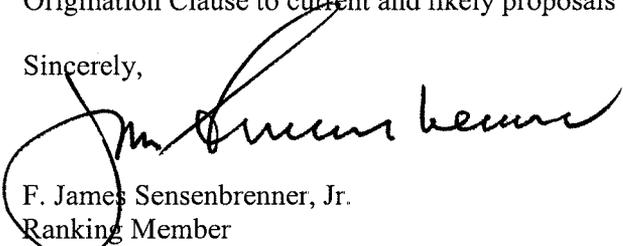
“In the case of Bills for raising Revenue, § 7 [of the U.S. Constitution] requires that they originate in the House before they can be properly passed by the two Houses and presented to the President. . . . The principle that the courts will strike down a law when Congress has passed it in violation of such a command has been well settled for almost two centuries.”

*Munoz-Flores*, 495 U.S. at 398 (internal quotes omitted).

Whether courts will consider Cap and Tax legislation to be revenue bills will depend on the specifics of the legislation. "Revenue Bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897).

Regardless of the ultimate judicial disposition of these questions, they raise legal issues that the Judiciary Committee should examine. We encourage you to hold hearings examining the applicability of the Origination Clause to current and likely proposals for Cap and Tax legislation.

Sincerely,



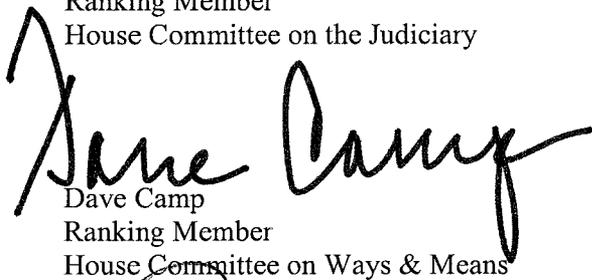
F. James Sensenbrenner, Jr.  
Ranking Member  
House Select Committee on Energy Independence & Global Warming



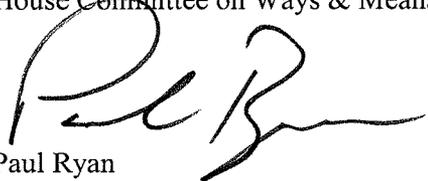
Eric Cantor  
Minority Whip



Lamar Smith  
Ranking Member  
House Committee on the Judiciary



Dave Camp  
Ranking Member  
House Committee on Ways & Means



Paul Ryan  
Ranking Member  
House Committee on the Budget