REVENUE-RAISING BILLS

I. GENERAL LEGAL BACKGROUND

Section 31 of article V of the state constitution requires that "[a]ll bills for raising revenue shall originate in the house of representatives, but the senate may propose amendments, as in the case of other bills." This provision was presumably taken from and modeled after a substantially similar provision in the United States Constitution.[1] In light of this constitutional mandate, it is important that all drafters have a working knowledge of what constitutes a bill to raise revenue - an issue which has been addressed in several Colorado cases and attorney general opinions. The first section of this chapter discusses the construction case authority at the federal and state levels has placed upon the phrase "bills for raising revenue". Section II. of this chapter provides drafters guidelines for dealing with revenue-raising bills in the pre-enactment and post-enactment contexts.

A. Historical Roots

As a result of the British Parliament's long struggle with the crown for control of the purse strings of the empire, Parliament and many of its American descendants require that revenue bills originate in the "lower house". N. Singer, *Sutherland Statutory Construction* [hereafter, "Sutherland"], § 9.06, 581 (5th ed. 1994). The right to originate money bills is an ancient and indisputable privilege of the "lower house" of the British Parliament, i.e., the House of Commons. This privilege was awarded the lower house in the belief that the House of Lords, a permanent, hereditary body created by the king, would be more subject to influence by the crown than the House of Commons, a temporary elective body. Hence, it would have been dangerous to permit the Lords to have the power of imposing new taxes. 1B Vernon's Ann. Texas Const., art. 3, § 33, Interpretive Commentary, 433 (West 1997).[2]

This privilege of the lower house concerning "money bills" was continued by a substantial number of state constitutions as well as by the federal constitution. At least 19 other states have a so-called "origination clause" in their constitutions identical or substantially similar to the one contained in section 31 of article V of the state constitution.[3]

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[1] U.S. Const. art. I, § 7, cl. (1).

[2] Similarly, Federalist Paper No. 66 argues that lodging the "exclusive privilege of originating money bills" with the House of Representatives would serve as one of "several important counterpoises to the additional authorities to be conferred upon the Senate," which at the time of the ratification of the federal constitution through the adoption of the 17th amendment to that document, was not directly elected by the people. See J. Madison, A. Hamilton, J. Jay, The Federalist Papers, 386 (I. Kremnick ed., Penguin Books 1987).

[3] See Alabama Const. art. IV, § 70; Delaware Const. art. VIII, § 2; Georgia Const. art. 3, § 5, para. 2; Idaho Const. art. III, § 14; Indiana Const. art. IV, § 17; Kentucky Const. § 47; Louisiana Const. art. 3, § 16, para. (B); Maine Const. art. IV, part 3, § 9; Massachusetts Const. part 2, cl. 1, § 3, art. 7; Minnesota Const. art. IV, § 18; New Hampshire Const. part 2, art. 18; New Jersey Const. art. 4, § 6, para. 1; Oklahoma Const. art. 5, § 33; Oregon Const. art. IV, § 18;

Although this limitation survives as a historical reminder of Parliament's struggles with the crown, in modern times, the clause expresses a preference for keeping the critical power to tax as close as possible to those subject to it. Under this view, the taxing power should rest exclusively with the lower house, which in Colorado and most other states is the House of Representatives. The lower house is presumed to more directly represent the people both because lower houses are customarily larger than their corresponding upper chambers and their membership is usually subject to more frequent elections. Sutherland, § 9.06, 581; Interpretive Commentary to article 3 of the Texas constitution, § 33, 433-34.[4]

B. Early Federal Interpretations of Revenue-raising Bills

Historically, the courts have accepted variations of three basic definitions of the constitutional phrase "bills for raising revenue".

The first of these definitions was borrowed from Justice Story by Justice Harlan in writing the majority opinion in *Twin City National Bank v. Nebeker,* 167 U.S. 196, 17 S. Ct. 766, 42 L. Ed. 134 (1897), and is probably the most frequently used definition in the reported cases. In *Twin City,* which involved a tax imposed by the federal government on circulating notes of national banks to fund a national currency secured by a pledge of bonds, Justice Harlan wrote:

> . . . (R)evenue 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. (167 U.S. 202-203)

A second definition was set forth in an early federal circuit court case, *United States v. Mayo,* Fed. Case No. 15,755, 26 Fed. Cas. 1230, 1 Gall 396 (Cir. Ct. D. Mass. 1813):

> The true meaning of 'revenue laws' in this clause (Article I, Section 7 of the United States Constitution) is, such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government. No laws whose collateral and indirect operation might possibly conduce to public or fiscal wealth, are within the scope of the provision. (26 Fed. Cas. 1231)

A third and more lengthy definition with elements of the two above definitions was set forth in a federal circuit court decision, *United States ex rel. Michels v. James,* Fed. Case No. 15,464, 26 Fed. Cas. 577, 13 Blatchf 207 (Cir. Ct. S.D. N.Y. 1875):

Pennsylvania Const. art. 3, § 10; South Carolina Const. art. III, § 15; Texas Const. art. 3, § 33; Vermont Const. chapter II, § 6; Wyoming Const. art. III, § 33.

[4] Federalist Paper No. 58 discusses the origination clause as among the devices inserted to enforce and maintain the separation of powers and, hence, to secure liberty. In the words of that document: "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, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." J. Madison, A. Hamilton, J. Jay, The Federalist Papers, 350 (I. Kremnick ed., Penguin Books 1987).

> Certain legislative measures are unmistakenly bills for raising revenue. They impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises for the use of the government, and give to the person from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefits of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen. They give no direct equivalent in return. (26 Fed. Cas. 578)

C. Colorado Case Interpretations

In assessing the constitutionality of bills under section 31 of article 5 of the state constitution, Colorado case authority has relied primarily upon the construction provided by Justice Harlan in the *Nebeker* case, although the other interpretations have influenced the courts' treatment of this issue as well.

Geer v. Board of Commissioners of Ouray County, 97 F. 435 (8th Cir. 1899) was the first case of importance dealing with the provisions of the state constitution concerning revenue-raising bills. In this case, a bill authorizing Colorado counties to refund certain of their debts through the issuance of bonds provided that the principal and interest payments on the bonds would be met through the levy and payment of a property tax. The plaintiff asserted that the act was void as it was a revenue-raising measure that had originated in the Senate. In striking down this contention, and upholding the act, the court said:

> A bill for raising revenue, within the meaning of this provision of the constitution (section 31 of article V), is one which provides for the levy and collection of taxes for the purpose of paying the officers and of defraying the expenses of government. This act was not of that character. Its main purpose was to authorize quasi-municipal corporations to refund their debts. The provisions for the levy and collection of taxes which it contained were mere incidents to the general refunding legislation which it carried. (97 F. at 440)

The court further noted that the act specifically provided that the taxes collected pursuant to the act were to be put aside to pay off the bonds and accrued interest and were not to be used to pay county officers or to defray the expense of government.

Another early Colorado case dealing with this issue was *Colorado National Life Assurance Co. v. Clayton*, 54 Colo. 256, 130 P. 330 (1913). In this case, the General Assembly had repealed and reenacted all the laws dealing with insurance, one of which imposed a two percent annual tax on the gross amount of premiums earned within the state. Because of the imposition of the tax, the plaintiff contended that the bill was revenue-raising and, therefore, void as it had originated in the Senate. The court disagreed, stating:

> A bill designed to accomplish some purpose other than raising revenue, is not a revenue-raising measure. Merely because as an incident, to its main purpose, it may contain provisions, the enforcement of which produces a revenue does not make it a revenue measure. Revenue measures are those which have for their object the levying of taxes in the strict sense of the words. If the principal object is another purpose, the incidental product of revenue growing out of the enforcement of the act will not make it a bill for raising revenue. The primary object and purpose of this bill was to regulate insurance companies,

> and the insurance business in this state. It is a regulation or supervision tax, and the method of arriving at the amount, or because of its operation the act produces an excess which is required to be turned into the general fund, does not affect its validity or render it an act for revenue. 54 Colo. at 259-60.

The next Colorado case dealing with revenue-raising bills was *Chicago, Burlington & Quincy Railroad Co. v. School District No. 1 in Yuma County*, 63 Colo. 159, 165 P. 260 (1917). This case involved a 1911 amendment to the general school laws of the state enacted in 1877. The amendment modified the taxation provisions of the school laws and, having originated in the Senate, the plaintiff argued that the amendment was a revenue-raising measure and was, therefore, void. The court held to the contrary, saying that the main purpose of the 1877 law was to establish a public school system in the state, and the provisions regarding the levy and collection of taxes were incidental but necessary to the main purpose of the 1877 law. The court then noted:

> If the senate had the power to originate a general and complete statute, as was the act of 1877, there does not appear to be any good reason why the senate cannot originate a series of acts when each is but a part of the complete and general law and all taken together are, and amount to the same, as one complete and general act. 63 Colo. at 163.

The court went on to hold that the levy and collection of taxes for the maintenance of a school system is not taxation for defraying the expenses of government or for the services of government, citing the *Geer* case. Nor, said the court, did the act constitute the levying of taxes in the strict sense of the word, as the levy is not actually imposed, but is only authorized to be imposed.

D. Other Case Authority at the Federal and State Levels

The *Geer* and *Chicago Burlington* cases are still good case authority in Colorado regarding what constitutes a bill to raise revenue and provide the foundation for the consideration of revenue-raising measures under this constitutional provision. Moreover, Colorado interprets its origination clause in a manner similar to that provided by federal and other state authority with respect to comparable revenue-raising provisions contained in their respective constitutions. More specifically, a strict or narrow construction of the phrase "revenue-raising bills" is the majority rule, with a particular bill being viewed as nonrevenue-raising whenever possible. A majority of the courts on the federal and state levels that have considered the question have ruled that revenue-raising bills are those which have as their main or primary objective raising money by taxation to support the general expenses and obligations of the government, and if the raising of revenue, even if it is through a tax and essential to the accomplishment of the bills's objective, is merely incidental to the primary purpose of the legislation, it is not a revenue bill. See generally Vermont Const., ch. II, § 6, annotations, ¶ 6, 257 (Michie 1996). See also Sutherland, § 9.06, 582 (collecting cases, including *Chicago, B & Q. R. Co.* case). Moreover, a majority of jurisdictions have also held that bills delegating taxing powers to municipalities are not revenue bills, because they do not, in themselves, raise revenue, but merely grant the power to do so. Vermont Constitution, ch. II, § 6, annotations, ¶ 6, 257.

On more than one occasion, the U.S. Supreme Court has specifically considered this issue as well. In the *Head Money Cases* (*Edye v. Robinson*), 112 U.S. 580, 5 S. Ct. 247, 28 L. Ed. 798 (1884), the court held that a fee imposed by the federal government on ship operators, rather than on their passengers (the "direct" beneficiaries of the fee), to defray the expenses of immigration, was not a tax. The court found that a tax was, in general terms, an exaction going to the general support of the government. 5 S.Ct at 252. In this case, however, the exaction was construed as a fee to create a fund to be raised from those profiting from immigration. In *Millard v. Roberts*, 202 U.S. 429, 26 S. Ct. 674, 50 L.Ed. 1090 (1906), the court held that legislation that imposed a property tax in the District of Columbia to pay for certain railroad improvements was not a bill to raise revenue within the meaning of the origination clause. Essentially, the court held that any taxes imposed were "but means" to the purposes provided by the legislation. 26 S.Ct. at 675. More recently, the Supreme Court has held that a Senate-initiated bill providing for a monetary special assessment to pay into a crime victims' fund did not violate the Origination Clause because the legislation raised revenue to support a particular government program and did not raise revenue to support government generally. *United States v. Munoz-Flores*, 495 U.S. 385, 398, 110 S. Ct.1964, 109 L. Ed. 2d 384 (1990). "Any revenue for the general Treasury that [the section of the legislation mandating the fee at issue] creates is thus 'incidenta[l]' to that provision's primary purpose." 110 S.Ct. at 1973.

E. Colorado Attorney General Opinions

Another source of helpful authority pertaining to this matter is contained in legal opinions from the Colorado Attorney General. As stated previously, the Attorney General has rendered several significant opinions regarding certain problems concerning revenue-raising bills. One of these opinions states that a bill that would have the obvious effect of *decreasing* collected revenues is, nonetheless, a bill for raising revenue. See the following opinions: Opinion No. 66-3941, dated February 3, 1966 [hereafter, 1966 Attorney General's opinion], and Memorandum, dated March 2, 1967. The 1966 Attorney General's opinion takes the form of a letter from Attorney General Duke Dunbar to State Senator Anthony Vollack. In that letter, Attorney General Dunbar opined that a bill repealing food sales tax credits or refunds was a revenue-raising bill required to be introduced in the House of Representatives under section 31 of article 5 of the state constitution. The letter states as follows: "Although Senate Bill No. 36 has the effect of decreasing the revenue to be collected pursuant to Chapter 300, it must be considered as a bill for raising revenue within the meaning of our constitution. The phrase 'raising revenue' as applied to legislative acts does not imply an increase in revenue."[5] This Attorney General opinion was affirmed by the

[5] The position that the origination clause applies in equal measure to bills that would *decrease* as well as increase tax revenues is also consistent with the weight of authority at the federal and state levels. See, e.g, *Texas Ass'n of Concerned Taxpayers, Inc. v. U.S.*, 772 F.2d 163, 166 (5th Cir. 1985) (Court notes that "all contemporary courts have adopted the construction apparently given it by Congress, i.e., 'relating to revenue'); *Armstrong v. U.S.,* 759 F.2d 1378, 1381 (9th Cir. 1985) ("The term 'Bills for raising revenue' does not refer only to laws *increasing* taxes, but instead refers in general to all laws *relating to* taxes.") (Emphasis in original.) *Wardell v. U.S.*, 757 F.2d 203, 205 (8th Cir. 1985) ("We cannot agree that 'revenue-raising' means only bills that increase taxes."); *In re Opinion of the Justices*, 249 Ala. 389; 31 So. 2d 558, 559 (1947) ("If the proposed act affects the amount of revenue which flows into the state treasury...it

Colorado Attorney General's Office in 1999. For more details, see the discussion under Section I. F. of this chapter.

The Colorado Attorney General has also opined that the power of the Senate to propose amendments to bills for raising revenue, as provided in section 31 of article V of the state constitution, applies only to pending bills, and not to revenue-raising bills passed at prior sessions. See the following opinions and memoranda: Memorandum, dated July 9, 1965, Opinion No. 66-3941, dated February 3, 1966, and Memorandum, dated March 2, 1967.

While there has been no formal opinion given on the following point, and presumably as an extension of the idea expressed in the previous paragraph, former Attorney General Dunbar additionally stated that a bill proposing an amendment to a "revenue-raising" statute that was originally enacted as a House bill must still be introduced in the House of Representatives, even in the absence of any effect upon revenues, so long as the measure relates to the levying and collection of taxes and the procedures therefor and not to the disposition of the revenues once collected. See undated memorandum relating to House Bills 1001 - 1005, inclusive, 1966 Regular Session.[6]

Another Attorney General opinion on this issue has stated that laws delegating authority to local government entities to levy and collect taxes are not revenue-raising bills as the revenue derived therefrom would not be used to defray the general expenses of the state government. See Opinion No. 60-3363, dated January 1, 1960. See also Vermont Constitution, ch. II, § 6, annotations, ¶ 6, 257.

F. Particular Applications

On the rationale that the revenue-raising feature of the legislation at issue was incidental to the main purpose of the act, the Colorado Supreme Court has held that the following types of acts are not bills for raising revenue within the meaning of section 31 of article V of the state constitution:

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is one to raise revenue....").

In the *Texas Ass'n of Concerned Taxpayers* case, the fifth circuit commented on the difficulties in formulating any standard of constitutionality to adequately guide Congress in dealing with the origination clause, particularly in terms of a facile distinction between "increasing" and "decreasing" revenue. In the words of the Court: "The fluctuations in national income and corresponding shifts in revenue yields make any label of 'increasing revenue' a slippery and potentially chameleonic one. The same bill may have an effect of increasing revenue under certain economic conditions and decreasing revenue under others." 772 F.2d at 166. See also *Armstrong*, 759 F.2d at 1381 (Such a distinction "may well be impossible to implement, since members of Congress may differ over whether a proposed revenue bill or amendment will 'increase' or 'decrease' taxes overall, and since the same revenue bill may well have varying effects upon the total taxes assessed in different years.").

[6] For the reasons discussed below, at section II. B. of this chapter, in connection with the discussion of GUIDELINE NO. 3, this conclusion seems a bit extreme.

(1) An act imposing a motor vehicle registration fee. In *Ard v. The People,* 66 Colo. 480, 182 P. 892 (1919), the court held that the purpose of registration fees is not the levying of taxes or the collection thereof as such fees are in the nature of a license or toll for using the public highways.

(2) An act setting up an elaborate code regulating the manufacture, sale, and use of malt, spirituous, and vinous liquors. *In the case of re Senate Interrogatories,* 94 Colo. 215, 29 P.2d 905 (1934), the court held that the main purpose of the act was to enact a comprehensive liquor code, and the revenue-raising feature was a remote incident to the code.

(3) An act imposing the gross ton mile tax. In *Public Utilities Commission v. Manley,* 99 Colo. 153, 60 P.2d 913 (1936), the court held that the act in question was regulatory in nature and was not primarily enacted for the purpose of raising revenue.

(4) In upholding the rates that a city charged for providing water and sewer services, the court, in *Western Heights Land Corporation v. City of Fort Collins,* 146 Colo. 464, 362 P.2d 155 (1961), held that a revenue-raising measure is one levying a tax to defray general municipal expenses. If the principal object is to defray the expense of operating a utility directed against those desiring to use the service, the incidental production of income does not make it a revenue-raising measure.

On the basis of the authority discussed above, the Office of Legislative Legal Services advises the General Assembly and its members that bills that affect the amount of general fund revenue collected by the state should be introduced in the House of Representatives. The Colorado Attorney General's Office has recently confirmed its support of this approach. Specifically, in response to a December 23, 1998, letter from Senator Ray Powers to the Attorney General asking for a review of the 1966 Attorney General's opinion, solicitor general Richard Westfall wrote: "We have researched the matter and conclude that [the 1966 attorney general's opinion] is correct. The term 'bills for raising revenue' ... means bills which provide for the levy and collection of taxes. A bill levying taxes may cause a tax to decrease as well as increase. Accordingly, art. V, § 31, precludes the senate from introducing measures that decrease state taxes." On November 10, 1999, this approach was confirmed again by the Colorado Attorney General's Office. See memo dated November 12, 1999, from Doug Brown in Appendix J of this manual for the opinion and discussion of its impact to staff.

Applying the case authority handed down at the federal level, by other states, as well as Colorado, produces the following general principles for assessing whether a statutory measure "raises revenue" within the meaning of section 31 of article V of the state constitution and thus must be introduced in the House of Representatives:

(1) If a bill levies a tax upon the property in the state either generally or locally and the revenues produced are payable into the state treasury for uses of the state government, the bill is one for raising revenue.

(2) If a bill authorizes a local governmental unit to levy a tax, or the bill itself levies a tax upon local property for a local purpose, the bill is not one for raising revenue.

(3) If a bill appropriates money from the state treasury, the bill is not one for raising revenue.

(4) If a bill commits a certain amount annually from revenues received from general taxes without requiring an increase in the tax levy, the bill is not one for raising revenue.

(5) If a bill is a bona fide regulatory measure, the bill is not one for raising revenue even though it levies a tax, toll, or fee.

(6) If a bill imposes a tax, toll, or fee in the nature of compensation for the use of governmental facilities or for compensation for government employees' services, the bill is not one for raising revenue.

G. Phrases Used to Describe Revenue-Raising Bills

Some of the stock phrases describing revenue-raising bills that have evolved from the principles discussed above and that are used by the courts frequently in their decisions are as follows:

(1) Revenue-raising bills are those that levy taxes in the strict sense of the word.

(2) Revenue-raising bills are those whose direct purpose is to raise revenue to defray the general expenses of the state government.

(3) Revenue-raising bills are those whose direct purpose is to raise revenue payable into the state treasury for general governmental uses.

(4) A tax is a compulsory payment that entitles the taxpayer to receive nothing in return other than the rights and privileges of good government which are enjoyed by all citizens alike.

(5) Bills that draw money from the citizen but give no direct or equivalent benefit in return are bills for raising revenue.

(6) Revenue-raising bills are limited to bills that transfer money from the people to the state, but do not include bills that appropriate money from the treasury of the state to particular uses of the state.

H. Phrases Used to Describe Non-Revenue-Raising Bills

Most of the cases arising under the revenue-raising clauses of the federal constitution and the various state constitutions have held that bills that fall into one of the following categories are not revenue-raising bills:

(1) Bills that delegate authority to local governmental units to levy taxes upon local property for local purposes.

(2) Bills that provide for the regulation of some business, trade, profession, or activity under the police power of the state.

(3) Bills that amend existing nonrevenue-raising statutes by increasing the license fees, tolls, or taxes imposed by the statute.

(4) Bills that appropriate money from the state treasury.

(5) Bills that impose a tax, toll, or fee as compensation for use of government facilities or for services provided by the government.

In concluding this Section I., reference should be made to the "Enrolled Bill Doctrine", a judicial doctrine which, with a certain amount of inconsistency, has been relied upon by the United States Supreme Court, the lower federal courts, and the courts of Delaware, Pennsylvania, Georgia, and South Carolina. The effect of the doctrine is to bar any court inquiry into the legislative origins of a bill. The doctrine is, however, of no great importance in Colorado since the Colorado Supreme Court, by the fact that it has consistently inquired into the origins of revenue-raising bills, has implicitly rejected the doctrine.

An additional legal issue for attorneys working in this area to consider is the policy implications of the TABOR amendment[7] on the origination clause. In particular, subsection (4) (a) of section 20 of article X of the state constitution requires voter approval for any legislation that increases taxes. As noted above, while section 31 of article V of the state constitution was intended to provide accountability to the citizens for tax increases because members of the House of Representatives are subject to re-election every two years, this purpose appears to have been superseded by TABOR's voter approval requirement. Voters now directly make the decision as to whether taxes should be increased. In light of this additional constitutional restriction, the continued viability of the origination clause - at least in terms of a check on the state's power over the purse - must be questioned, and it is possible

[7] Section 20 of article X of the Colorado Constitution.

that a court resolving a case in which the origination clause is at issue may see matters the same way. It is also possible that future courts will continue to maintain some core essence of the clause, e.g., requiring a bill that would directly increase the state income tax rate to originate in the House of Representatives, while sustaining the Senate's ability to play a more active role through the amendment process in crafting legislation with an impact on state revenues even in the absence of parallel action by the House.

NOTE: Another source of information on this issue is the Research Memorandum dated December 1, 1969, entitled "Revenue Raising Bills", prepared by the Legislative Drafting Office. For a more detailed and complete reference, consult the Research Memorandum.

II. GUIDELINES FOR DEALING WITH REVENUE-RAISING BILLS IN THE PRE-ENACTMENT AND POST-ENACTMENT CONTEXTS

The responsibilities of this Office in the implementation of section 31 of article V of the state constitution require different, sometimes conflicting, legal perspectives. Performance of these responsibilities is complicated by the fact that the meaning of section 31 may differ depending on whether it is being interpreted to apply to a bill during the legislative process or to enacted law, i.e., after the presumption of constitutionality has attached. This Section II. is intended to provide guidance in the application of section 31 of article V of the state constitution to bills in the pre-enactment and post-enactment contexts. The pre-enactment status of bills for raising revenue discussed in section II. A. is to be contrasted with the post-enactment status of such bills discussed in section II. B.

A. What is a Bill for Raising Revenue During the Legislative Process?

Section 31 of article V of the state constitution is, in effect, a constitutional rule of legislative procedure. It was intended to govern legislative behavior during the course of the legislative process.[8] The General Assembly has not adopted any written rules or other guidelines for determining the practical application of section 31 in the legislative process. The only guidance has come from the Legislative Drafting Office Research Memorandum referred to in section I of this chapter. The principles set forth in the Research Memorandum have been interpreted and applied since its publication, but the application of those principles to different taxes and in various legislative scenarios remains unclear.

The principles described in the Research Memorandum were based on judicial decisions that interpreted section 31 of article V of the state constitution after enactment of

[8] "It is obvious that the constitutional rules of procedure take precedence over all other rules of legislative procedure. They are judicially reviewable and enforceable, though in some jurisdictions they are considered to be addressed exclusively to the legislature and courts either refuse to consider questions of compliance or else find them to be only directory." Sutherland, section 7.01, at 561-2 (5th ed. 1994).

the bill in question at which point the presumption of constitutionality attaches. See *Lamm v. Barber*, 192 Colo. 511, 565 P.2d 538 (1977) (Law held unconstitutional only if violation of the constitution proven beyond a reasonable doubt). Courts often construe section 31 and other constitutional rules of legislative procedure (such as the "single subject" rule contained in section 21 of article V of the state constitution) to uphold legislation in the face of an alleged minor technical violation. Thus, courts often defer to the legislature in their application of these rules, and they uphold the legislature's action as reflected in the enacted bill. As a result, judicial decisions do not provide guidelines for interpretation of constitutional rules of legislative procedure that are consistent with the restrictive purposes to be served by these rules. One of these purposes is to preserve the integrity of legislative policy deliberations and decisions. For these reasons, this Office has often taken the position that constitutional rules of legislative procedure should be literally interpreted and strictly construed when such rules are applied before the enactment of a bill, i.e., during the legislative process.

The following guidelines are to be used in:

(a) Determining if a bill is or may be a bill for raising revenue that should be introduced in the House; and

(b) In giving advice as to whether amendments that affect revenues can be offered to such bills during the legislative process.

The guidelines attempt to apply section 31 of article V of the state constitution in the context of specific taxes and specific legislative scenarios. GUIDELINES NOS. 1 to 5 are to be used when a bill request is received and the primary question is whether the request involves a bill for raising revenue and whether the sponsor should be advised that the bill should be introduced in the House of Representatives. GUIDELINE NOS. 6 to 9 are applicable when a bill has already been introduced and the question arises whether a revenue-raising amendment can be added. Consistent with the above discussion, these guidelines reflect a strict or literal interpretation of section 31 because this interpretation seems most appropriate in view of the restraints imposed by constitutional rules of legislative procedure in the pre-enactment context.

GUIDELINE NO. 1. Any bill that would increase or decrease state income tax, state sales tax, state use tax, state estate tax, or any other state tax that goes to the state general fund and becomes available for general state purposes should be introduced in the House of Representatives.

Examples:

(1) Bills that increase or decrease these taxes would include bills that:

(a) Increase or decrease a tax rate;

(b) Extend tax liability to a new individual or class of taxpayers or increase an individual's or class's tax liability;

(c) Exempt an individual or class of taxpayers from tax liability or reduce an individual's or class's tax liability;

(d) Define or redefine the income or transaction subject to tax; or

(e) Create credits or deductions against an existing tax. On the other hand, a bill that provides for an "income tax checkoff" is not a bill that increases or decreases the income tax because such legislation merely designates the public purpose fund to which a taxpayer wishes to direct some of his or her refund. Such legislation does not affect revenue; it merely allows a taxpayer to direct money that would have been returned to the taxpayer to a particular cause that the taxpayer favors.

(2) Other state taxes that go to the state general fund and become available for general state purposes are: State cigarette tax, state tobacco tax, state controlled substances tax, state excise tax on beer, state excise tax on liquor, license fees for beer and liquor, parimutuel racing fees, limited gaming fees, and insurance premium tax.[9]

GUIDELINE NO. 2. Section 31 of article V of the state constitution has been interpreted to require introduction of a bill for raising revenue in the House even though the obvious effect of the bill is to *decrease* revenues.[10]

GUIDELINE NO. 3. Section 31 of article V of the state constitution may require the introduction of a bill for raising revenue in the House *even if it doesn't increase or decrease*

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[9] The taxes referenced in paragraph (2) were instituted in part in an effort to regulate some aspect of personal behavior or business conduct, but they are general fund taxes and as such have an impact on the money available for general state purposes.

Further, each of these taxes (with the exception of limited gaming fees) was originally enacted in a bill that originated in the House, and the Attorney General's Opinions discussed above indicate that the power of the Senate to propose amendments to bills for raising revenue applies only to pending bills, and not to revenue-raising bills passed at prior sessions.

While the enactment of an insurance premium tax in a Senate bill was held not to violate section 31 of article 5 of the state constitution because the primary purpose of the bill was regulation of insurance companies, *Colorado National Life Assurance Co. v. Clayton,* 54 Colo. 256, 130 P. 330 (1913), the current insurance tax was enacted in a House bill subsequent to *National Life Assurance.* A bill enacting a liquor regulation code was sustained against a section 31 challenge on the grounds that its chief purpose was other than raising revenue; however, the bill was ultimately declared invalid because the bill was not within a Governor's special session agenda. *In re Senate Interrogatories,* 94 Colo. 215, 29 P.2d 705 (1934). Moreover, the current laws enacting the excise taxes on liquor and beer and the current laws authorizing liquor license fees were enacted in House bills. Finally, the purpose of keeping the taxing power closest to the people is better served by assuming that bills increasing or decreasing general fund taxes should be introduced in the House.

[10] This guideline stems from the 1966 Attorney General's Opinion that states that the phrase "raising revenue" as applied to legislative acts does not imply an increase in revenue. One explanation for this apparently anomalous requirement is as follows: It could be inferred that, when a bill that decreases income taxes is introduced, the General Assembly will assume that the bill puts the entire subject of income taxes before them in an unrestricted sense, without limitation as to increase or decrease. If the bill is amended to add an increase in taxes or to eliminate the decrease and substitute an increase, the bill will be saved from a violation of section 31 because it was introduced in the House. It should be noted that a title that limits the ability of the General Assembly to amend such a bill to increase taxes could provide a safeguard against this danger. On this point, the reader's attention is also directed to the case authority discussed in note 5, above.

revenues, so long as the bill amends an act which was originally revenue-raising and relates to the levying and collection of taxes, and the procedures therefor.[11]

CAVEAT: This interpretation seems a bit extreme. For example, while a bill that accelerates the date by which those collecting sales tax must remit to the state is perhaps a bill for raising revenue, a bill that has a merely procedural or administrative effect and that has a title which limits amendments to procedural or administrative matters should not be considered a bill for raising revenue.

GENERAL EXCEPTION: If the bill does not increase or decrease revenues but merely provides for the disposition of revenues once collected, it is not a bill for raising revenue.[12]

Examples relating to general exception:

(1) Appropriation bills are not bills for raising revenue.

(2) If a bill neither increases nor decreases a general fund tax but diverts existing general fund revenues to a special purpose fund, it is not revenue-raising and may be introduced in the Senate. See Senate Bill No. 536, adopted in the 1979 session, which transferred a portion of sales and use tax revenues attributable to sales or use of vehicles or related items that had been credited to the general fund to the highway users tax fund.[13] The key distinction here appears to be that Section 31 of article V of the state constitution does not apply because there is no increase or decrease in the affected tax.

GUIDELINE NO. 4. A bill imposing a tax or fee that is in the nature of a users' fee and that is earmarked for a state special purpose fund (not the state general fund) usually is not considered to be "revenue-raising" and may, accordingly, be introduced in the Senate.

Example: A bill increasing motor fuel tax proceeds that are constitutionally dedicated to the highway users tax fund may be introduced in the Senate.

CAVEAT: A bill that increases the state income or sales tax or another state general fund tax and diverts the new revenue to a state special purpose fund poses a difficult

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[11] The 1966 Attorney General's Opinion also says that the power of the Senate to propose amendments to bills for raising revenue applies only to pending bills, i.e., bills for raising revenue pending in the current session that have already passed the House, and not to bills passed at prior sessions. This means any bill that amends an act that was originally a bill for raising revenue (for example, the income or sales and use tax laws) must be introduced in the House even if it does not increase or decrease revenues. The supporting theory is that "amendments are to be construed together with the original act to which they relate as constituting one law." 82 C.J.S. Statutes 896.

[12] 1966 Attorney General's Opinion.

[13] The transfers to the highway users tax fund mandated by Senate Bill No. 536 were repealed in 1981, effective July 1, 1986. See 1981 Colorado Sess. Laws, Ch. 469, 1890-91. Through Senate Bill No. 97-1, the General Assembly reestablished the transfer of a portion of the sales and use tax attributed to the sales or use of vehicles and related items that had been credited to the general fund to the highway users tax fund. See 1997 Colorado Sess. Laws, Ch. 262, 1531-1535.

question; however, the bill should start in the House because of the potentially erosive effect of such an exception on the general rule stated in section 31 of article V of the state constitution.[14]

GUIDELINE NO. 5. Since there is no longer a state property tax that could go to the state general fund and all property taxes are imposed by local governments, property tax bills are not usually revenue-raising and may be introduced in the Senate.

GUIDELINE NO. 6. A House bill that, as introduced, does not increase or decrease state general fund taxes may be amended in the House to increase or decrease state general fund taxes.[15]

COMMENT: Since section 31 of article V of the state constitution requires that bills for raising revenue "originate" in the House of Representatives but does not require that such bills be bills for raising revenue at the moment of their introduction in the House, a literal interpretation of section 31 does not bar House amendments that increase or decrease state general fund taxes. An interpretation of the origination clause that equates "origination" with "introduction" would hold the taxation power hostage to the requirement that a representative must introduce a bill for raising revenue before the House or Senate could even vote on the issue. It is not clear that such an interpretation would be consistent with the purpose of keeping the taxing power as close as possible to those subject to it because such an interpretation could contradict the fundamental concept of representative government.

GUIDELINE NO. 7. A House bill that, as passed to the Senate, does not increase or decrease state general fund taxes should not be amended in the Senate to increase or decrease state general fund taxes. Such a Senate amendment would result in origination of a revenue-raising bill in the Senate that violates the general rule.[16]

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[14] See, e.g., H.B. 90-1305 imposing a charge through the income tax to fund the uninsurable health insurance plan. This bill had been introduced in the Senate but was reintroduced in the House after an inquiry to this Office related to revenue-raising issues.

[15] Statements in GUIDELINE NOS. 6 to 9 regarding whether amendments are permissible are subject to the further qualification that such amendments come within the title of the bill to be amended as well as the requirements of section 17 (no change in original purpose of bill) and section 21 (bill must have single subject) of article V of the state constitution.

[16] Such an interpretation differs from the manner in which the origination clause has traditionally been interpreted at the federal level. Specifically, federal courts have held that the Senate may amend a particular bill to increase the federal equivalent of (state) general fund taxes even though the same bill as passed by the House decreased such taxes. See e.g., *Wardell*, 757 F.2d at 205 (Sustaining constitutionality of 1982 "Tax Equity and Fiscal Responsibility Act" against origination clause challenge even though bill as introduced in the House reduced revenue and the Senate "SEBEC" version, that was ultimately enacted, increased revenue). In assessing the constitutionality of Senate amendments to House-initiated revenue measures, federal courts have generally required only that the Senate amendments be germane to the subject matter of the bill, i.e., revenue collection, and within the Senate's power to propose. See *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 346, 55 L.Ed. 389 (1911) (Senate substitution of corporate income tax for inheritance tax contained in house bill); *Wardell*, 757 F.2d at 205; *Rowe v. U.S.*, 583 F. Supp. 1516, 1518 (D. Del. 1984) ("Once a bill has passed the House, ...no constitutional reason why the Senate may not make amendments germane to the subject matter of the legislation.").

GUIDELINE NO. 8. A Senate bill that, as introduced, does not increase or decrease state general fund taxes should not be amended in the Senate or the House to increase or decrease state general fund taxes. Such a Senate or House amendment would result in origination of a revenue-raising bill in the Senate in violation of the general rule.

GUIDELINE NO. 9. A Senate bill that, as introduced, increases or decreases state general fund taxes violates section 31 of article V of the state constitution even if it includes a referendum clause so that the bill does not become effective until approved by vote of the people. It is still a "bill for raising revenue" that did not originate in the House. This practice could result in a more obvious violation of section 31 if the referendum clause were removed by amendment during its passage by the two houses.

B. Would a Court Uphold the Bill under Section 31 after Enactment?

If a bill is introduced or an amendment is adopted that is inconsistent with the guidelines section II. A. of this chapter, this Office may be asked to provide advice as to whether the bill or amendment would be upheld in court after the bill is enacted. These guidelines should still be used as a frame of reference. However, the presumption of constitutionality that attaches upon statutory enactment may tip the balance in favor of the bill or amendment in the case of a "close call".

The following circumstances illustrate how this Office should approach the question of post-enactment validity: A Senator wishing to introduce a bill in the Senate resists our conservative advice that a bill that may be revenue-raising should be introduced in the House. While the Senator believes that the bill is not revenue-raising as introduced, the Office should point out that the bill's revenue-raising aspects may be enhanced by amendment, i.e., a clear tax increase or decrease might be added or amendments could alter the basic structure of the affected tax. Further, the Office should also work with the particular Senator on composing a bill title that would avoid amendments likely to render the bill one for raising revenue.

The Senator may remain unconvinced by the arguments presented in section II. A. of this chapter concerning the viability of section 31 of article V of the state constitution in the pre-enactment context and may believe the central question is whether a court would uphold the bill upon enactment in the face of a constitutional challenge under section 31. That question presents different issues from those present while the legislation is pending.

Sutherland notes that "The question of origin is not often litigated," but "[t]he general tendency favors narrow construction of what constitutes a revenue bill which must originate in the lower house." Further, Sutherland notes that the United States Supreme Court "has indicated a preference for restricting the provision to the narrowest possible terms."[17]

[17] Sutherland, 581,582. See also U.S. Supreme Court cases discussed under section I. D., above.

No cases have been found in which the Colorado Supreme Court has ruled a bill unconstitutional under section 31 of article V of the state constitution.[18]

Colorado decisions upholding bills against section 31 challenges have employed three basic tests:

TEST NO. 1. Does the bill levy taxes to be used for general state purposes?[19] (In short, does it affect any of the taxes that go to the general fund that are listed in GUIDELINE NO. 1?)

TEST NO. 2. Is the principal object of the bill to levy taxes in the strict sense of the word or is the principal object to accomplish some other purpose and to raise revenue incidental to that purpose?[20]

TEST NO. 3. Does the bill amend a bill that was originally an act for raising revenue?[21]

The following advice is offered on the basis of these tests:

ADVISORY NO. 1.0. A Senate bill that has as its principal object some purpose other than an increase in a general fund tax, but that creates or increases a nongeneral fund tax "as an incident" to its principal purpose, is likely to be upheld by a court under section 31 of article V of the state constitution.

ADVISORY NO. 2.0. A Senate bill that has as its clear principal object an increase in income or sales and use tax, or both, should be held by a court to be in violation of section 31 of article V of the state constitution.

The following hypothetical examples (ADVISORIES NOS. 3 to 5) would be cases of first impression. It seems likely that a court would uphold these Senate bills in the face of a section 31 challenge, although they could pose hard cases depending on the particular facts:

ADVISORY NO. 3.0. A Senate bill that has as its principal object an increase in any of the other general fund taxes listed in GUIDELINE NO. 1 should be held by a court to be in violation of section 31 of article V of the state constitution. However, a court probably would uphold the Senate bill on the grounds that the original law that enacted the tax had as

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[18] See discussion of *In re Senate Interrogatories*, note 9, above.

[19] *Geer v. Board of County Commissioners of Ouray County,* 79 F. 435 (8th cir.1899).

[20] *Colorado National Life Assurance Co. v. Clayton,* 54 Colo. 256, 130 P. 330 (1913).

[21] *Chicago, Burlington & Quincy Railroad Co. v. School District No. 1 in Yuma County,* 63 Colo. 159, 165 P. 260 (1917).

its principal object the regulation of certain behavior, such as smoking or drinking, or the regulation of some commercial activity, such as the insurance business or racing.[22]

ADVISORY NO. 4.0. A Senate bill that has as its principal object some purpose other than the creation of or an increase in a general fund tax, such as the funding of a new or existing state program, but that creates or increases a general fund tax to fund the new or existing state program would probably be upheld if the court felt that the new or existing state program was the principal object of the bill or because a court is likely to accord weight to the presumption of constitutionality in the face of a section 31 challenge. However, the revenue-raising aspect of the bill, i.e., the creation or increase of a general fund tax, is probably not "incidental" in the sense that it would not be occurring merely by chance or as a minor consequence of the principal object of the bill. If a court did uphold such a Senate bill, it seems reasonable to ask whether any continuing purpose is served by section 31 of article V of the state constitution.

ADVISORY NO. 4.1. A Senate bill that contains several substantive programs and provides general fund increases to fund those programs appears to be subject to the analysis provided under ADVISORY NO. 4.0.

ADVISORY NO. 4.2. A Senate bill that provides a system of income tax credits or income tax credits or refunds to promote a predominant state interest such as economic development would probably be upheld if the state interest were strong enough.[23] Although apparently in violation of TEST NO. 3 above, the bill would not actually increase taxes and this factor could be enough to tip the balance in favor of the bill.

ADVISORY NO. 4.3. Senate bill that provides a redefinition of income to reduce the income taxes of a particular class of individuals would probably be upheld.

ADVISORY NO. 5.0. A Senate bill that enacts or implements a tax that was imposed or authorized by a vote of the people through a constitutional amendment should be introduced in the House. However, a court challenge based on section 31 of article V of the state constitution could fail on the theory that those subject to the taxing power had imposed the tax on themselves.

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[22] See cases cited in note 9 above.

[23] See the "Urban and Rural Enterprise Zone Act", article 30 of title 39, C.R.S.

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