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The Misuse of Textualism: A Further Reply to Prof. Kahn

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MISUSING TEXTUALISM:

A FURTHER REPLY TO PROF. KAHN

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Because readers have already endured four separate articles, two by Prof. Douglas A. Kahn and two by me, debating the interpretation of Internal Revenue Code Section 67(e)(1), I am reluctant to respond to Prof. Kahn’s rejoinder, which appeared in the Tax Notes issue of January 18.¹ Nevertheless, our disagreement implicates the judicial craft of two current U.S. Supreme Court members, Chief Justice John Roberts and Associate Justice Sonia Sotomayor. I therefore feel it important to answer Prof. Kahn’s latest contentions, recognizing my duty to be as brief as possible.

Section 67(e)(1) limits a trust’s deduction for costs except costs “[that] are paid or incurred in connection with the administration of the . . . trust and [that] would not have been incurred if the property were not held in . . . trust.” Chief Justice Roberts added the word “customarily” to the statute. He read the exception as applying to trust administration costs “[that] would not have customarily been incurred if the property were not held . . . in trust.” On the other hand, Associate Justice Sotomayor, at the time a court of appeals judge, interpreted the exception to apply to trust administration costs that could not have been incurred if the property were not held in trust. In effect, she read the exception to apply to trust administration costs “[that] would not ever have been incurred if the

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2 The limit consists of treating such costs as miscellaneous itemized deductions, deductible under the regular tax only to the extent that they exceed 2% of adjusted gross income and not deductible at all for purposes of the alternative minimum tax.


property were not held . . . in trust.” In effect, she added the word “ever” rather than the word “customarily” to the statute.

I contended that either reading is semantically plausible. I did express a personal preference for Associate Justice Sotomayor’s reading because it would be easier to administer. I did not assert either that her reading was otherwise superior or that Chief Justice Roberts’ reading was untenable.

Chief Justice Roberts, on the other hand, argued that Associate Justice Sotomayor’s reading “flies in the face of the statute,” and Prof. Kahn agreed. Obviously, either reading imposes some judicial gloss on Section 67(e)(1). How then do Chief Justice Roberts and Prof. Kahn justify their shared conclusion that the word “customarily” can be read into Section 67(e)(1) but that adding the word “ever” “flies in the face of the statute”?

They argued that Congress’ use of “would” rather than “could” in Section 67(e)(1) indicates that Associate Justice Sotomayor’s reading is necessarily incorrect. I suggested other explanations for the use or “would” rather than “could”:

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5 Knight, 128 S. Ct. at 787.
It might signify a lack of consciousness about the ambiguity inherent in the statute as written. Or it might reflect a legislative decision not to resolve this ambiguity and instead to allow courts to determine more specifically how to apply the language. The logical mistake of both Roberts and Kahn is assuming that a failure to resolve the ambiguity through the use of the word “could” in place of “would” necessarily implies a resolution of the ambiguity in one way rather than another.

To repeat, Chief Justice Roberts and Prof Kahn assume that the use of “would” necessarily implies that Congress rejected the meaning ascribed to Section 67(e)(1) by Associate Justice Sotomayor. I offered two alternative explanations, both plausible. Given these plausible alternative explanations, along with the absence of any evidence that Congress ever considered the “could” alternative, the use of “would” cannot justify rejecting Associate Justice Sotomayor’s reading as implausible.

Prof. Kahn and I also disagreed about the meaning of the word “costs” in Section 67(e)(2), a companion provision to Section 67(e)(1). The meaning is relevant to whether Associate Justice Sotomayor’s reading would make some of Section 67(e)(1)’s language superfluous. I will spare readers an explanation of the connection, which is available in our prior articles. What is relevant here is our specific disagreement about the meaning of “costs.”
I argued that “costs” in Section 67(e)(2) could be read as that word is understood in everyday “common parlance.” Prof. Kahn emphatically insisted that the word “costs” be given a specialized, technical meaning and ridiculed the “common parlance” approach. Again, as a matter of semantics, either reading is plausible. Moreover, Prof. Kahn’s insistence that only a highly technical reading of the word “costs” is permissible seems at odds with the position of at least one eminent jurist, Judge Henry Friendly, who wrote:

When Congress uses a non-technical word in a tax statute, presumably it wants administrators and courts to read it in the way that ordinary people would understand, and not “to draw on some unexpressed spirit outside the bounds of the normal meaning of words.” Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 617, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944).\(^6\)

In truth, the language of Section 67(e)(1) is a mess. The language is not susceptible of easy application because it refers to a counterfactual. The language directs us to assume that the property in question, which is in fact held by a trust, is not held by a trust. We are then to determine whether, in those hypothetical, counterfactual circumstances, the owner would have incurred the expenses, either

\(^6\) Rosenspan v. United States, 438 F.2d 905, 912 (2d Cir.), cert. denied, 404 U.S. 864, 92 S.Ct. 54, 30 L.Ed.2d 108 (1971)
customarily or ever, depending on how we choose to interpret the statute. Instead of applying the law to facts that have occurred, we are asked to apply the law to counterfactuals and imagine what would have occurred had the facts been counter to what they were. Given such problematic language, as well as an absence of clear legislative intent, it is unsurprising that there is more than one semantically plausible way to read the statute.

I was moved to write about the differing interpretations of Section 67(e)(1) by Justice Roberts’ characterization of Associate Justice Sotomayor’s reasoning. It “flies in the face of the statute,” he wrote, suggesting a judicial activist, intent on overturning the intent of Congress in order to pursue a private social or political agenda. I believe that the Chief Justice should have offered more plausible reasons for preferring his reading of Section 67(e)(1) instead of the implausible claim that Associate Justice’s Sotomayor’s semantically plausible reading “flies in the face of the statute.”

In her court of appeals decision, then Judge Sotomayor did examine these two possible ways of reading Section 67(e)(1) and explained her preference for reading the statute as if it contained the word “ever” rather than the word “customarily.” It would make the
statute, she argued, easier to administer, a view later endorsed by tax
experts concerned that Chief Justice Roberts’ contrary position would
create an administrative mess.7

After my initial article appeared, I was further chagrined to read
Prof. Kahn’s response, characterizing my citation of both the
Treasury’s and the Solicitor General’s approval of Associate Justice
Sotomayor’s reading of Section 67(e)(1). He wrote:

Cohen’s view that approval of a court’s holding by the
winning party demonstrates the validity of that holding is
extraordinary to the point of being bizarre (emphasis
added).

In fact, I did not claim that approval by any winning party
demonstrates the validity of the holding. The Treasury and the
Solicitor General have larger responsibilities for the fair and efficient
administration of federal law than any purely private litigant. My point
- that their approval suggests that Associate Justice Sotomayor’s
reading was semantically plausible and did not, as Chief Justice

7 Lindsay Roshkind, “Interpreting I.R.C. § 67(e): The Supreme Court’s
Attempt to Nail Investment Advisory Fees to the Floor,” 60 Fla. L.
Rev. 961, 970-972 (2008); Dean Roy, “Is That the End? Section
67(e)(1) and Trust Investment Advisory Fees after Knight v.
Roberts claimed, “fly in the face of the statute” - is hardly bizarre or extraordinary.

A principal concern of the Solicitor General, in deciding what position to adopt in tax litigation, is practical administration of the tax laws. The office does not want to win with a theory that the IRS personnel in the field cannot administer. In the words of one former Deputy Solicitor General:

In my experience in the office, administrative feasibility was as important as revenue-grabbing. Associate Justice Sotomayor’s interpretation has much to recommend it in terms of ease of administration, and this is something the Solicitor General properly takes into account in deciding what position the United States will advance.8

There is, of course, nothing wrong with Chief Justice Roberts and Prof. Kahn preferring their interpretation of the statute to Associate Justice Sotomayor’s interpretation. But they find “plain meaning” where none exists and too readily accuse others, who disagree with their interpretation, of riding roughshod over the statute.