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## It Is Logic Rather Than Whom You Trust: A Rejoinder to Prof. Cohen

By Douglas A. Kahn

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Recently, Prof. Stephen B. Cohen and the author have been engaged in a dispute about statutory construction in the context of the *Rudkin* decision. This article resumes that discussion and outlines the conflicting views about the broader issues and the proper approach for courts to take in interpreting statutes.

This article is the continuation of an exchange that has taken place between Prof. Stephen B. Cohen and me concerning the validity of criticisms leveled by Chief Justice John Roberts on an opinion by then-Judge Sonia Sotomayor writing for the Second Circuit in the case of *William L. Rudkin Testamentary Trust v. Commissioner*.<sup>1</sup> While affirming the Second Circuit's decision, Chief Justice Roberts, writing for a unanimous Supreme Court, criticized and rejected Justice Sotomayor's construction of the relevant statutory provision.<sup>2</sup> In an article in the August 3, 2009, issue of *Tax Notes*,<sup>3</sup> Cohen defended Justice Sotomayor's construction of the statute and labeled Chief Justice Roberts's criticisms as "logically flawed" and "unpersuasive and overstated." I wrote a piece in *Tax Notes* disputing Cohen's analysis and concluded that Chief Justice Roberts's criticisms were "persuasive and accurately stated."<sup>4</sup> Cohen then responded to me in another *Tax Notes* article in which he concluded that my arguments are "contestable and perhaps even untenable."<sup>5</sup> This piece is a rejoinder to Cohen's reply.

In his most recent article, Cohen purports to state the three major points that I made in my prior article and proffers his response to each of them. His response to one of my points is palpably incorrect. In regard to another of my points, his statement of what I wrote omits crucial elements of my argument and so does not join issue with me. However, he does make several additional points to which I will respond. As to the remaining third argument, Cohen's response is unpersuasive.

Before addressing each of the three disputed issues, as well as another item that Cohen raised at the end of his article, I will set forth the conflicting constructions of the statutory provision that is at the heart of the controversy.

In the *Rudkin* case, a trust had incurred expenses to obtain expert advice to assist the trustees in investing the trust's assets. There was no dispute that the expenses were deductible. The dispute centered on the question of whether the deduction of the expenses was subject to the limitation imposed by section 67(a) on the amount of "miscellaneous itemized deductions" that can be taken. Under that provision, only the amount of the aggregate miscellaneous itemized deductions that exceeds 2 percent of the trust's adjusted gross income is deductible. While the AGI concept typically does not apply to a trust, for purposes of that limitation, the trust will have AGI as determined by section 67(e).

The dispute in *Rudkin* was over the question of whether investment advisory expenses of the trust were deductible in determining AGI; if so, they would not be a miscellaneous itemized deduction that is subject to the limitation. Both the Second Circuit and the Supreme Court agreed that the expenses in question were miscellaneous itemized deductions, but they disagreed on the construction of the crucial statutory provision on which the case turned. To put into focus the current dispute between Cohen and myself, I have set forth below the relevant portion of section 67(e), the construction of which is the matter in issue:

For purposes of this section, the AGI of an estate or trust shall be computed in the same manner as in the case of an individual, except that:

1. the deduction for costs that are paid or incurred in connection with the administration of the estate or trust and *that would not have been incurred if the property were not held in such trust or estate*, and
2. the deductions allowable under sections 642(b), 651, and 661, shall be treated as allowable in arriving at AGI. [Emphasis added.]

It is the construction of the language in section 67(e), which is italicized above, that is the subject of the dispute. Justice Sotomayor construed that language to refer to expenses that cannot possibly be incurred by an individual. Rejecting that construction, the Supreme Court construed that language as referring to expenses that customarily would not be incurred by individuals. Under the Supreme Court's construction, a trust's expense will qualify for a full deduction even though an individual is not prevented from incurring it as long as it is not an expense that individuals customarily incur. The Supreme Court nevertheless affirmed the Second Circuit's decision because the Court determined that the expense was one that customarily is incurred by individuals. Let us now turn to the points in contention.

### Vitiating of a Statutory Clause

Note that there are two separate paragraphs in section 67(e) authorizing full deductions for some deductible items of a trust. Paragraph (1) allows a full deduction for deductible "costs" that are paid or incurred in connection with the administration of the trust, and the second clause of that paragraph prevents a full deduction for a trust administration expense unless the expense is one that "would not have been incurred" by an individual. Paragraph (2) allows a full deduction for the exemption

<sup>1</sup>467 F.3d 149 (2d Cir. 2006), *Doc 2006-21522*, 2006 TNT 203-4.

<sup>2</sup>*Knight v. Commissioner*, 552 U.S. 181 (2008), *Doc 2008-948*, 2008 TNT 12-6, *aff'g* the Second Circuit's decision in *Rudkin*.

<sup>3</sup>Stephen B. Cohen, "Judge Sotomayor's Tax Opinions," *Tax Notes*, Aug. 3, 2009, p. 474, *Doc 2009-15953*, or 2009 TNT 146-12.

<sup>4</sup>Douglas A. Kahn, "*Rudkin* Testamentary Trust — A Response to Prof. Cohen," *Tax Notes*, Sept. 21, 2009, p. 1263, *Doc 2009-19184*, or 2009 TNT 180-10.

<sup>5</sup>Stephen B. Cohen, "Whom Do You Trust? A Reply to Prof. Kahn," *Tax Notes*, Nov. 9, 2009, p. 711, *Doc 2009-23081*, or 2009 TNT 216-7.

deduction that a trust is allowed and for distributions made to beneficiaries of the trust. Chief Justice Roberts made the point that if the second clause of paragraph (1) had the meaning that Justice Sotomayor gave to it, that would make superfluous the first clause of that paragraph, which limits that paragraph's application to trust or estate administration expenses. If only expenses that can be incurred exclusively by a trust or estate can be fully deductible, there would be no significance to requiring, as the first clause does, that the expense be incurred in connection with the administration of an estate or trust. Any deductible expense of a trust or estate that could not be incurred by anyone else would have to be connected with the administration of the trust or estate, and so there would be no need to have that requirement in the first clause of paragraph (1).

In his first article,<sup>6</sup> Cohen rejected that argument on the asserted ground that if it were not for the limitation to trust administration expenses of the first clause of paragraph (1), the second clause of that paragraph would prevent a full deduction for the items listed in paragraph (2). Of the deductions listed in paragraph (2), that is, the exemption deduction and the deduction for distributions to beneficiaries, the deduction for distributions to beneficiaries is an item that cannot be deducted by anyone other than a trust or estate, and so the second clause of paragraph (1) would not prevent that deduction. As to the deduction for the trust or estate's exemption, it is true that individuals are allowed a personal exemption deduction. It is far from clear, however, that the personal exemption deduction allowable to individuals would be treated as the same deduction as the exemption deduction allowable to a trust or estate by section 642(b). Unless those exemption deductions are treated as the same, the purported conflict that Cohen asserts would not exist. For the sake of discussion, let us assume that the exemption deductions will be treated as the same. Even in that case, because paragraph (1) applies only to deductible costs, and because an exemption deduction is not a cost, paragraph (1) cannot apply to the exemption deduction. Consequently, without regard to the administration cost provision of the first clause of paragraph (1), the second clause of paragraph (1) cannot possibly apply to any of the deductions listed in paragraph (2).

As previously stated, Cohen asserts that paragraph (1) would negate paragraph (2) if it were not for the limitation in the first clause of paragraph (1) restricting the application of that paragraph to trust (or estate) administration expenses. Accordingly, he concludes that Justice Sotomayor's construction does not make the trust administration expense limitation superfluous.

I pointed out in my response to Cohen that paragraph (1) applies exclusively to deductible costs, and so cannot apply to any of the items in paragraph (2), which consists of an exemption allowance and the deduction for distributions to beneficiaries, neither of which are "costs" in any sense of that term. If the trust administration expense limitation were deleted from paragraph (1), the paragraph would read, "The deduction for costs which would

not have been incurred if the property were not held in such trust or estate." That sentence would not apply to the deductions listed in paragraph (2) because none of those items are costs of the trust or estate.

In his reply to that point, Cohen attempts to show that the trust administration expense provision is necessary to protect the full deduction of the items listed in paragraph (2). He points out that a trust could pay expenses of a beneficiary, such as educational costs, and he maintains that, in common parlance, a trust's payment of a beneficiary's expenses would be considered costs incurred by the trust. He contends therefore that those costs would be subjected to the second clause of paragraph (1) if it were not for the limitation that paragraph (1) applies only to trust administration expenses, and so he concludes that the trust administration expense provision would not be made superfluous by Justice Sotomayor's construction. To quote him, "A trust, however, might pay the expenses of its beneficiaries, for example, for education or travel. Those expenses would be, in common parlance, costs incurred by the trust. However, they would not be costs incurred in the administration of trust property."<sup>7</sup>

Contrary to Cohen's assertion, a trust's payment of expenses of a beneficiary is not a payment of costs of the trust itself. Rather, it constitutes a constructive distribution to the beneficiary whose expense was paid and a constructive payment of that expense by the beneficiary. The payment of the expense is a payment on behalf of the beneficiary. It is not a payment of an expense incurred by the trust. The payment would be deductible by the trust under section 651 or section 661 as a distribution to a beneficiary. It is significant to note that if a trust's payment of a beneficiary's expense were not treated as a distribution to the beneficiary, there would be no basis for allowing the trust a deduction for that payment; in which case, neither paragraph (1) nor paragraph (2) would apply to the payment because those provisions apply only to deductions.

Also, even if a trust's payment of a beneficiary's expense were treated as a cost of the trust, and even if somehow the payment was deductible by the trust, any deduction that might be allowable for that "cost" would not come within paragraph (2). Paragraph (2) applies only to deductions for the exemption allowable to the trust and for distributions made by the trust under section 651 or section 661, the provisions of which provide a deduction for distributions made, or that are required to be made, to the trust's beneficiaries. So, the type of payment to which Cohen refers has no bearing on the issue under discussion.

Moreover, if the trust's payment were not treated as a distribution to the beneficiary, that would conflict with the basic structure of subchapter J, the part of the code that deals with trusts and beneficiaries. The trust is allowed a deduction under section 651 or section 661 as an element of the congressional scheme to provide passthrough treatment for a trust's income that is distributed (or required to be distributed) to a beneficiary. The

<sup>6</sup>See *supra* note 3.

<sup>7</sup>See *supra* note 5, at 712.

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trust deducts distributions to, or on behalf of, a beneficiary,<sup>8</sup> and the beneficiary takes into account the trust's income with the same characteristics that it had in the hands of the trust.<sup>9</sup> The scheme is to treat the trust as a passthrough entity to the extent that the trust makes (or is required to make) distributions to beneficiaries. If the trust's payment of a beneficiary's expense were not treated as a distribution to the beneficiary, the latter would have no income from that payment, and the trust likely would not qualify for a deduction. Payment of the educational expenses of a beneficiary, for example, would not be deductible by the trust unless the payment is treated as a distribution to the beneficiary; and it will be so treated.

Cohen claims that "in common parlance" a trust's payment of those expenses would be considered as payment of the costs of the trust. Common parlance has no relevance here. The question that must be determined is the operation of a word in a tax statute. It is not the meaning of the word "costs" that is in question; rather, it is the operation and scope of that term as it is used in the statute. In the context in which the word "costs" is used in section 67(e)(1), it clearly refers only to costs incurred by the trust. Expenses incurred by a beneficiary on his own behalf are not expenses incurred by the trust. Moreover, even if common parlance were relevant, it is far from clear that a lay person would consider a trust's payment of a beneficiary's expenses to be a cost of the trust.

Common parlance includes the views of people who have no knowledge of what a trust is or how it operates, much less how the tax law deals with trusts. The views of the general public on the characterization of trust activities have no bearing on how a tax statute should be construed. The construction of a tax statute is not a proper subject for a referendum or a poll of the general public.

### The Choice Between 'Would' and 'Could'

A second point made by Chief Justice Roberts focuses on the use of the word "would" in the second clause of paragraph (1). The second clause reads "which would not have been incurred if the property were not held in such trust or estate." As Chief Justice Roberts noted, and as both Cohen and I have agreed, the use of the word "would" in that clause creates an ambiguity. The determination of whether an expense would be incurred if it were held by someone other than the trust or estate rests on a prediction or speculation of what would occur in a situation that does not actually exist. The statute leaves open the question of the standard to be employed in making that prediction. There are several possible standards that could be employed.

One possible choice is to speculate whether the actual beneficiaries of the trust in question would be likely to incur that expense if they held the property. That subjective approach was not adopted by any of the courts that have dealt with the issue and has nothing to support it.

The standard adopted by Justice Sotomayor, and endorsed by Cohen, is that the expense must be one that no one other than a trust or estate could incur. In other words, it must not be possible for the expense to be incurred by anyone other than a trust or estate. I noted in my last article<sup>10</sup> that it is possible to construe the statute in that manner. The ultimate question, however, is not whether it is possible to construe the statute in that manner, but rather the question is whether there is another construction of the statute that better accords with the text of the statute. Whatever one thinks about the restraining force of text on statutory construction, when, as here, there is no legislative history indicating what Congress thought about this issue, the text is all that the courts have available to make their determination.

Instead of those two standards, the Supreme Court, and several Circuit Courts of Appeals that previously passed on this issue, have adopted the standard of whether it would be customary for persons other than an estate or trust to incur the expense.<sup>11</sup> This approach avoids the subjectivity of having to predict the likely behavior of the actual beneficiaries of the trust, and instead adopts an objective standard of community behavior. Because the use of the word "would" requires a prediction of what would take place, using a community standard is a reasonable means of measuring whether it is more likely than not that the expense would be incurred outside of the trust.

Chief Justice Roberts stated several reasons in support of the adoption of a community standard and for rejecting the narrower construction that Justice Sotomayor and Cohen prefer. One of those reasons is discussed above — namely, that Justice Sotomayor's construction causes a significant portion of the statute to have no application or effect, and that consequence would contravene the canon of construction to read a statute so that every part of it will have significance. A second point that Chief Justice Roberts made was that Justice Sotomayor's construction effectively changed the word "would" to the word "could," and if Congress had intended to require that the expenses *could not* have been incurred outside of the trust, they likely would have used the word "could." The fact that Congress chose to use the word "would" instead of "could" suggests that Congress did not wish the clause to apply only when it is not possible for the expense to be incurred outside the trust.

In his first article, Cohen argued that Congress could have eliminated the ambiguity that exists by adding one of several other words. If Congress wished to adopt the approach taken by Chief Justice Roberts, it could have added the word "customarily" after "would not" so that the clause would read in part, "would not customarily have been incurred." Alternatively, if Congress preferred Justice Sotomayor's construction, it could have added the word "ever" after "would not" so that the clause

<sup>10</sup>See *supra* note 4.

<sup>11</sup>*Scott v. United States*, 328 F.3d 132 (4th Cir. 2003), *Doc 2003-11125*, 2003 TNT 86-1; *Mellon Bank, N.A. v. United States*, 265 F.3d 1275 (Fed. Cir. 2001), *Doc 2001-23461*, 2001 TNT 176-10; *Knight v. Commissioner*, 552 U.S. 181 (2008).

<sup>8</sup>Sections 651 and 661.

<sup>9</sup>Sections 652 and 662.

would read in part, “would not ever have been incurred.” Cohen correctly noted that the failure of Congress to add either of those words no more points to Chief Justice Roberts’s construction than it does to Justice Sotomayor’s. He then concluded that the failure of Congress to choose the word “could” also has no bearing on the proper construction of the statute.

In my prior article, in response to Cohen’s argument, I contended that there is a difference between the failure of Congress to add a word or words that would improve the statute’s clarity, and Congress’s choice of one word rather than another in its drafting of the statute. Many statutes could be improved with the addition of some word or phrase, but that has little bearing on the construction of the provision. On the other hand, the choice of one word to the exclusion of another readily available and similar word that would give a different meaning is quite significant. The choice of “would” instead of “could” is especially significant in this context because the two words are commonly used and so were readily available to Congress to make its choice; and because, although there is a significant difference between the two words, they have much in common, so it seems likely that one drafting the statute would have thought of both words if he thought of either one. The similarity in the sounds of the two words makes it even more likely that the choice of one over the other was not merely an accident, but rather reflects a deliberate choice. Let me quote briefly from my prior article:

[Chief Justice Roberts] did not raise the question of why a word was missing when its addition would have clarified the issue. Rather, he asked why Congress chose the word “would” when the word “could” would have been more precise if that was Congress’s intent, especially because “could” is far from being an obscure term.

A vast number of tax statutes would have been more precise if a word or phrase had been added. In construing those statutes, not much weight can be given to the omission of those words. However, Congress’s choice of one word instead of another highly accessible word that would have given a different meaning to the provision is very significant.<sup>12</sup>

In his reply to my piece, Cohen repeats his point that Congress could have added the word “customarily,” and he contends that the absence of that word is no less significant than the failure to use the word “could.” I responded to that argument in the statements quoted above from my prior article, but Cohen did not mention my contention or reply to it. Because Cohen made no mention of the distinction I made between the omission of a word and the choice of one word over another, we really have not yet joined issue on that question.

Cohen does make the point that Congress’s choice of the word “would” may “signify a lack of consciousness about the ambiguity inherent in the statute. . . . 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.”<sup>13</sup> Of course, that is possible. But, the possibility of other explanations does not make it inappropriate to draw on the most likely explanation. Congress will sometimes deliberately leave an ambiguity in a statute rather than to continue to debate a controversial issue. There is nothing about the issue in question that suggests that it would engender a sharp division in Congress over its resolution. Nor is there any legislative history that indicates the issue was debated. Whether Congress simply was unaware of the issue, and so did not choose language to clarify it, is always a possibility when an ambiguity exists. But courts have to resolve statutory ambiguities when the issue arises. If there is no legislative history to guide them, the courts have to draw reasonable inferences from the text of the statute, from the policies underlying the statute, and from general principles that draw on a pool of experience with the determination of the likely meaning of language. That is the reason that maxims of statutory construction have been adopted; they are general principles that are aids to determining the likely intent of the legislature. In applying these principles, it is necessary to assume that the legislature acted rationally and had a purpose. If that assumption is not made, there is no basis for making any judgment about the meaning of the statute.

Cohen treats each separate point that Chief Justice Roberts made as if his ultimate decision rested solely on that point. That is not the case. Each of the points that Chief Justice Roberts made supports his decision, but that is not to say that any one of them alone would have been sufficient. The accumulation of those points takes on greater weight than any one alone has. Moreover, the whole is greater than the sum of the parts in that each added factor gives strength to the other factors.

### The Solicitor General and Treasury’s Position

In his original article,<sup>14</sup> Cohen observes that after Justice Sotomayor’s opinion was published, Treasury promulgated a proposed regulation adopting her view, and the solicitor general adopted her view as one of his arguments in the Supreme Court’s review of that case. Cohen asserted that those adoptions by Treasury and the solicitor general “affirmed the validity, and perhaps the superiority, of Justice Sotomayor’s approach.” In my prior article, I responded:

The significance of Treasury’s temporary adoption of Justice Sotomayor’s view is minimized by the fact that Treasury often takes into consideration, when choosing the position it takes on an issue, which position will increase the amount of revenue collected — that is, it takes the position that favors its interests. Justice Sotomayor’s construction would both increase revenue collection and serve administrative ease of enforcement, and so it is not surprising that Treasury would favor that position. Perhaps that was not the reason that Treasury

<sup>12</sup>See *supra* note 4.

<sup>13</sup>See *supra* note 5.

<sup>14</sup>See *supra* note 3.

promulgated its proposed regulation in this case, but that possibility reduces the significance of its adoption. As for the solicitor general's brief, it is not unusual for an advocate to urge, on review in a higher court, the position that the lower court took in deciding the case in favor of the advocate's client. As to both Treasury's and the solicitor general's actions, Cohen's view that the approval of a court's holding by the winning party demonstrates the validity of that holding is extraordinary to the point of being bizarre.<sup>15</sup>

In response, Cohen said:

Is it sensible, however, to equate the position taken by Treasury and the solicitor general as no different from that of any self-interested private litigant? Treasury has a special interest in the fair and effective administration of the tax laws. The solicitor general has an obligation, not just to try to win, but to pursue the fair and effective application of the U.S. code. Surely their endorsement cannot be dismissed as if they were private litigants with only private interests to pursue. Surely their endorsement supports the judgment that Judge Sotomayor's approach did not, as Chief Justice Roberts claimed, fly in the face of the statute.<sup>16</sup>

I am not sure that Cohen's statement is entirely responsive to my point; but, in any event, it is unpersuasive. I did not claim that the position that Treasury took in the proposed regulation was of no consequence at all. What I said, and what seems fairly obvious, is that Treasury's self-interest in increasing the revenue and reducing its administrative burden "reduces the significance of its adoption." In other words, one has to approach that proposed regulation with a fair amount of skepticism. Moreover, given that the proposed regulation was promulgated while the litigation was still in progress distinguishes it from the usual circumstances surrounding the issuing of a regulation. Anyone familiar with tax law knows that Treasury does not always act independently of its self-interest. The timing of this proposed regulation makes it especially vulnerable to doubts. The Second Circuit's decision in *Rudkin* was issued on October 18, 2006. The proposed regulation<sup>17</sup> was promulgated on July 27, 2007, seven months after the Second Circuit's decision. The *Rudkin* case was argued to the Supreme Court on November 27, 2007, five months after the proposed regulation was promulgated. It would not require a cynical disposition to suspect that the proposed regulation was promulgated to improve the government's litigating prospects in the case pending before the Supreme Court.

As for the position taken by the solicitor general, it is true that he was not *merely* a litigant, but he was a litigant. There are occasional circumstances when the solicitor general will take a position contrary to his litigating interest because of some overriding policy consideration.

The solicitor general will not take a position that would undermine what he sees as the proper administration of the tax law, but there are few circumstances in which that consideration arises. The *Rudkin* case did not present a situation of that nature. The question of whether to accept Justice Sotomayor's construction was a technical one of fairly limited consequence. It is not the type of issue that would induce the solicitor general to abandon his litigating cap. Like any litigator, the solicitor general's office will try to win the case it is presenting. Moreover, there are other considerations, peculiar to a government attorney that would lead the solicitor general to adopt Justice Sotomayor's approach even if he harbored doubts about it. A government litigator will not lightly fail to urge on appeal the rationale used by a judge below in deciding in favor of the government. The government likely will have cases in the future before that same judge, and it will not wish to irritate the lower court judge by not defending the view that judge adopted in deciding the case for the government. If the government fails to advance the lower court's rationale as one of its arguments, it risks facing a hostile reception when it next appears before that judge. The risk is greater with some judges than others, but it is possible that it was one of the considerations that the solicitor general's office took into account.

In any event, whatever weight one might give to Treasury's position, surely it did not validate Justice Sotomayor's position or demonstrate its superiority to Chief Justice Roberts's. Treasury has been known to take invalid positions. Even its final regulations have sometimes been held to be invalid, but the regulation in question was merely a proposed regulation. A proposed regulation is promulgated by Treasury before it has received comments from the tax bar and before it has been subjected to public scrutiny. When a proposed regulation is replaced, the final regulation that is adopted often is dramatically different from the one that was proposed. Even in the normal situation when a proposed regulation is not connected to ongoing litigation, it would seem extravagant to suggest that it demonstrates the superiority of Treasury's position.

It should not be forgotten that this dispute is not just the view of Chief Justice Roberts versus the view of Justice Sotomayor. Chief Justice Roberts's opinion was written on behalf of the entire Supreme Court; it was a unanimous decision. If, in the mind of Cohen, the view adopted by one litigant in the case validates that view because the litigant also has a public role, is not the view adopted by a unanimous Supreme Court that has no ax to grind in the case worthy of even greater weight? The question of the validity of conflicting statutory constructions should not be determined by the identity of the person or entity that holds them, but rather by an analysis of the virtues of the conflicting views. It is not whom you trust; it is what logic dictates.

If Cohen's statement about the weight to be accorded to a solicitor general's litigating position were valid, it would seem to mean that anytime the solicitor general appeared in court there should be a strong presumption that the position of the government is the superior one. If that were true, there might be little need to have the government litigate in the Supreme Court; the solicitor

<sup>15</sup>See *supra* note 4, at 1265.

<sup>16</sup>See *supra* note 5, at 712.

<sup>17</sup>Prop. reg. section 1.67-4.

general's adoption of a position would be sufficient to sustain it. Speaking *ex cathedra*, the solicitor general would be something of a secular pope. Since for the government to appeal from a decision it lost in a trial court the appeal must first be approved by the solicitor general's office, this presumption of correctness would seem to apply equally to appellate court cases in which the government is the appellant. Strangely, contrary to that assumption, the solicitor general and the government have not always prevailed in litigation.<sup>18</sup> Apparently, the courts do not share Cohen's extraordinarily high confidence in the solicitor general's office.

### Policy Overriding Statutory Text

Cohen and I both believe that the limitation on the full deduction of some trust expenses by section 67(e)(1) is poor tax policy, and the limitation should be repealed.<sup>19</sup> Cohen suggests that my objection to the statute led me to prefer Chief Justice Roberts's construction because it narrows the range of expenses that would be denied full deductibility by that statute. While that may be a virtue of the Supreme Court's construction, it did not influence my approval of it. Within constitutional limits, Congress has the role of determining tax law, and I do not condone a court's substituting its judgment for Congress's when it disapproves of what Congress did. Whether or not I agree with congressional decisions, I see the proper role of a court in construing a statute as implementing the intent of the legislature as best it can. If legislative history, including the climate in which the statute was adopted, indicates a purpose for the statute, that purpose should be implemented even if it means straining or even ignoring statutory text. Congress sometimes does make mistakes in the language employed in statutes, and if the statutory purpose can be ascertained, it should take precedence. In most cases, the text of a statute will control because a contrary legislative purpose will not be evident.

In the *Rudkin* situation, there was no indication of a legislative purpose that would point to one of the competing constructions over the other. Legislative purpose can be derived from more than the congressional committee reports and hearings. The apparent role of a statute in the income tax system can provide an insight into its purpose. The identification of the abuse at which the statute was aimed also can provide an insight. There was no information of that nature that shed light on the construction issue discussed in these articles. In that circumstance, the statutory text is controlling. But in this case, the text is ambiguous, and so the court must resolve that ambiguity. For the reasons stated above, Chief Justice Roberts's resolution of that ambiguity is far superior to Justice Sotomayor's. In addition to those reasons, there is another item that supports the Supreme Court's view.

As noted above, the natural meaning of the word "would" in the second clause of paragraph (1) of section 67(e) requires a prediction of whether the expense in

question would have taken place if the property were not held in trust. In other words, would an individual who held the trust's property have incurred the same expense? Justice Sotomayor determined that Congress did not intend there to be speculation whether an individual would have incurred such expenses and chose instead to adopt a bright-line rule that excludes from full deduction all expenses that are not uniquely those of a trust or estate. That approach essentially rejects the notion that the term used by Congress requires a prediction. By including in full deductions only those expenses that cannot possibly be incurred by an individual, that makes the term "would" refer to the current status of the item's deductibility rather than to a prediction of likely behavior. Because the natural reading of the term "would" requires a prediction of likely behavior, the Supreme Court's adoption of the customary community standard adheres to that natural meaning and provides an objective standard for applying it.

At the end of my first article,<sup>20</sup> I stated, in an aside observation, that a court might have chosen to permit a full deduction in the *Rudkin* situation because the expense in that case was for investment advice; and if the trustee had charged for its own service in determining the investment of the trust's assets, the trustee's fee would be fully deductible. I suggested that because Congress clearly intended to allow a full deduction for that type of service when conducted by the trustee, the statutory language could be expanded to permit an expense incurred for the same service performed by a third party to be fully deducted on the ground that that treatment was consistent with the apparent legislative purpose even though it does not fit the literal statutory language. Cohen raises the question of whether my willingness to strain or ignore statutory language in that case is reconcilable with my application of statutory language in rejecting Justice Sotomayor's construction. I see no inconsistency. In the case of Justice Sotomayor's construction, there is no evidence of a legislative purpose that would support departing from the statutory text. As to my suggestion that the statutory language could be ignored or expanded to permit a deduction of the investment advisory expenses, I relied on the apparent legislative intention to allow those expenses to be deducted. I do not see a substantive difference between a service performed by a trustee and the same service being delegated to a third party to perform. I therefore concluded that the legislative decision to allow a deduction for the cost of the trustee's performance of that service likely incorporates an intention to allow a full deduction for that cost no matter who performs it.

<sup>20</sup>See *supra* note 4.

<sup>18</sup>A famous example, with which tax lawyers are familiar, is *Commissioner v. Duberstein*, 363 U.S. 278 (1960).

<sup>19</sup>See *supra* note 5, at 712.