# Thoughts On Statutory Interpretation—For Tax Specialists, Too

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**Date :** January 10, 2017

- Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 **Harv. L. Rev.** 2118 (2016).
- Robert A. Katzmann, *Response to Judge Kavanaugh's Review of Judging Statutes*, 129 **Harv. L. Rev. F.** 388 (2016).

Tax specialists are no strangers to the exercise of statutory interpretation. The Internal Revenue Code is an enormously complex statute, with all of the overlapping provisions, competing goals, and specificity interspersed with ambiguity that one would expect to accompany that complexity. And mastering the tax policy aspects of the Code is hard enough that tax specialists might be forgiven for reducing the exercise of statutory interpretation to short statements about considering the Code's text, history, and purpose, or the "spirit" of the tax laws. A recent exchange between two prominent federal judges—Chief Judge Robert Katzmann of the Second Circuit and Judge Brett Kavanaugh of the D.C. Circuit—and the lengthier books highlighted within their exchange offer a highly readable reminder of the parallel complexity of statutory interpretation theory and jurisprudence. Tax specialists interested in seeing their policy preferences succeed in the real world would do well to take note.

Although tax specialists often like to think of the tax laws as unique, judges in tax cases routinely rely upon and debate about the same tools of statutory construction that they apply and discuss in interpreting other statutes. Consider just one particularly expansive example. In *Rand v. Comm'r*, 141 T.C. 376 (2013), deciding that refundable credits like the earned income tax credit reduce "the amount shown as the tax by the taxpayer on his return" when computing the underpayment penalty under § 6662 and 6664, Judge Ronald Buch discussed the consistent usage canon, the expressio unius canon, the surplusage canon, and the rule of lenity, in addition to the *Chevron* and *Auer* standards of review. Judge David Gustafson in dissent maintained that proper application of the rule of lenity supported the opposite conclusion. Judge Richard Morrison, dissenting separately, criticized Judge Buch's opinion for relying too heavily on the consistent usage canon and ignoring relevant legislative history. (Congress subsequently amended § 6664 to clarify its intent.) Also, *Carpenter Family Investments, LLC v. Comm'r*, 136 T.C. 373 (2011)—one of the cases leading up to the Supreme Court's decision in *United States v. Home Concrete* that basis overstatements are not omissions of an amount from gross income under §§ 6229(c)(2) and 6501(e)(1)(A)—includes an interesting exchange between Judge Robert Wherry for the majority and Judges James Halpern and Mark Homes in concurrence over whether unique attributes of the tax legislative process are relevant when considering legislative history in tax cases. And in *Yari v. Comm'r*, 143 T.C. 157 (2014), in interpreting the phrase "tax shown on the return" in connection with the § 6707A reportable transaction penalty, Judge Robert Wherry referenced several canons, discussed at some length which documents were relevant as legislative history, and observed further that "the process of divining the legislative intent underlying a statute's language and structure, while subject to canons of construction and well-established methodologies, is hardly an exact science."

In a sense, Katzmann's and Kavanaugh's conversation about statutory interpretation theory and jurisprudence started when Katzmann published the well-received Judging Statutes in 2014. For that matter, although not styled precisely as such, Katzmann's book could be read as responding to the also-acclaimed Reading Law: The Interpretation of Legal Texts, published by the late Justice Antonin Scalia and Professor Bryan Garner in 2012. As good textualists, Scalia and Garner rejected legislative history and emphasized semantic canons like the whole act rule and substantive canons like the rule of lenity. By comparison, Katzmann offered a robust and scholarly defense of legislative history as instructive in discerning congressional intent. As a key part of his argument, Katzmann contended that courts (and the rest of us) need to understand better how Congress operates in order to use legislative history appropriately.

In his review of Judging Statutes, Kavanaugh accepts the proposition that legislative history may be useful in resolving textual ambiguity. But he objects to relying on legislative history to override clear statutory text in the vein of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), and he criticizes Katzmann for failing to make that distinction. Kavanaugh observes further that many canons of statutory construction (including the "canon" of relying on legislative history to clarify textual ambiguity) "depend on an initial evaluation of whether statutory text is clear or ambiguous," and he describes at some length why it is often difficult to determine where textual clarity ends and textual ambiguity begins. He suggests, therefore, that courts should reduce their reliance on those canons that turn on a threshold finding of textual ambiguity and instead "seek the *best reading* of the statute." Kavanaugh offers ways in which several traditional tools of statutory construction that turn on the clarity/ambiguity distinction—from the application of legislative history to the *Chevron* standard—might be reframed to better facilitate the search for congressional intent. Other canons, like anti-consistency and consistent usage, he suggests using cautiously. Ejusdem generis, he suggests tossing outright.

In his response to Kavanaugh's review, Katzmann first clarifies that he did not intend to suggest a return to *Holy Trinity*'s reliance on legislative history to override clear statutory text, but rather merely "to highlight the challenges of the interpretive task and approaches to addressing that challenge." Katzmann also lauds Kavanaugh's efforts to explore "how canons can be better employed as interpretive rules of the road . . . freed from an inquiry into 'ambiguity.'" But Katzmann then poses a series of questions suggesting, for example, that seeking the best reading of a statute is what judges already do, and also that debates over clarity versus ambiguity and disagreements over best reading are both legitimate and inevitable whenever the words of a statute are not explicit.

In the end, Katzmann and Kavanaugh agree on critical starting points. Both start from the premise that the role of a judge (and, thus, anyone trying to read a statute) is to discern and comply with congressional intent. Both begin the interpretive process with statutory text. To quote Justice Kagan, as Kavanaugh does in his review, "we're all textualists now." Both Katzmann and Kavanaugh agree, though to substantially different degrees, that legislative history has a role to play in discerning congressional intent. But they disagree significantly over many of the details, wherein of course lies the devil.

This sophisticated conversation between Katzmann and Kavanaugh is a must-read for tax specialists for a couple of reasons. As sitting federal appellate court judges, Katzmann and Kavanaugh together offer a bird's eye view into real-world judicial decisionmaking. Yet Katzmann's book, Kavanaugh's review, and Katzmann's response not only offer examples from case law, but also draw extensively from the latest scholarship on statutory interpretation. Nevertheless, maybe because they are judges rather than scholars, Katzmann and Kavanaugh have made their conversation clear and easy to read, and thus accessible for audiences who are not so interested in a deep dive into that scholarly literature. Highly recommended for busy tax specialists who appreciate that they need to think more about statutory interpretation but want to get back to debating tax policy!

Cite as: Kristin Hickman, Thoughts On Statutory Interpretation—For Tax Specialists, Too, JOTWELL (January 4, 2017) (reviewing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 **Harv. L. Rev.** 2118 (2016) and Robert A. Katzmann, *Response to Judge Kavanaugh's Review of Judging Statutes*, 129 **Harv. L. Rev. F.** 388 (2016).), http://tax.jotwell.com/?p=2019.