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The Bureaucrat's Grammarian: A Supreme Court Trilogy

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Three times this month, the Supreme Court has released opinions in which it was called upon to determine whether a federal agency's construction of its own bailiwick was reasonable.

Twice it was, once it was not.

Although they were written by justices with very different bents or reputations, all three opinions were unanimous.

Given their proximity, their similarity, and their unanimity, the opinions might reveal something about this court's approach to the regulatory state.

A few words about:

- Holder v. Gutieerrez written by Justice Kagan;
- *Astrue v. Capato* written by Justice Ginsberg; and
- *Freeman v. Quicken Loans* written by Justice Scalia

Words mean things.

Especially Congress' words.

In these three recent cases, two of the Court's so-called "liberal" judges along with its senior "conservative" justice all garnered nine votes to delineate an agency's power or discretion, and all three began (and practically speaking ended) with the words Congress used. None of the opinions prompted any other justice to write separately.

In *Gutierrez*, Justice Kagan wrote that the Bureau of Immigration appeals need not "tack on" or consider a parent's time in the country when considering whether a child has remained here long enough to have a removal order canceled. Why? Because Congress did not require it:

> The Board's approach is consistent with the statute's text, as even respondents tacitly concede. Section 1229b(a) does not mention imputation, much less require it. The provision calls for "the alien"—not, say, "the alien or one of his parents"—to meet the three prerequisites for cancellation of removal. Similarly, several of §1229b(a)'s other terms have statutory definitions referring to only a single individual. . . . Respondents contend that none of this language "forecloses" imputation: They argue that if the Board allowed imputation, "[t]he alien" seeking cancellation would "still have to satisfy the provision's durational requirements"— just pursuant to a different computational rule. . . . . But even if so—even if the Board could adopt an imputation rule consistent with the statute's text—that would not avail respondents. Taken alone, the language of§1229b(a) at least permits the Board to go the other way—to say that "the alien" must meet the statutory conditions independently, without relying on a parent's history.

Singular grammar permitted singular construction. In the face of the text, all resort to history or statutory purpose paled. Agency uses good grammar, so agency wins.

Although slightly less textual, *Capato* revolves on the manner in which Congress used other provisions to narrow a definition that was completely circular an unhelpful . . . "'child' means . . . the ***child of an individual.***" Gee, thanks.

Justice Ginsberg wrote that the Social Security Administration was within its rights to deny benefits to a child who was conceived and born after her biological father had died. because Congress had completed its definition by reference to state intestacy law, which this child could not meet.

> As we have explained, §416(e)(1)'s statement, "[t]he term 'child' means . . . the child . . . of an individual," is a definition of scant utility without aid from neighboring provisions. . . . That aid is supplied by §416(h)(2)(A), which completes the definition of "child" "for purposes of th[e] subchapter" that includes§416(e)(1). Under the completed definition, which the SSA

> employs, §416(h)(2)(A) refers to state law to determine the status of a posthumously conceived child. The SSA's interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference.
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> Tragic circumstances—Robert Capato's death before he and his wife could raise a family—gave rise to this case.But the law Congress enacted calls for resolution of Karen Capato's application for child's insurance benefits by reference to state intestacy law. We cannot replace that reference by creating a uniform federal rule the ***statute's text scarcely supports***.

Agency has textual foundation, Agency wins again.

But in *Freeman*, Justice Scalia found that the plaintiffs were relying upon an agency interpretation that was characterized as policy "overreach" because it had no grounding in the Congress' text and grammar. They had sued under a statute that prohibited fee splitting and kickbacks in mortgage settlement services, but their complaint was that they had just been charged fees in exchange for work that had not been done.

No go. Congress' grammar would not support the Agency's policy overreach:

> The dispute between the parties boils down to whether this provision prohibits the collection of an unearned charge by a single settlement service provider—what we might call an undivided unearned fee—or whether it covers only transactions in which a provider shares a part of a settlement-service charge with one or more other persons who did nothing to earn that part.
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> By providing that no person "shall give" or "shall accept"a "portion, split, or percentage" of a "charge" that has been"made or received," "other than for services actually performed," §2607(b) clearly describes two distinct exchanges. First, a "charge" is "made" to or "received" from a consumer by a settlement-service provider. That provider then"give[s]," and another person "accept[s]," a "portion, split,or percentage" of the charge. Congress's use of different sets of verbs, with distinct tenses, to distinguish between the consumer-provider transaction (the "charge" that is "made or received") and the fee-sharing transaction (the "portion, split, or percentage" that is "give[n]" or "accept[ed]") would be pointless if, as petitioners contend, the two transactions could be collapsed into one.

Grammar rules.

And that's more than just a nerdy thing.

As long as the court is focused on Congress' words and Congress' grammar, the court is keeping the legislative power in the legislative branch with elected representatives where it belongs.

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