UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

RUTH BADER GINSBURG
UNITED STATES CIRCUIT JUDGE

July 27, 1993

Senator Joseph R. Biden
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Enclosed, please find my responses to the written questions you forwarded to me today.

With appreciation for your interest.

Sincerely,

Ruth Bader Ginsburg

Enclosures

Responses by Ruth Bader Ginsburg to Written Questions by Senator Joseph R. Biden, Jr., received July 27, 1993

1. The doctrine of deference to agency constructions of statutes applies when "Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency." *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991). The first step in deciding whether deference is due, therefore, is to determine if the statute itself answers the question, leaving no gap for the agency to fill. This step requires the courts to "employ[] traditional tools of statutory construction." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). The courts must examine "the language and structure of the Act as a whole" (*Dole v. United Steelworkers of America*, 494 U.S. 26, 41 (1990)) and any other pertinent evidence of the statute's proper meaning, including its legislative history (*id.* at 41-42) and "its object and policy" (*id.* at 35 (internal quotation marks omitted)).

In short, the task of statutory construction for the courts is neither mechanical nor narrow. Statutory language that might seem ambiguous in isolation, presenting a "gap" for the agency to fill, can take on a clear meaning in the light of full judicial consideration of congressional intent. Only if the reviewing court concludes that more than one answer is consistent with the congressional will expressed in the statute, having fully considered the relevant materials, is the agency charged with administering the statute owed deference.

Even then, deference is limited, because the reviewing court must determine whether the particular construction advanced by the agency is a "reasonable interpretation." *Chevron*, 467 U.S. at 844. Lack of a single congressionally determined meaning does not give the agency license to adopt any view it pleases. The agency view must itself be consistent with statutory language and congressional policy. *Chevron*, 467 U.S. at 843-45; *Pauley*, 111 S. Ct. 2534-35. Beyond that, the agency position must -- whether treated as a matter of statutory interpretation or as a matter of administrative policymaking subject to normal APA-review standards -- be *internally* reasonable. It must reflect reasoned decisionmaking, judged in light of such factors as the thoroughness of the agency's consideration of evidence and policies, the need for expertise on the question, and the consistency of the agency position with earlier views or the presence of articulated reasons for changing such views. *Id.* In this respect as in the initial task of statutory construction, the judicial role is anything but mechanical.

In the end, the courts' task is to ensure rational administration consistent with governing law, giving full weight to authoritative guidance from Congress. The "tensions" you describe are always present in determining where congressional constraint leaves off and agency discretion begins. The process demands sometimes-difficult judgment calls about when Congress has spoken with sufficient clarity. Greater legislative clarity, of course, reduces the difficulty of these judgments.

2. This is to confirm the response I gave to the Committee's questionnaire: No attempt was made by anyone associated with the Administration to obtain a commitment concerning, or to determine, how I would decide any issue or case.

WRITTEN QUESTIONS FOR RUTH BADER GINSBURG
FROM SENATOR STROM THURMOND

I want to ask you a few questions about the 10th Amendment to the United States Constitution.

As we all know, and as discussed here, the Constitution was submitted to the states by resolution of the Constitutional Convention on September 17, 1787. South Carolina was the eighth state to ratify on May 23, 1788.

The Bill of Rights, the first ten amendments to the Constitution, was proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

After the Constitution was submitted and before it was ratified, assurances were made to Legislatures of the several states that the 10th Amendment as part of the Bill of Rights would become a part of the United States Constitution. These assurances assured the ratification of the Constitution.

What is your view of two levels of sovereignty guaranteed by the Constitution--State sovereignty and federal sovereignty?

What is you view of the separation of powers doctrine as enunciated by the founding fathers and guaranteed by the 10th Amendment?

What weight will you give to the 10th Amendment when considering laws enacted by Congress that pre-empt state authority and sovereignty?

In your judgment, does the 10th Amendment have meaning and worth today and in the future?

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

RUTH BADER GINSBURG
UNITED STATES CIRCUIT JUDGE

July 27, 1993

The Honorable Strom Thurmond
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Your questions about the Tenth Amendment were forwarded to me yesterday. I enclose a response, which I hope you will find satisfactory.

With appreciation for your interest.

Sincerely,

Ruth Bader Ginsburg

Enclosure

Response by Ruth Bader Ginsburg to Written Questions of Senator Strom Thurmond, received July 26, 1993

In response to the four questions you asked about the Tenth Amendment, I have several overlapping thoughts and therefore hope you will find this composite answer satisfactory. The plan for dual sovereignty, confirmed in, and reinforced by the Tenth Amendment, is a core part of our Nation's history and an important reason for our Nation's success. Justice Black, in *Younger v. Harris*, 401 U.S. 37 (1971), spoke eloquently on this subject when he referred to the essential character of "Our Federalism." Many other Justices have expressed similar views over the years. "Our Federalism" has inspired foreign systems, notably, the European Economic Community members, and the motivating spirit of the Tenth Amendment should continue to contribute to the greatness of the United States.

As you note, the Tenth Amendment is vital to the Constitution's separation of powers scheme. The separation for which the Founders provided is indicated both by the tripartite structure established in the first three Articles of the Constitution, and by the Tenth Amendment. Further recognition of the sovereignty of the states is contained in the Guarantee Clause of Article IV, section 4.

Today, as in earlier years, the Tenth Amendment serves as a basic reminder -- first to Congress and then to the courts in interpreting congressional actions -- that the national government is one of limited powers and that the sovereignty of the states is a cornerstone in our constitutional structure. In specific application, the Amendment requires Congress to be clear and careful when it considers displacement of state authority with federal programs; and it requires the courts to insist on such clarity in cases involving claims that Congress has pre-empted state legislative, regulatory, or judicial authority.

WRITTEN QUESTIONS FOR RUTH BADER GINSBURG
FROM SENATOR HERB KOHL

1. My home state of Wisconsin has taken a lead in allowing televised court proceedings. So I was especially pleased with your support for allowing cameras in the courts when you discussed this matter with Judge Heflin yesterday and with Senator Hatch today. But I'm not sure precisely where you stand with respect to televising Supreme Court oral arguments.

Almost two years ago, Justice Thomas told this Committee that "it would be good for the American public to see what's going on there" -- meaning the Supreme Court.

QUESTIONS: Do you agree with Justice Thomas? Do you personally support televising Supreme Court oral arguments?

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

RUTH BADER GINSBURG
UNITED STATES CIRCUIT JUDGE

July 27, 1993

The Honorable Herbert Kohl
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Kohl:

Your written question, dated July 22, 1993, was forwarded to me yesterday. I enclose a response, which I hope you will find satisfactory.

With appreciation for your interest.

Sincerely,

Ruth Bader Ginsburg

Ruth Bader Ginsburg

Enclosure

Response by Ruth Bader Ginsburg to Written Question
of Senator Herbert Kohl, dated July 22, 1993

As I suggested at the Hearings, televised appellate proceedings can convey at once a picture not easily drawn in words spoken outside the courtroom. One can also view televised proceedings as an extension of the U.S. tradition of open proceedings.

I am sensitive, however, to concerns about distortion, and consider essential court control of any editing. Furthermore, I appreciate the need for good will among colleagues, and would not push my own preference without first hearing the views of others on this subject.

Just now an experiment with televised proceedings is ongoing in the federal courts, with several district courts and courts of appeals as participants. A report based on experience will be made to the U.S. Judicial Conference and the Conference may thereafter adopt a resolution on cameras in courts. It would be judicious to await the Conference report so that Supreme Court practice can be developed in light of the Conference discussion and recommendations.

LARRY PRESSLER
SOUTH DAKOTA

COMMITTEES
FOREIGN RELATIONS
COMMERCE SCIENCE AND TRANSPORTATION
SELECT COMMITTEE ON AGING
SMALL BUSINESS
JUDICIARY

United States Senate
WASHINGTON, DC 20510-4101

July 23, 1993

The Honorable Ruth Bader Ginsburg
U.S. Supreme Court Nominee
c/o Senate Judiciary Committee
Dirksen Senate Office Building, Room 246
Washington, D.C. 20510

Dear Judge Ginsburg:

As I mentioned in my questioning last Wednesday, I would appreciate your answering for the record the enclosed questions regarding issues of interest to the small business community.

Thank you for your attention to this matter.

Sincerely,

Larry Pressler
United States Senator

LP/gwg
Enclosures

SMALL BUSINESS

I would like to ask a couple of questions relating to business issues. While Ranking Member on the Small Business Committee, I intend to devote considerable attention during this Congress to improving the business climate for the small businesses of my state and throughout the nation.

MINORITY SET-ASIDE PROGRAMS

In City of Richmond v. Croson, 488 U.S. 469 (1989), the Supreme Court overturned a minority set-aside program that had been implemented by the City of Richmond, Virginia. In doing so, the Court outlined a two-part test that must be met if state and local governments are to implement constitutional set-aside programs for minority contractors.

As I understand the test, it requires that local public sector entities must base remedial minority set-aside programs on their own past discriminatory practices -- not on more general societal wrongs that precipitated past discrimination against minority groups, even if ample historical evidence supports such a finding. Once a strong factual predicate is established, state and local governments must develop a set-aside program narrowly tailored to a specific goal.

You had occasion to apply the Croson standard in O'Donnell Construction Company v. District of Columbia, 963 F.2d 420 (1992). In that case, you wrote a concurrence in which you held with the majority that the District of Columbia Minority Contracting Act violated a local non-minority contractor's Fifth Amendment right to equal protection. You agreed that under the Croson test, where "race classification is resorted to for remedial purposes, measures must be narrowly focused and supported by a strong factual predicate". You also agreed that the District's Minority Contracting Act "falls short on both counts."

However, you go on to state that you concur "with the understanding, made clear by Croson, that minority preference programs are not per se offensive to equal protection principles, nor need they be confined solely to the redress of state-sponsored discrimination."

1) First, do you believe I have stated the holding in Croson correctly -- that (1) a state or locality must demonstrate a compelling governmental interest by relying on prior discrimination by the state or local government itself; and (2) a resulting set-aside program must be narrowly tailored to accomplish a remedial purpose?

2) Could you elaborate on what you meant in your O'Donnell concurrence when you state that it is your "understanding" that minority preference programs need not "be confined solely to the redress of state-sponsored discrimination."

Over 75 percent of the states and more that 190 U.S. localities have implemented some form of set-aside programs for minority contractors. In many of these instances -- such as in Richmond and the District of Columbia -- these programs were developed using the guidance of Fullilove v. Klutznick, 448 U.S. 448 (1980). However, cases such as Croson and Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) hold that Fullilove does not provide an appropriate standard for state and local governments since it applied to actions of the U.S. Congress taken under its specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.

3) Do Croson, Wygant and their progeny provide state and local governments with a standard clear enough that they can revise their Fullilove based minority set-aside programs in such a manner as to make them constitutional? My basis for this question once again is your statement in O'Donnell that these programs need not "be confined solely to the redress of state-sponsored discrimination" and your additional statement that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified."

4) Do the caveats you expounded in O'Donnell demonstrate your belief that communities and states can develop constitutional minority set-aside programs based on standards other than those established by Croson? If so, doesn't this leave the future of Croson somewhat unclear and the job of state and local officials trying to develop a constitutional program much more difficult?

EMPLOYER V. UNION RIGHTS

In Microimage Display Division of Xidex Corporation v. National Labor Relations Board, 924 F.2d 245 (1991), you voted in the majority in a case involving a series of actions taken by Xidex Corporation following its purchase of a new plant that had been a union shop. The union alleged many of these actions constituted unfair labor practices. An administrative law judge and the NLRB agreed with the union on several points and you enforced their orders against Xidex.

1) In Xidex, the Circuit Court relied on the holding in NLRB v. Brown, 380 U.S. 278, 287-88 ((1965) that "antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice." Please elaborate on what you understand this standard to mean.

2) The Circuit Court in Xidex also makes the point that in conducting its review of NLRB actions, it would extend deference to the Board's findings of fact. Indeed, the court's opinion cites 29 U.S.C. 160(e) and explains its decision is governed by the statutory language that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

   a) Please explain your understanding of the phrase "substantial evidence on the record considered as a whole."

   b) Do you find the use of the word "substantial" particularly instructive in making a fact-based determination that the National Labor Relations Act has been violated?

3) At another point in the opinion, the Circuit Court notes that "although a showing of antiunion animus does not automatically establish a violation of [the Act], it places on the employer the burden to prove that it would have undertaken the action alleged to be an unfair labor practice even in the absence of the antiunion sentiment." The Court goes on to find that "[h]ere, the employer failed to carry its burden; the Board was therefore justified in finding a violation" of the Act.

a) What evidentiary standard must a union meet in order to demonstrate "antiunion animus" sufficient to shift the burden of proof to the company?

b) What evidentiary standard is applied to employers once the burden of proof has shifted to them in these cases?

INCOME TAX DEDUCTION FOR HOME OFFICE EXPENSES

Earlier this year, the Supreme Court, in Commissioner v. Soliman, 113 S. Ct. 701 (1993), limited the availability of the home office income tax deduction for many taxpayers. While I know you did not have occasion to write an income tax opinion during your years on the Circuit Court, as the ranking member of the Small Business Committee, I would like to explore this issue. I am troubled by the decision in Soliman and what it could mean for small business men and women and other self-employed individuals.

As you may know, the issues in Soliman, revolved around an anesthesiologist who practiced in three local hospitals--none of which provided him an office. He used a room in his home for administrative office functions such as records keeping and billing. While the District and Circuit courts allowed his deduction of expenses associated with his home office, the Supreme Court reversed and created new factors to be considered in the determination of whether home office expenses are deductible.

In essence, it seems to me the decision wrote two new conditions into law--conditions that appear nowhere in the tax statutes written by Congress. The Court held that in deciding whether to allow a deduction for home office expenses, the IRS and the courts should take into account: (1) the relative importance of the activities performed at each business location; and (2) the time spent in each place.

The reason I am troubled by the decision is that it creates new standards based upon what the justices think Congress meant to say. While such an exercise certainly is part of the statutory interpretation responsibilities of the Court, it seems to me that in this case, the Justices read the statute very expansively--and did so

in favor of the IRS position at the expense of individual taxpayers' interests.

1) What is your philosophy concerning the Court's role in statutory interpretation? In answering, I would like to hear your views with regard to tax cases, but anything you would wish to add in a general vein on the subject also would be appreciated.

2) If you are familiar with Soliman, I also would appreciate any comments you might have concerning the Court's reasoning and decision in that case.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

RUTH BADER GINSBURG
UNITED STATES CIRCUIT JUDGE

July 28, 1993

Senator Larry Pressler
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Pressler:

The questions attached to your July 23, 1993 letter were forwarded to me yesterday. I enclose responses which I hope you will find satisfactory. If you wish me to supply, in writing, the answers I gave to the questions you asked on the second day of the Hearings, please tell me, and I will be glad to do so.

With appreciation for your interest.

Sincerely,

Ruth Bader Ginsburg

Enclosures

Responses by Ruth Bader Ginsburg to Written Questions
by Senator Larry Pressler on Employer v. Union Rights
received July 26, 1993

In *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245 (D.C. Cir. 1991), a unanimous panel (Judges Henderson, Wald and R.B. Ginsburg), in an opinion by Judge Henderson, agreed to enforce an NLRB order in full in the face of cross-petitions for review by the employer and the union. The opinion is highly fact-specific and turns on the panel's statutorily-guided deference to the Board's decision.

The NLRB determined that the employer's threat to transfer work from its union to its non-union facility (which would have entailed laying off over twenty workers at the union plant) contravened section 8(a)(1) of the NLRA. That section declares it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under [the NLRA to engage in concerted activity for purpose of collective bargaining or other mutual aid or protection]."

Evidence in the record indicated that prior to the threatened transfer, a company manager had declared his intent to develop a strategy to rid the company of the union. Following the threat, employees, with some employer encouragement, circulated a union decertification petition. The record indicated that after circulation of the decertification petition, the company reversed its plan to move work away from the union facility. Just over a month later, the employer terminated recognition of the union, and actually transferred in work from its other, non-union plant.

Based on a full review of the record, the panel accepted the Board's finding that the employer's threat was motivated by antiunion animus. Given that adequately-supported finding, it was incumbent on the employer to demonstrate that it would have planned the work change even absent antiunion sentiment. Again, the panel deferred to the NLRB's finding that the employer had not made the necessary showing, i.e., had not carried the proof burden cast on it. Accordingly, the court enforced the Board's order regarding the 8(a)(1) violation.

Your first question concerns my understanding of *NLRB v. Brown*, 380 U.S. 278 (1965). In that case, the Supreme Court indicated that the NLRB need not inquire into employer motivation to support an unfair labor practice finding where the employer's conduct is inherently destructive of employees' rights and is not justified as serving significantly a legitimate business end. The Court's opinion in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), is illustrative. There, the employer offered twenty years of superseniority to any striking worker who crossed the picket line and returned to work. Blatant conduct of that order is "inherently discriminatory or destructive," *Erie Resistor*, 373 U.S. at 228, and obviates the need for independent evidence of antiunion animus.

But where the conduct is not so blatant and is designed on its face to achieve legitimate business ends, then, according to *Brown*, the Board can find antiunion motivation only when independent evidence so demonstrates. In the *Xidex* case, as Judge Henderson's opinion explained, the Board pointed to independent evidence sufficient to support a finding that antiunion animus motivated the employer's threat to transfer work

to its nonunion plant. In sum, after reviewing the record, we were satisfied that the Board's unfair labor practice finding had the requisite evidentiary support.

Your second question concerns the standard courts use to review decisions of the NLRB. The NLRA directs the court to defer to NLRB findings of fact and sets out the standard for such deference. Section 10(e) provides that the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The word "substantial" was added to section 10(e) of the NLRA by the Taft-Hartley Act of 1947. This standard for review of agency fact-finding is consistent with the standard generally applicable under the Administrative Procedure Act.

In his opinion for the Court in 1951 in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), Justice Frankfurter discussed the meaning of the word "substantial." Quoting from earlier Supreme Court decisions, Justice Frankfurter noted that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion." In the *Xidex* case, the panel adhered to the statutory instruction and the long-held precedent in this area. The decision is consistent with the views I expressed in the Hearings that a court considering an agency's decision should respect that decision but not to the point of abdicating the reviewing court's responsibility to canvass the record carefully.

You next ask about evidentiary standards and antiunion animus. I note first that the union bears no evidentiary standard in these cases because the General Counsel of the NLRB, not the union, presents the cases on behalf of workers. The evidentiary standard NLRB's General Counsel must meet to show "antiunion animus" was set out by Justice White in his opinion for a unanimous Supreme Court in 1983 in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In that decision, Justice White indicated that the General Counsel must persuade the Board that antiunion animus has contributed to the employer's adverse action. He noted that, consistent with the statutory requirement in section 10(c) of the NLRA, the Board must rest its unfair labor practice determination on a "preponderance of the testimony."

If the General Counsel has demonstrated antiunion animus motivating the employer's action, the employer may show, as an affirmative defense to the unfair labor charge, that the conduct in question would have occurred in any event. *Transportation Management Corp.*, 462 U.S. at 395. Applying this rule in the *Xidex* case, it was incumbent on the employer to show that the plan to transfer work, and lay off employees, would have occurred regardless of the divergent union status of each facility. As Judge Henderson's opinion developed after carefully reviewing the record, we deferred to the Board's reasonable determination that the employer did not make the requisite showing.

Responses by Ruth Bader Ginsburg to Written Questions by Senator Larry Pressler on Minority Set-Aside Programs, received July 26, 1993

You asked several related questions about the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Joining a unanimous panel and briefly concurring, I applied the teachings of *Croson* in *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992). I hope you will find in the following discussion adequate answers to your inquiries.

As you state, *Croson* dealt with "*remedial* minority set-aside programs" for the award of government construction contracts -- i.e., with a local government's adoption of a program for the purpose of remedying past discrimination. In that context, *Croson* made clear, the past discrimination to be remedied need not be the local government's *own* discrimination; it may be private discrimination (by the construction industry) in which the government had "become a 'passive participant'" through financial support, 488 U.S. at 491-92, thus "exacerbating [the private discrimination] pattern," 488 U.S. at 504. That is what I meant in *O'Donnell* when I wrote "minority preference programs" need not "be confined solely to the redress of state-sponsored discrimination." 963 F.2d at 429.

Croson also made clear that a local government, in establishing the basis for its remedial program, cannot rely on a "generalized assertion" of nationwide discrimination in an industry as a whole, 488 U.S. at 498, but "must identify [the] discrimination, public or private, with some specificity." 488 U.S. at 504. Furthermore, the program must be "narrowly tailored to remedy [the] prior discrimination." 488 U.S. at 507.

With respect to its essential, practical meaning, *Croson* explicitly stated: "Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." 488 U.S. at 509. The Court thus contemplated that its "specificity" and "narrow tailoring" standards were not impossibly restrictive, but could be met by proper showings and proper programs. My concurrence in *O'Donnell* cited an instance in which a court of appeals found, on the particular facts, that the *Croson* standards likely would be met. 963 F.2d at 429 (citing *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992)).

Finally, because *Croson* involved a city program designed as a remedy for past discrimination, the holding of the case did not address whether a race-based classification, in other contexts, can be justified on a non-"remedial" ground. In *O'Donnell*, I commented that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified." 963 F.2d at 429. I cited as support for the comment Justice Stevens' concurrence in *Croson*. Although Justice Stevens ruled out any non-remedial justification for Richmond's race-based restriction on contractors' access to the construction market, 488 U.S. at 512-13, he added that he would not "totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits" in, for example, an education setting. 488 U.S. at 511 n.1, 512 & n.2. Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 311-19 (1978), elaborated on such a non-remedial justification in a school setting. Future cases, as you know, could well present questions about the kinds of "narrow tailoring" or other requirements one might appropriately apply to a justification of the kind Justice Powell described, and it would not be appropriate for me to address -- without a record, briefs, and arguments -- what those uses might be.

Responses by Ruth Bader Ginsburg to Written Questions by Senator Larry Pressler on the Supreme Court's Decision in *Commissioner v. Soliman*, 113 S. Ct. 701 (1993), received July 26, 1993

Federal courts should interpret statutes, first and foremost, by examining the statute's text. If the text is clear -- and as I have said, it is always the hope of federal judges that enactments will clearly reveal what the legislature meant -- the text itself should resolve the matter. When the legislature's meaning is not apparent from the statute's language, it is appropriate to take into account traditional aides to interpretation, notably, the overall statutory and historical contexts of the provision at issue, including similar and prior statutes, and the legislative history. While these additional materials should be relied on cautiously, they sometimes prove helpful guides.

In addition, applicable regulations authorized by the statute should be accorded reasonable deference by courts. This is particularly important in tax cases because the IRS has adopted a comprehensive (often interrelated) set of regulations that Congress and the country depend upon to foster evenhanded administration of our complex tax laws.

Regarding the *Soliman* case in particular, it would not be appropriate for me to comment on the Court's holding, especially without the benefit of briefing and argument. I might note, however, that the Court's endeavor in that case was to interpret the provision of the Internal Revenue Code, 26 U.S.C. § 280A(c)(1)(A), that allowed a deduction for a home office when the office was used as "the principal place of business for any trade or business of the taxpayer." All the Justices agreed that the case turned on the meaning of this phrase.