NLWJC - Kagan
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Welfare-Means Tested Benefits

Ur - means-tested benefits

EK - What ended up happening w/this? - BR

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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Bruce/Diana/Cynthia — How did anyone ever convince DOT - to do This? Where is This now? I wasn't aware That we had issued it yet. Or haven't we? Elena

July 29, 1997

The Honorable Janet Reno
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear General Reno:

I was very dismayed and disappointed after having read the Office of Legal Counsel's memorandum that was presented to me as justification for your interpretation of the term "means-tested public benefit" as will be used in future affidavits of support executed by sponsors of intending immigrants.[1]

On July 11, Justice Department officials including Deputy Assistant Attorney General Randolph D. Moss told me that the term would be interpreted as only applying to benefits provided through mandatory spending programs, i.e., entitlement programs. I was later given the memorandum, written by Mr. Moss and Acting Assistant Attorney General Dawn Johnsen, that I understand was adopted by this Administration as the basis for its definition of "means-tested public benefit." I can only conclude that the Administration's analysis was constructed to fit a predetermined result – that is, to minimize the scope of the term.

Section 551 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) requires that the new affidavit of support you are to draft is to be legally enforceable against the sponsor by any entity "that provides any means-tested public benefit." By interpreting this term to apply to only mandatory spending programs, you are relieving the sponsor of all responsibility for benefits consumed by the sponsored immigrant that are provided through discretionary programs. This is terrific blow not only to IIRIRA but to the American taxpayer as well, made doubly powerful by the fact that the interpretation is unfounded.

The Administration justifies its conclusion solely because the definition of the term "Federal means-tested public benefit" was removed from S. 1956, last year's Senate version of welfare reform legislation, on the Senate floor on a "Byrd rule" point of order raised by Senator

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[1] Memorandum for Harriet S. Rabb, General Counsel, Department of Health and Human Services (Jan. 14, 1997)(hereinafter cited as "Memo").

Exon.[2] The definition stated that:

> [T]he term "Federal means-tested public benefit" means a public benefit (including cash, medical, housing, and food assistance and social services) of the Federal Government in which the eligibility of an individual, household, or family eligibility unit for benefits, or the amount of such benefits, or both are determined on the basis of income, resources, or financial need of the individual, household, or unit.[3]

The Byrd rule[4] allows a Senator to raise a point of order against "extraneous" provisions during Senate consideration of a reconciliation bill. The rule describes six types of extraneous provisions, including provisions that do not produce a change in outlays or revenues and provisions that are not within the jurisdiction of the committee that submitted them for inclusion in the reconciliation measure.

Senator Exon objected to many provisions in his point of order. His rationale for objecting to the definition of "Federal means-tested public benefit" was that "Aspects are not in Finance Committee's jurisdiction."[5] No Senator made a motion to waive the Byrd rule (which would have required 60 votes) in this instance.

Ms. Johnsen and Mr. Moss conclude that the definition was struck because "it reached discretionary spending programs" (having no direct budgetary impact, as mandatory entitlement programs would).[6] Therefore, the "legislative record provides strong evidence that the phrase 'federal means-tested public benefits,' as used in [PRWORA], should be construed to reach only mandatory (and not discretionary) spending programs."[7] Thus, the term "means-tested public benefit" as it applies to the new affidavit of support should be so construed, or so I was told on July 11.

Not only is this argument wrong-headed, it is simply perplexing. Ms. Johnsen's and Mr.

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[2] Cong. Rec. S8423 (July 22, 1996).

[3] S. 1956, 104th Cong., 2d Sess. sec. 2403(c)(1) (1996).

[4] 2 U.S.C. sec. 644.

[5] Cong. Rec. S8424 (July 22, 1996).

[6] Memo at 2. "The Parliamentarian upheld Senator Exon's Byrd rule objection on the grounds that the provision was outside the Finance Committee's jurisdiction and that, to the extent the definition encompassed discretionary programs, its impact on the budget was 'merely incidental.'" Id. At 6.

[7] Id. At 7.

Moss' memorandum presents the views of the Office of Legal Counsel "regarding a construction . . . of the scope of the phrase 'federal means-tested public benefit[s]' contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 . . . ."[8] However, the only term relevant to the new affidavit of support is "means-tested public benefit", and this term, along with all requirements for the new affidavit of support, is contained in section 551 of IIRIRA.[9]. And IIRIRA was never part of a reconciliation bill!

The interpretation of a term justified solely by the application of the Byrd rule to the legislation the term is contained in does not transfer to a similar term in another piece of legislation not subject to the Byrd rule in the first place. The memorandum provides no justification at all for an interpretation of "means-tested public benefit" as contained in IIRIRA.

Even if we were to examine the meaning of the term "Federal means-tested public benefit" as it exists in PRWORA, there is no legitimate rationale for concluding that it does not encompass benefits provided by discretionary programs simply because its definition was "Byrded-out."

The Byrd rule is merely a procedural device, an internal Senate rule designed to protect the Senate's deliberative process by excluding from consideration under expedited reconciliation procedures extraneous provisions added by the House. It was never intended to play any role in the executive branch's interpretation of a statute. This is not just my opinion, this is how the Senate Parliamentarian's Office views the Byrd rule. By all means ask Senate Parliamentarian Bob Dove (202-224-6128) -- I wish Ms. Johnsen and Mr. Moss would have done so before writing their memorandum.

If the Administration's reliance on the Byrd rule for purposes of statutory interpretation was improper, how then should we interpret "means-tested public benefit" or "Federal means-tested public benefit"? The Supreme Court tells us that:

> As in all cases involving statutory construction, "our starting point must be the language employed by Congress," . . . and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." . . . Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[10]

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[8] Id. at 1.

[9] While PRWORA also contained provisions setting forth the requirements for a new affidavit of support (sec. 423), superseding requirements were contained in the later-enacted IIRIRA.

[10] American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)(citations omitted).

Consistent with this precedent, the language of PRWORA clearly indicates that the term "Federal means-tested public benefit" includes benefits provided through discretionary programs, and there is no "clearly expressed legislative intention to the contrary."

"Federal means-tested public benefit" is an undefined term in PRWORA. The Supreme Court has held that when a term used in a statute is not defined in that statute, "we construe [the] term in accordance with its ordinary or natural meaning."[11] Where would one find the ordinary meaning of a term? "A dictionary is an appropriate source for gleaning that 'ordinary meaning.'"[12]

Webster's Third New International Dictionary of the English Language Unabridged defines "means test" as "any examination of the financial state of a person as a condition precedent to receiving social insurance, public assistance benefits, or other payments from public funds." The Random House Dictionary of the English Language defines "means test" as "any investigation into the financial position of a person applying for aid from public funds."

There is no indication in these definitions that means-tested benefits are limited to those provided by "mandatory" benefit programs. Ms. Johnsen and Mr. Moss argue that "the proposition that combining plain terms necessarily results in an equally plain phrase is not at all self-evident."[13] However, I find it inconceivable that "Federal means-tested public benefit" could mean anything other than a Federal public benefit that is means-tested.

An additional indication of the proper definition of the term "Federal means-tested public benefit" in section 403 of PRWORA is provided by the fact that the term is preceded by the word "any." Webster's New World Dictionary defines "any" to mean "without limit" and "every". The plain meaning of the phrase "any Federal means-tested public benefit" -- every Federal means-tested public benefit without limit -- is directly at odds with the Administration's reading of the phrase. "Any Federal means-tested public benefit" clearly cannot mean "a means-tested benefit except if it is provided through a discretionary program".

The structure of PRWORA provides additional evidence that "Federal means-tested public benefit" must be read to include benefits provided through discretionary programs. Section 403 of PRWORA includes the term "Federal means-tested public benefit" in subsection (a) and then sets out a list of exceptions in subsection (c)(2) -- the "limitation" as to the receipt of Federal means-tested public benefits by "qualified" aliens in (a) does not apply to the "[a]ssistance and benefits" listed in (c)(2).

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[11] F.D.I.C. v. Meyer, 114 S.Ct. 996, 1001 (1994).

[12] Koyo Seiko Co., Ltd. v. U.S., 36 F.3d 1565, 1571 n.9 (Fed. Cir. 1994).

[13] Memo at 9 (footnote and citation omitted).

Conspicuously absent from (c)(2)'s list of exceptions is "benefits provided under a discretionary program." The Supreme Court has ruled that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[14] Since, as will be shown shortly, there was no contrary legislative intent, "Federal means-tested public benefit" in section 403(a) should not be read as containing an exception for "discretionary" benefits not found in section 403(c)(2).

Also, the list of exceptions in subsection (c)(2) itself includes discretionary programs! As Ms. Johnsen and Mr. Moss admit in their memorandum, a "textual argument" can be made that "[t]he inclusion of some discretionary programs in this list of exceptions would be unnecessary unless the term itself included such programs."[15] But, this is more than an "argument", it is a cannon of statutory construction. As the Eleventh Circuit has stated, "[i]n a case of a true statutory exception . . . an exception exists only to exempt something which would otherwise be covered."[16] The statute is thus clear that the definition of "federal means-tested public benefits" includes benefits provided through discretionary programs.[17]

All there is left to do is to determine whether there was "clear congressional intent" that would have us set aside the plain meaning of the statute.

As Ms. Johnsen and Mr. Moss admit in their memorandum, the conference committee's report on PRWORA states that "[i]t is the intent of conferees that [the deleted] definition be presumed to be in place for purposes of this title."[18] The deleted definition was the one quoted at the beginning of this letter that made no distinction between "mandatory" and "discretionary" benefits. So much for contrary legislative intent.

The memorandum states that "[w]e believe that this statement in the conferees' report

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[14] U.S. v. Smith, 111 S.Ct. 1180, 1185 (1991).

[15] Memo at 10.

[16] Florida Gulf Coast Building and Construction Trades Council v. N.L.R.B., 796 F.2d 1328, 1341 (11th Cir. 1986).

[17] Ms. Johnsen and Mr. Moss explain away this problem by stating that "[t]he categorization of particular programs as mandatory or discretionary is not at all obvious, and it is likely that many, if not most, members [of Congress] did not know precisely which programs fell into which category." Memo at 11. This argument shows a deplorable contempt for Congress that is unfortunately also exhibited elsewhere in the memorandum.

[18] H. Conf. Rep. No. 104-725, 104th Cong., 2d Sess. 381 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2770.

cannot be taken as controlling."[19] Even if we were to accept this argument that the conferees' statement is not "controlling" (which I must object to as showing altogether too little respect for Congress on the part of the Justice Department), the statement must still be agreed to trump other proffered legislative history. It is a settled matter of statutory construction that, as the Seventh Circuit states, a conference report "is the most persuasive evidence of congressional intent besides the statute itself."[20] Why? Because "the conference report represents the final statement of terms agreed to by both houses . . . ."[21]

There can surely be no "clearly expressed legislative intent" that is contradicted by the conference report itself! Thus, as the Supreme Court ruled, we must return to the language of the statute (even if other legislative history could be argued to provide some evidence of a contrary meaning). As I have shown earlier, this language clearly indicates that "Federal means-tested public benefit" must be read to include benefits provided through discretionary programs.

The other legislative history used by the Administration to support its interpretation of the term "Federal means-tested public benefit" is contradicted and made impotent by the language of the conference report. Even if it were not, this "other legislative history" is not properly read as excluding "discretionary" benefits. For it is merely a recitation of the events surrounding Senator Exon's point of order involving the Byrd rule -- a procedural rule inappropriate for statutory interpretation.

Even if Senator Exon's utilization of the Byrd rule were relied upon for statutory interpretation, it would not in this case indicate that "Federal means-tested public benefit" should exclude "discretionary" benefits. If Senator Exon had wanted to limit the meaning of the term to "mandatory" programs, he should have done one of two things.

One, when he raised his point of order on the basis of the Byrd rule, he should have included the phrase "any Federal means-tested public benefit" itself[22] in the list of violations of the Byrd rule that he sent to the Chair. Or, two, after raising his point of order to the definition, he should have offered an amendment to PRWORA adding "a benefit provided through a discretionary program" to the list of exceptions -- those "Federal means-tested public benefits" to

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[19] Memo at 11.

[20] Resolution Trust Corporation v. Gallagher, 10 F.3d 416, 421 (7th Cir. 1993). See also Northwest Forest Resource v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881 (4th Cir. 1996); RJR Nabisco, Inc. v. U.S., 955 F.2d 1457, 1462 (11th Cir. 1992).

[21] Demby v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981), quoted in Resolution Trust Corporation at 421.

[22] The term was contained in section 2403(a) of S. 1956.

which the restrictions on receipt by "qualified" aliens would not apply.[23]

Senator Exon eliminated a definition of "Federal means-tested public benefit", but he left the underlying term alone. Since the underlying term had a clear meaning in standard English -- a meaning that included benefits provided through discretionary programs -- his actions did not affect that meaning.

Additionally, we cannot attribute Senator Exon's intent in raising his Byrd rule point of order to the other members of the Senate. Given that the underlying term had a clear meaning in standard English, other Senators would have assumed that this "ordinary" meaning would still apply to the term. They could not know what Senator Exon was up to unless he informed them. This, he did not do until August 1, when on the floor of the Senate he ascribed his intent in offering his point of order to limiting the definition of "Federal means-tested public benefit" to benefits provided through mandatory programs.[24] At the time, the Senate was considering the conference report to PRWORA -- it had long since passed the versions of S. 1956 to which Senator Exon raised his Byrd rule point of order.

Remember, when Senator Exon made his point of order (on July 22), he merely indicated that, as to the definition of "Federal means-tested public benefit", "Aspects are not in Finance Committee's jurisdiction." How could any other Senator have known of Senator Exon's intent when it mattered, when he or she could have offered a motion to waive the Byrd rule?

For the reasons set forth in this letter, I urge you in the strongest terms to reconsider your interpretation of "Federal means-tested public benefit" as it will be utilized in affidavits of support. The present Department of Justice interpretation is utterly lacking in merit and makes a travesty of statutory interpretation. More importantly, it prevents from being fulfilled the promise to the American taxpayer that was the Illegal Immigration and Immigrant Responsibility Act of 1996.

Sincerely,

Lamar Smith

Lamar Smith
Chairman, Subcommittee on Immigration
and Claims

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[23] These exceptions were found at section 2403(c)(2) of S. 1956.

[24] Cong. Rec. S9400 (August 1, 1996)(statement of Senator Exon). The claim is not made until August 1 that the Senate Parliamentarian agreed that benefits provided through discretionary programs violated the Byrd rule. Id. (statement of Senator Graham).

W2- Means-tested benefits

Diana Fortuna
08/15/97 04:29:25 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Christopher C. Jennings/OPD/EOP

cc: Cathy R. Mays/OPD/EOP, Laura Emmett/WHO/EOP
Subject: fax you will receive

OMB is ready to clear the definition of means tested benefits. (Background is attached if you're interested).

In order to make sure we are OK with it, some or all of you will get a mysterious fax from Josh Gotbaum with an issue paper on the subject attached. The purpose of this is to give us a chance to speak now or forever hold our peace. I think the new definition is sensible, and so you can do nothing.

---------- Forwarded by Diana Fortuna/OPD/EOP on 08/15/97 04:26 PM ----------

Diana Fortuna
08/14/97 01:34:58 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP, Christopher C. Jennings/OPD/EOP
Subject: definition of means tested benefit and new child health program

People have been looking into this question of whether we should reconsider our (tentative) definition of means tested benefits, such that it would exclude the new child health program. Everyone has concluded or will probably conclude soon that we should give up on this. Apparently, there is some legal argument that you could exclude the new program, on the grounds that capped entitlements should be excluded. However, our opponents might argue that this clouds our big argument (the colloquy when the Byrd Rule knocked out a definition last year made an important mandatory/discretionary distinction).

Also, even if this logic were acceptable to OLC, the same logic would also let TANF off the hook -- and the only means tested programs we have defined in the entire government are SSI, food stamps, Medicaid, TANF, and probably now this new child health program. Taking TANF off the listt too would risk making Lamar Smith even madder than he is, such that he would mount a more serious legislative effort to get a much meaner definition into the law. So there seems to be an emerging consensus that we are at the end of the line on this -- HHS, Apfel, NEC, and I guess me too. OMB is still checking with Josh Gotbaum, but I think he will agree. HHS will probably officially issue it next week, so let me know if you aren't ready to drop this.

// Wp- means-tested benefits ID.

cc: Bruce

HHS Definition of Federal Means-Tested Benefits -- INFORMATIONAL

ISSUE

This note informs you that HHS intends to issue a Federal Register Notice that defines Federal means-tested public benefits. As written, the HHS agencies that will be defined as a Federal means-tested public benefit are TANF and Medicaid.

HHS has concluded that the Children's Health Insurance Program will be considered a Federal means-tested public benefit, although it will not be specifically listed in the Notice. Given the approach already taken for other programs, particularly TANF, other options for Children' Health were not feasible. The Children's Health Insurance Program will not be mentioned in the Notice since the program will not be operational until October 1, 1997 and we anticipate that HHS will publish this Notice next week.

BACKGROUND

Under the welfare reform law, legal immigrants who enter the country on or after the date of enactment are ineligible for any Federal means-tested public benefit for a period of five years after their date of entry into the U.S. The welfare reform law did not provide a statutory definition of Federal mean-tested public benefits and therefore the definition must be established by the Administration.

The main benefit administering agencies, including HHS, SSA, USDA, and Education will use the same definition as put forth in the HHS Notice, but HHS will be the first agency to publish the definition. As written, the definition would include all Federal means-tested, mandatory spending programs. Under HHS programs, this definition will apply to TANF and Medicaid.

WR - means-tested benefits

Record Type: Record

To:

cc:
Subject: Means tested benefits and Lamar Smith letter

---------- Forwarded by Elena Kagan/OPD/EOP on 08/12/97 04:02 PM ----------

Diana Fortuna
08/12/97 01:46:03 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: Means tested benefits and Lamar Smith letter

You asked where this issue is, and said you weren't aware we had issued it yet. We haven't officially issued it, because DOJ felt very strongly that they first must consult with Rep. Lamar Smith. That happened almost a month ago. He insisted on seeing a copy of the OLC opinion from last January, and then he wrote this nice letter to Reno. The plan is for the agencies to officially issue the definition this week or next, but the cat is kind of out of the bag since Smith already knows. So I don't think it will get any attention. Also fyi, it appears that the new child health program will end up getting classified as means-tested, but it's not 100% sure yet.

Re- means-tested benefits

07-30-97 WED 09 09 FAX 202 225 3673 IMMIGRATION & CLAIMS @002

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Moss' memorandum presents the views of the Office of Legal Counsel "regarding a construction . . . of the scope of the phrase 'federal means-tested public benefit[s]' contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 . . . ."[8] However, the only term relevant to the new affidavit of support is "means-tested public benefit", and this term, along with all requirements for the new affidavit of support, is contained in section 551 of IIRIRA.[9]. And IIRIRA was never part of a reconciliation bill!

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If the Administration's reliance on the Byrd rule for purposes of statutory interpretation was improper, how then should we interpret "means-tested public benefit" or "Federal means-tested public benefit"? The Supreme Court tells us that:

> As in all cases involving statutory construction, "our starting point must be the language employed by Congress," . . . and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." . . . Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[10]

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Consistent with this precedent, the language of PRWORA clearly indicates that the term "Federal means-tested public benefit" includes benefits provided through discretionary programs, and there is no "clearly expressed legislative intention to the contrary."

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[13] Memo at 9 (footnote and citation omitted).

Conspicuously absent from (c)(2)'s list of exceptions is "benefits provided under a discretionary program." The Supreme Court has ruled that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[14] Since, as will be shown shortly, there was no contrary legislative intent, "Federal means-tested public benefit" in section 403(a) should not be read as containing an exception for "discretionary" benefits not found in section 403(c)(2).

Also, the list of exceptions in subsection (c)(2) itself includes discretionary programs! As Ms. Johnsen and Mr. Moss admit in their memorandum, a "textual argument" can be made that "[t]he inclusion of some discretionary programs in this list of exceptions would be unnecessary unless the term itself included such programs."[15] But, this is more than an "argument", it is a cannon of statutory construction. As the Eleventh Circuit has stated, "[i]n a case of a true statutory exception . . . an exception exists only to exempt something which would otherwise be covered."[16] The statute is thus clear that the definition of "federal means-tested public benefits" includes benefits provided through discretionary programs.[17]

All there is left to do is to determine whether there was "clear congressional intent" that would have us set aside the plain meaning of the statute.

As Ms. Johnsen and Mr. Moss admit in their memorandum, the conference committee's report on PRWORA states that "[i]t is the intent of conferees that [the deleted] definition be presumed to be in place for purposes of this title."[18] The deleted definition was the one quoted at the beginning of this letter that made no distinction between "mandatory" and "discretionary" benefits. So much for contrary legislative intent.

The memorandum states that "[w]e believe that this statement in the conferees' report

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[14] U.S. v. Smith, 111 S.Ct. 1180, 1185 (1991).

[15] Memo at 10.

[16] Florida Gulf Coast Building and Construction Trades Council v. N.L.R.B., 796 F.2d 1328, 1341 (11th Cir. 1986).

[17] Ms. Johnsen and Mr. Moss explain away this problem by stating that "[t]he categorization of particular programs as mandatory or discretionary is not at all obvious, and it is likely that many, if not most, members [of Congress] did not know precisely which programs fell into which category." Memo at 11. This argument shows a deplorable contempt for Congress that is unfortunately also exhibited elsewhere in the memorandum.

[18] H. Conf. Rep. No. 104-725, 104th Cong., 2d Sess. 381 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2770.

cannot be taken as controlling."[19] Even if we were to accept this argument that the conferees' statement is not "controlling" (which I must object to as showing altogether too little respect for Congress on the part of the Justice Department), the statement must still be agreed to trump other proffered legislative history. It is a settled matter of statutory construction that, as the Seventh Circuit states, a conference report "is the most persuasive evidence of congressional intent besides the statute itself."[20] Why? Because "the conference report represents the final statement of terms agreed to by both houses . . . ."[21]

There can surely be no "clearly expressed legislative intent" that is contradicted by the conference report itself! Thus, as the Supreme Court ruled, we must return to the language of the statute (even if other legislative history could be argued to provide some evidence of a contrary meaning). As I have shown earlier, this language clearly indicates that "Federal means-tested public benefit" must be read to include benefits provided through discretionary programs.

The other legislative history used by the Administration to support its interpretation of the term "Federal means-tested public benefit" is contradicted and made impotent by the language of the conference report. Even if it were not, this "other legislative history" is not properly read as excluding "discretionary" benefits. For it is merely a recitation of the events surrounding Senator Exon's point of order involving the Byrd rule -- a procedural rule inappropriate for statutory interpretation.

Even if Senator Exon's utilization of the Byrd rule were relied upon for statutory interpretation, it would not in this case indicate that "Federal means-tested public benefit" should exclude "discretionary" benefits. If Senator Exon had wanted to limit the meaning of the term to "mandatory" programs, he should have done one of two things.

One, when he raised his point of order on the basis of the Byrd rule, he should have included the phrase "any Federal means-tested public benefit" itself[22] in the list of violations of the Byrd rule that he sent to the Chair. Or, two, after raising his point of order to the definition, he should have offered an amendment to PRWORA adding "a benefit provided through a discretionary program" to the list of exceptions -- those "Federal means-tested public benefits" to

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[19] Memo at 11.

[20] Resolution Trust Corporation v. Gallagher, 10 F.3d 416, 421 (7th Cir. 1993). See also Northwest Forest Resource v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881 (4th Cir. 1996); RJR Nabisco, Inc. v. U.S., 955 F.2d 1457, 1462 (11th Cir. 1992).

[21] Demby v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981), quoted in Resolution Trust Corporation at 421.

[22] The term was contained in section 2403(a) of S. 1956.

which the restrictions on receipt by "qualified" aliens would not apply.[23]

Senator Exon eliminated a definition of "Federal means-tested public benefit", but he left the underlying term alone. Since the underlying term had a clear meaning in standard English -- a meaning that included benefits provided through discretionary programs -- his actions did not affect that meaning.

Additionally, we cannot attribute Senator Exon's intent in raising his Byrd rule point of order to the other members of the Senate. Given that the underlying term had a clear meaning in standard English, other Senators would have assumed that this "ordinary" meaning would still apply to the term. They could not know what Senator Exon was up to unless he informed them. This, he did not do until August 1, when on the floor of the Senate he ascribed his intent in offering his point of order to limiting the definition of "Federal means-tested public benefit" to benefits provided through mandatory programs.[24] At the time, the Senate was considering the conference report to PRWORA -- it had long since passed the versions of S. 1956 to which Senator Exon raised his Byrd rule point of order.

Remember, when Senator Exon made his point of order (on July 22), he merely indicated that, as to the definition of "Federal means-tested public benefit", "Aspects are not in Finance Committee's jurisdiction." How could any other Senator have known of Senator Exon's intent when it mattered, when he or she could have offered a motion to waive the Byrd rule?

For the reasons set forth in this letter, I urge you in the strongest terms to reconsider your interpretation of "Federal means-tested public benefit" as it will be utilized in affidavits of support. The present Department of Justice interpretation is utterly lacking in merit and makes a travesty of statutory interpretation. More importantly, it prevents from being fulfilled the promise to the American taxpayer that was the Illegal Immigration and Immigrant Responsibility Act of 1996.

Sincerely,

Lamar Smith

Lamar Smith
Chairman, Subcommittee on Immigration
and Claims

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[23] These exceptions were found at section 2403(c)(2) of S. 1956.

[24] Cong. Rec. S9400 (August 1, 1996)(statement of Senator Exon). The claim is not made until August 1 that the Senate Parliamentarian agreed that benefits provided through discretionary programs violated the Byrd rule. Id. (statement of Senator Graham).

WR - means-tested benefits

Diana Fortuna
08/05/97 01:02:35 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Christopher C. Jennings/OPD/EOP, Jeanne Lambrew/OPD/EOP, Sarah A. Bianchi/OMB/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: Is the new child health program a means tested benefit?

The welfare law prevents legal immigrants who arrive after 8/96 from getting something called means tested benefits. After a very long, tortured process, HHS is about to release its definition of this term (although it has already given Lamar Smith and others on the Hill an advance peek). It will place only a few programs off-limits to these new entrants -- mostly programs that are already off-limits because of other explicit provisions in the law (Medicaid, TANF, SSI, food stamps). Now, however, it is dawning on all of us that we have this new child health program. I have heard that HHS's definition would probably make this program inaccessible to new entrants. We and OMB are asking HHS to take a few days to examine this question before releasing its definition. HHS is more inclined not to wait.

Let me know if you want to be involved in this issue as we figure it out.

Diana —

We've wanted this long.

Let's figure it out first.

Elena

WR - means-tested benefits

Diana Fortuna
07/10/97 11:45:20 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: Affidavit of support and means tested benefits

You've asked me about the timing and status of the decision on means tested benefits, as well as the timing of the affidavit of support rule that Sally Katzen wrote that interesting note about. Here's the wonderful story:

Means-tested is ready to go. But there are now 2 holdups to getting these 2 out.

1. DOJ feels very strongly that it should not send out major interpretations of the welfare law on immigration without first meeting and "consulting" with Rep. Lamar Smith. There is about .000005% chance that he would like our interpretation, tell us anything we don't already know, or change our minds, but DOJ has been very firm on this. So we are waiting for this meeting to get scheduled and occur, and then to let a respectable number of days pass before taking our action.

2. On the affidavit of support, a final snag has arisen in the last few days on the definition of "state means tested benefits" that OLC says was raised by the Brady Law decision. DOJ and INS met today to iron this out; I don't know the resolution yet. I am trading calls with David Ogden to suggest to him that time is of the essence.

Finally, HHS feels very strongly that means-tested should be announced at the same time as the affidavit, so there will be one day of attention to this rather than two. Therefore they are very reluctant to schedule the meeting with Smith until they know that the affidavit issue is resolved.

So the schedule is:
1. settle state means tested definition issue in affidavit of support (punting is a possibility)
2. meet with Smith
3. issue both a few days later

WR - means - tested benefits

Diana Fortuna
07/11/97 04:13:17 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: Update on affidavit of support and means tested benefits

Wow -- progress on this since yesterday's note to you -- DOJ and HHS met with Lamar Smith today, and it went as well as could be expected. They also briefed some Democrats. So now the only remaining issue is the remaining legal snag in the affidavit of support, and people think that's getting resolved. So the best guess is this will go public the week after next.

---------- Forwarded by Diana Fortuna/OPD/EOP on 07/11/97 04:07 PM ----------

Diana Fortuna
07/10/97 11:45:20 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: Affidavit of support and means tested benefits

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Finally, HHS feels very strongly that means-tested should be announced at the same time as the affidavit, so there will be one day of attention to this rather than two. Therefore they are very reluctant to schedule the meeting with Smith until they know that the affidavit issue is resolved.

So the schedule is:

cc: Diana, Cynthia
FYI. When is this happening? Fib: WR - means-tested benefits.
Elena

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 2, 1997

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

MEMORANDUM FOR ERSKINE BOWLES

THROUGH: Franklin D. Raines

FROM: Sally Katzen

SUBJECT: Heads-up on DOJ/INS Affidavit of Support Interim Final Rule

We have just completed review of an Immigration and Naturalization Service interim final rule that implements part of the recently enacted Immigration reform law by requiring sponsors of immigrants to file an affidavit of support that will enable Federal, State, and local governments to recoup the costs of any "means-tested benefits" received by the immigrants. It has taken an interagency group (including OMB, DOJ, and DPC) several months to work through the issue of how to define "means-tested" at both the Federal and State levels. To oversimplify the matter, the group decided to define "means-tested" for Federal purposes as programs funded under mandatory spending rules (as distinct from discretionary programs). For State benefit purposes (not including any Federal contribution), the group left it entirely up to the States to define the term, so long as they notify the sponsors of their definition.

This rule will not go unnoticed by some on the Hill, but it appears to be the right result. Please call me if you have any questions.

cc: Maria Echaveste
Rahm Emanuel
John Hilley
Ann Lewis
Thurgood Marshall, Jr.
Sylvia Mathews
Bruce Reed
Victoria Radd
Barry Toiv
Michael Waldman
Kathy Wallman
Ken Apfel
Michael Deich
Larry Haas

4-22 Means-tested benefits

1. Taplin – little activity – until end of the benefit flow 2–3 weeks.
2. Ogden – mtb! – for many reasons you'd like not to have discretion –
   will be changed w/ dissimulation.
   like to have real disclosure.

WR - means tested benefits

Diana Fortuna 04/22/97 09:53:07 AM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: DOJ means tested benefits

Elena was going to talk to Bruce about a disagreement between DOJ and HHS on how to proceed on the definition of means-tested benefits. Can you ask her if she has any advice for us on how to proceed on this? We have the agencies on a conference call at 12:30 today and this will come up.

F/U: welfare – means-tested benefits

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 14, 1997

MEMORANDUM FOR HARRIET S. RABB
GENERAL COUNSEL
DEPARTMENT OF HEALTH AND HUMAN SERVICES

From: Dawn Johnsen
Acting Assistant Attorney General

Randolph D. Moss
Deputy Assistant Attorney General

Re: Applicability of Limitations on Availability of "Federal Means-Tested Public Benefits" under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

You have requested the views of the Office of Legal Counsel regarding a construction, proffered by the Departments of Health and Human Services ("HHS") and Housing and Urban Development ("HUD"), of the scope of the phrase "federal means-tested public benefit[s]" contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA" or "Act").[1] In particular, HHS and HUD have concluded that this phrase is best construed to apply only to mandatory (and not discretionary) spending programs.[2] Both departments have determined that this construction of the PRA "best balances [their] other statutory obligations with Congressional goals embodied in the [PRA]."[3] We further understand that the Departments of Agriculture,

[1] Pub. L. No. 104-193, 110 Stat. 2105 (1996).

[2] See Letter to Christopher H. Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from Harriet S. Rabb, General Counsel, Department of Health and Human Services (Dec. 13, 1996) ("Rabb Request").

[3] See, e.g., Letter to Arthur Fried, General Counsel, Social Security Administration, from Harriet S. Rabb, General Counsel, Department of Health and Human Services, and Nelson A. Diaz, General Counsel, Department of Housing and Urban Development (Nov. 21, 1996) ("Rabb/Diaz Letter").

Education, Labor and Veterans Affairs and the Social Security Administration all concur in, or defer to, the HHS and HUD proffered interpretation of the PRA.[4]

As explained more fully below, we believe that the proffered interpretation is a permissible construction of the statute. The PRA was enacted as a budget reconciliation bill, and, accordingly, must be construed against the backdrop of the Congressional Budget Act of 1974 ("CBA").[5] Under the CBA, budget reconciliation legislation is subject to expedited procedures in both the Senate and the House. To counterbalance these expedited procedures, the CBA permits a member of the Senate to raise a point of order against any material included in the legislation that is extraneous to the budget reconciliation process. Here, through application of this procedure, a broad definition of the phrase "federal means-tested public benefit" was struck from early versions of the bill that ultimately became the PRA. Significantly, the broad definition was struck because it reached discretionary spending programs, which, in this context, lay beyond the proper scope of the reconciliation process.

In light of this history, and the absence of a sufficiently clear indication that Congress intended, notwithstanding the CBA, to reach discretionary spending programs, we conclude that the meaning of the phrase "federal means-tested public benefit" is, at the very least, ambiguous. We further conclude that the HHS/HUD proffered definition is a reasonable construction of the statute, that the agency interpretation is entitled to judicial deference, and that, accordingly, the proffered definition should govern.

DISCUSSION

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. at 2260, imposes various restrictions on aliens' eligibility for public benefits in the United States. A number of provisions in title IV establish restrictions with respect to aliens' receipt of "federal means-tested public benefit[s]." These restrictions fall into three general categories: (1) provisions that deny "federal means-tested public benefit[s]" to qualified aliens for the first five years after their entry into the United States;[6] (2) provisions that require certain groups of aliens who seek federal and state public benefits to prove that they can be credited with 40 qualifying quarters of work under title II of the Social Security Act ("SSA") and have not received any "federal means-tested public benefit" during any of

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[4] Rabb Request at 1. Since receiving your letter of December 13, 1996, we have received oral advice from your office that the Social Security Administration concurs in the proffered definition.

[5] Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended in scattered sections of 2 U.S.C.).

[6] See § 403(a) & (c).

those quarters;[7] and (3) provisions that establish and define sponsor-to-alien deeming rules to be applied to aliens seeking "federal means-tested public benefit[s]."[8]

The PRA contains no statutory definition of the phrase "federal means-tested public benefit." HHS and HUD, however, have concluded that the restrictions on federal means-tested public benefits contained in title IV should apply only to mandatory spending programs, i.e. programs for which funding is not subject to a definite appropriation.[9] Under this construction of the Act, for example, newly arrived qualified aliens would be ineligible for benefits under mandatory programs for the first five years after their arrival in this country, but they would remain eligible for benefits under discretionary spending programs. The rationale of HHS and HUD for this approach is that "affected departments should hesitate to apply the term 'federal means-tested public benefit' broadly in a manner that would deny qualified aliens more benefits than Congress may have clearly intended." Rabb/Diaz Letter, attachment at 4. HHS and HUD assert that "this reading of the term best balances our Departments' other statutory obligations with Congressional goals embodied in [the PRA]," Rabb/Diaz Letter at 1, and that "sound legal and policy considerations support a conclusion that the term is limited to means-tested mandatory spending programs." Rabb/Diaz Letter, attachment at 1.

In evaluating the construction proposed by HHS and HUD, we are guided by the Supreme Court's landmark opinion, Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), which explains the proper approach for reviewing the construction of statutes by the agencies that administer them. The first step in the Chevron analysis is to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If congressional meaning, as discerned through "traditional tools of statutory construction," id. at 843 n.9, is clear, then no further inquiry is necessary, for the "unambiguously expressed intent of Congress" must control. Id. at 843. See also United States v. Alaska, 503 U.S. 569, 575 (1992). If the statute is silent or ambiguous with respect to the issue posed, then, under the second step in the Chevron analysis, the questions become whether Congress has implicitly or explicitly delegated to the agency the authority to resolve the ambiguity and, if so, whether "the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843. See also Alaska, 503 U.S. at 575.

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[7] See §§ 402(a)(2)(B)(ii)(II), 402(b)(2)(B)(ii)(II), 412(b)(2)(B)(ii), 435.

[8] See § 421(a), (b)(2)(B), (c), (d).

[9] While we have not been provided with a comprehensive list of which programs would be subject to these title IV restrictions under the HHS/HUD interpretation, we understand that Medicaid, food stamps, Supplemental Security Income ("SSI"), and Temporary Assistance for Needy Families ("TANF") are included within the mandatory category.

I. Chevron Step I

The starting point in determining whether "Congress had an intention on the precise question at issue," Chevron, 467 U.S. at 843 n.9, is, of course, the language of the statute itself. See Kaiser Aluminum v. Bonjorno, 494 U.S. 827, 835 (1990); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Ordinarily, if the terms of the statute are plain, they control and that is the end of the matter. See Chevron, 467 U.S. at 843; Holly Farms Corp. v. NLRB, 116 S. Ct. 1396, 1401 (1996).

At the same time, it is well-established that a provision in one Act of Congress should be read in conjunction with other relevant statutory provisions and not in isolation. See Jett v. Dallas Indep. School Dist., 491 U.S. 701, 712-13, 722-36 (1989); id. at 738-39 (Scalia, J., concurring in part and concurring in the judgment); see also Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1067 (1995). Thus, courts regularly construe statutory language in light of both other provisions of the same law and relevant provisions from other laws. See, e.g., Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1718 (1996); Sullivan v. Everhart, 494 U.S. 83, 92 (1990); cf. Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) (meaning of later enacted statute may affect interpretation of "previously enacted statute, since statutes in pari materia should be interpreted harmoniously"). The fact that different statutory provisions may employ similar terms in varying contexts, for example, may give insight as to the meaning of the term in the particular context that is under review. See Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2251-52 (1996) (plurality opinion). Similarly, the possibility that the adoption of a seemingly plain statutory meaning may cause a direct conflict with a different statutory provision, even if in a different law, may trigger application of the presumption against repeals by implication. See Watt v. Alaska, 451 U.S. 259, 266 (1981); FAA v. Robertson, 422 U.S. 255, 263 (1975); Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963). Moreover, courts commonly rely upon a general interpretive statute, the Dictionary Act, 1 U.S.C. § 1, in construing specific statutory language that, but for the otherwise-codified definitional provision, might suggest a different meaning. See Rowland v. California Men's Colony, 506 U.S. 194, 199-200, 209-10 (1993); id. at 212-13, 222 (Thomas, J., dissenting); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666 (1979); United States v. A & P Trucking Co., 358 U.S. 121, 123 (1958).

The general rule that the meaning of particular statutory provisions should be determined with reference to the broader legislative landscape provides significant guidance here. As reconciliation legislation, the PRA must be interpreted in the context of both the Congressional Budget Act of 1974, which establishes general rules that govern the enactment of budget reconciliation measures, and congressional actions taken pursuant to that statutory regime. Just as courts, when considering a term that has been defined in the Dictionary Act, read that term in light of the Dictionary Act definition, so too, here, the rules set forth in the CBA provide important guidance in discerning the meaning of the relevant provisions of the PRA.

A.

The PRA was brought to the floor of the Senate as a reconciliation bill, and as such was subject to the special rules that govern the reconciliation process set forth in section 313 of the CBA. See 2 U.S.C. § 644; Robert Keith & Edward Davis, The Senate's "Byrd Rule" Against Extraneous Matter in Reconciliation Measures 1-2 (Congressional Research Service 1995). Section 313 serves to facilitate the expedited consideration of reconciliation legislation by providing a mechanism for restricting the content of such legislation to provisions that are material to the reconciliation process. See Allen Schick, The Federal Budget: Politics, Policy, Process 82-86 (1995). Over time, these subject matter restrictions have become known as the "Byrd rule," after Senator Robert Byrd of West Virginia, their principal proponent. The basic purpose of the Byrd rule is twofold: to protect the effectiveness of the reconciliation process by excluding extraneous material that has no significant budgetary effect, and to preserve the deliberative character of the Senate by exempting from expedited consideration all legislative matters that should properly be debated under regular procedures.[10]

Section 313 establishes the general framework that governs the nation's budgeting process and shapes the content of the legislation that Congress enacts through the reconciliation process. Indeed, the Byrd rule has been deemed sufficiently important to the fashioning of the nation's budget that it is not merely an internal rule of Senate procedure but, as we have noted, a statute duly passed by both houses of Congress and signed by the President. The meaning of a particular provision of reconciliation legislation, therefore, such as the phrase "federal means-tested public benefit" in the PRA, must be construed in light of congressional actions taken pursuant to the CBA.

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[10] The Byrd rule was adopted in 1986, following years of struggle on the Senate floor over the inclusion of extraneous provisions in budget reconciliation legislation. Originally enacted as section 20001 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 82, 390-91 (1986), it was, in 1990, incorporated as section 313 of the Congressional Budget Act of 1974. See Budget Enforcement Act of 1990, enacted as Title XIII of Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13214(b)(1), 104 Stat. 1388, 1388-622 (1990). As Senator Byrd explained in introducing the amendment that ultimately bore his name:

> Mr. President, the Senate is a deliberative body, and the reconciliation process is not a deliberative process. . . . Such an extraordinary process, if abused, could destroy the Senate's deliberative nature. Senate committees are creatures of the Senate, and, as such, should not be in the position of dictating to the Senate as is being done here. By including mater[i]al not in their jurisdiction or matter which they choose not to report as separate legislation to avail themselves of the nondeliberative reconciliation process, Senate committees violate the compact which created both them and the reconciliation process.

131 Cong. Rec. 28,968 (1985).

Specifically, the CBA provides:

> When the Senate is considering a reconciliation bill or a reconciliation resolution . . . upon a point of order being made by any Senator against material extraneous to the instructions to a committee which is contained in any title or provision of the bill or resolution or offered as an amendment to the bill or resolution, and the point of order is sustained by the Chair, any part of said title or provision that contains material extraneous to the instructions to said Committee as defined in subsection (b) of this section shall be deemed stricken from the bill and may not be offered as an amendment from the floor.

Pub. L. No. 93-344, title III, § 313 (codified at 2 U.S.C. § 644(a)). Section 313(b)(1) outlines six categories of "extraneous" provisions, the most significant of which, for purposes of this analysis, is (b)(1)(D), which states that a provision shall be considered extraneous "if it produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision." 2 U.S.C. § 644(b)(1)(D). The rule, as set forth in section 313, is enforced by a Senator raising a point of order against some provision or provisions of the bill, on the ground that that provision deals with subject matters extraneous to the legislation.

The PRA's original definition of "federal means-tested public benefit," contained in both the Senate and House bills, encompassed an expansive range of benefit and assistance programs and did not distinguish between those that were mandatory and those that were discretionary. When the Senate bill reached the floor, Senator Exon invoked the Byrd rule to raise an omnibus point of order against a number of provisions of the legislation, including the definition of "federal means-tested public benefit." 142 Cong. Rec. S8423-24 (daily ed. July 22, 1996). His objection to this provision was based upon section 313(b)(1)(C) of the CBA, i.e. the provision was not within the Finance Committee's jurisdiction. Id. at S8424.

The Parliamentarian upheld Senator Exon's Byrd rule objection on the grounds that the provision was outside the Finance Committee's jurisdiction and that, to the extent the definition encompassed discretionary programs, its impact on the budget was "merely incidental."[11] Rules determining eligibility for discretionary program benefits within a

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[11] The Parliamentarian upheld the objection on the basis of both sections 313(b)(1)(C) (not within Finance Committee's jurisdiction) and 313(b)(1)(D) (prohibition against policy changes with "merely incidental" budgetary impact). See 142 Cong. Rec. S9400 (daily ed. Aug. 1, 1996) (statement of Senator Graham during consideration of conference report on H.R. 3734); see also id. at S9403 (statement of Senator Chafee). Although Senator Exon's specific objection to the definition, as itemized in his list, was jurisdictional only, he raised that objection in an omnibus point of order based generally upon section 313(b)(1), which permitted the Parliamentarian to consider any basis under (b)(1) for upholding the objection. In any event, in this case it ultimately makes no difference to the analysis whether Senator Exon's objection was sustained on jurisdictional grounds alone or on both grounds because any jurisdictional objection under section 313 is based upon the fact that the Senate committee considering a reconciliation bill would only have jurisdiction over mandatory programs. See Schick, The Federal Budget 83 (1995) (under current practice, "reconciliation instructions are

reconciliation bill have no direct effect on the budget. Rather, reducing the size of a discretionary program is accomplished by Congress reducing the appropriation for the program, which the proposed definition of "federal means-tested public benefit" did not do. By contrast, so-called entitlement, or mandatory, programs, generally operate under indefinite appropriations; the size of the program is not determined based on a fixed appropriation, but rather on expenditures incurred for all eligible program participants. Thus expenditures under mandatory programs can be directly reduced by restricting eligibility and thereby reducing the number of people receiving benefits.

The ruling sustaining Senator Exon's objection was not appealed by any other Senator. As a result, the definition of "federal means-tested public benefit" was struck from the Senate bill. Moreover, the House acceded to the Senate deletion and agreed to remove its own expansive definition of the term "federal means-tested public benefit" in conference. The conference committee acknowledged the deletion of the definition under the Byrd rule. 142 Cong. Rec. H8927 (daily ed. July 30, 1996).

This legislative record provides strong evidence that the phrase "federal means-tested public benefits," as used in the PRA, should be construed to reach only mandatory (and not discretionary) spending programs. In keeping with section 313, a Byrd rule objection was made and sustained, a definition was dropped from the bill in response to the objection, and the House acceded to the Senate version of the bill in light of the Byrd rule objection. To ignore these events in determining the meaning of the phrase "federal means-tested public benefit" would be to disregard the purpose and language of section 313 itself, which serves to facilitate the budgeting process by providing a mechanism by which the scope of reconciliation legislation may be contained.[12]

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given only to committees that have jurisdiction over revenues or direct (mandatory) spending programs"). Thus, the underlying reasoning for objections under (b)(1)(C) and (b)(1)(D) is the same.

[12] Some language in one appellate decision might be read to suggest that courts should distinguish between procedural and substantive legislative motivations in inferring congressional intent. See Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 180 (3d Cir. 1995), cert. denied, 116 S. Ct. 816 (1996). The appellees in Elizabeth Blackwell Health Center argued that Congress, by using a rule of House parliamentary procedure to eliminate a provision in the 1994 Hyde Amendment requiring victims of rape or incest to report the crime to the police prior to seeking publicly funded abortions, intended to prohibit state statutes imposing such reporting requirements. The Third Circuit rejected that argument stating that, "[a]t most, the rejection [of the provision] is a sign that Congress did not wish to mandate reporting requirements on the states," and that Congress' rejection of mandatory reporting requirement "on procedural grounds provides no basis for any inference regarding Congress' views about the substantive provisions of the legislation." 61 F.3d at 180. Unlike here, the procedural objection made in Elizabeth Blackwell Health Center did not in any way suggest that Congress intended the specific interpretation offered in that case. The procedural objection raised to the reporting provision was based upon a House rule of parliamentary procedure that prohibited attempts to "legislate" on an appropriations bill. Id. at 174. The basis for this objection bore no relationship to the substantive interpretation appellees urged. In contrast, here the definition proffered by HHS and HUD is based upon a budgetary distinction between mandatory and discretionary programs, precisely the same basis upon which Senator Exon's Byrd rule objection was made.

B.

Several aspects of the text and legislative history of the PRA, when viewed in isolation, arguably support a broad interpretation of "federal means-tested public benefit" that would include discretionary programs. Ultimately, however, we find little evidence that Congress, in passing the final version of the bill, intended to reintroduce the very definition that had been struck through the operation of section 313 of the CBA. What evidence does exist is at best ambiguous, and thus, in our view, does not foreclose HHS and HUD, two of the agencies charged with administering the Act, from construing the PRA in the manner that they propose.

As previously noted, the PRA, as enacted, contains no definition of the phrase "federal means-tested public benefit." Had Congress intended for this phrase to include discretionary spending programs, over the sustained objection of a member of the Senate, it could have reinserted the deleted definition or similar language in the final version. Indeed, the conference committee did reintroduce a number of other provisions that also had been struck from the Senate bill through Senator Exon's omnibus Byrd rule objection, and Congress ultimately voted to retain these provisions in the final version of the PRA. See § 816 (caretaker exemption; originally § 1126 of S. 1956); § 838 (expedited coupon service; originally § 1148 of S. 1956); § 850 (waiver authority; originally § 1159 of S. 1956); § 729(d) (WIC program/drug abuse; originally § 1259(d)(1) of S. 1956); § 912 (abstinence education; originally § 2909 of S. 1956); compare with S. 1956 (July 16, 1996 and July 24, 1996 versions). The decision of the conference not to reintroduce the deleted definition of "federal means-tested public benefit" leaves the PRA without the most obvious textual guidance that Congress might have provided had it wished to adopt the previously stricken definition.

The PRA does, however, define the related phrase "federal public benefit" broadly, and in a manner that appears to draw no distinction between mandatory and discretionary programs.[13] The phrase "means tested," moreover, though not defined in the statute, is defined in the dictionary.[14] It could be argued that these two phrases combine to produce a

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[13] Section 401(c)(1) defines "federal public benefit" as:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

[14] The dictionary defines "means test" as "any examination of the financial state of a person as a condition precedent to receiving social insurance, public assistance benefits, or other payments from public funds," Webster's Third New International Dictionary 1399 (3d ed. 1986). See also Random House Dictionary of the English Language 1192 (2d ed. 1987) ("means test" is "an investigation into the financial position of a person

phrase that is sufficiently plain to make clear that, in enacting the bill, Congress effectively overruled the prior Byrd rule deletions.

Although not entirely without force, we find this argument inconclusive. First, even assuming that the phrases "federal public benefit" and "means-tested" are free of ambiguity, the proposition that combining plain terms necessarily results in an equally plain phrase is not at all self-evident.[15] See, e.g., Smiley v. Citibank, 116 S. Ct. 1730, 1736 (1996). It is not clear, therefore, that, even ignoring the deletion of the broad definition pursuant to the CBA, the bill's final language is so free from ambiguity as to be deemed plain.

More important, as we have explained, the PRA was enacted as reconciliation legislation, and thus can be understood only in light of the special rules that Congress set forth in the CBA and the congressional action taken pursuant to those rules. Therefore, the critical question is not whether the phrase "federal means-tested public benefit" is plain when read in isolation, but rather whether the phrase reveals that Congress intended to incorporate the definition that the Senate had deleted, with the House's acquiescence, as a consequence of its compliance with the budgetary rules established by section 313. The PRA's definition of "federal public benefit" does not reveal such an intention. That same definition was already in the bill at the time Senator Exon raised his point of order objecting to the definition of "federal means-tested public benefit." Its inclusion in the final bill, therefore, cannot reasonably be viewed as a rejoinder to Senator Exon's objection.

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applying for aid from public funds"). Despite this definition, precisely what constitutes a "means test" in the context of federal programs that distribute benefits on the basis of need is not clear. Some federal programs look to both an applicant's income and his or her resources to determine eligibility. See, e.g., Medicaid program, 42 U.S.C. §§ 1396-1396v; Supplemental Security Income program, 42 U.S.C. §§ 1381-1381a; Food Stamp program, 7 U.S.C. §§ 2011-2032. Others look only to income without any inquiry into resources. See, e.g., National School Lunch program, 42 U.S.C. §§ 1751-1769h; Women, Infants & Children program, 42 U.S.C. § 1786. Still others presume need on the basis of area of residence, enrollment in another welfare program, or some other factor. See, e.g., Indian health services, 42 C.F.R. § 36.12 (eligibility based upon area of residence); Commodity Supplemental Food Program, 7 U.S.C. § 612c note (eligibility based upon enrollment in another government benefit program for low-income persons); Chapter 1 migrant education program, 20 U.S.C. § 6398 (presumption of need for migrant children).

[15] An unrelated provision of the PRA itself hints at the ambiguity of the phrase "federal means-tested public benefit." Section 911 of the PRA ensures that individuals whose benefits have been reduced because of an act of fraud by the individual may not receive increased benefits under "any other means-tested welfare or public assistance program for which Federal funds are appropriated" as a result of such reduction. The provision then defines the phrase "means-tested welfare or public assistance program for which Federal funds are appropriated" to include "the food stamp program . . . , any program of public or assisted housing under title I of the United States Housing Act of 1937 . . . , and any state program funded under part A of title IV of the Social Security Act." The provision does not state whether these programs are intended to be exhaustive or exemplary, but, in any event, the fact that Congress concluded that it was necessary to provide a definition of some sort suggests that Congress did not believe that the meaning of the defined phrase was plain.

Moreover, even apart from the operation of section 313, it is a well-settled canon of interpretation that "where the final version of a statute deletes language contained in an earlier draft, [it may be presumed] that the earlier draft is inconsistent with ultimate congressional intentions." In re Town & Country Home Nursing Servs., Inc., 963 F.2d 1146, 1153 (9th Cir. 1991); see also Russello v. United States, 464 U.S. 16, 23-24 (1983); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974) (Congress' deletion of provision "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"); cf. INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) ("'Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.'") (citations omitted). That canon surely applies with particular force in a context such as this, in which the deletion occurs by reason of an independent congressional statute that governs the nation's budgeting process.

A second textual argument that could be made in support of a broader definition arises from the list of exceptions to "federal means-tested public benefit" programs in section 403(c)(2) of the PRA. The inclusion of some discretionary programs in this list of exceptions would be unnecessary unless the term itself included such programs. As an initial matter, we note that the logic of this argument proves too much, particularly in light of other drafting flaws that appear in the Act. The same provision that excepts certain discretionary programs from the limitation on eligibility for "federal means-tested public benefits," for example, also excepts certain programs specified by the Attorney General that are not conditioned on "the individual recipient's income or resources." § 403(c)(2)(G). The view that Congress would not have excepted a program that was not otherwise covered would erroneously suggest that "means-tested" must be a more expansive term than the phrase "condition[ed] . . . on the individual recipient's income or resources."

More to the point, the list of exceptions included in section 403(c)(2) is quite plausibly understood as an inconsistency resulting from the proper operation of the Byrd rule itself. The remedy provided in section 313 is a blunt instrument offering a basis for striking extraneous material in a reconciliation bill, but no mechanism for re-drafting remaining legislative provisions to conform them to the legislation as revised by application of the Byrd rule. Indeed, there was no careful mark-up of the bill following the deletion of the definition of "federal means-tested public benefit," where inconsistent provisions might have been brought into conformity.[16]

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[16] Similar inconsistencies appear in other provisions of the PRA as a result of Byrd rule deletions. For example, the family cap provision of S. 1956, see § 103 of July 16 version of S. 1956 (establishing new section 408(a)(2) of TANF program), was deleted through a Byrd rule objection. The conference report notes this deletion and the provision does not appear in the final version of the PRA. 142 Cong. Rec. H8903 (daily ed. July 30, 1996). Nevertheless, a reference to the family cap provision remains, in § 103 of the PRA (establishing new § 402(a)(7) of title IV of the SSA), which permits states to waive program requirements in cases of domestic violence.

Moreover, it is unlikely that members of Congress would have seen the list of exceptions as obviously inconsistent with the PRA as revised by application of the Byrd rule. The categorization of particular programs as mandatory or discretionary is not at all obvious, and it is likely that many, if not most, members did not know precisely which programs fell into which category.[17] In addition, the list of exceptions can be seen as Congress' attempt to safeguard certain programs from any definitional skirmishes and ensure their exception.[18]

We are also unpersuaded that the legislative history of the PRA supports the conclusion that Congress intended to enact extraneous material through the reconciliation process over the sustained objection of a member of the Senate. Although noting that the definition of "federal means-tested public benefit" was deleted from the bill through operation of section 313, the conferees' report on the PRA nonetheless asserts that "it is the intent of the conferees that [the deleted] definition be presumed to be in place for purposes of this title." 142 Cong. Rec. H8927 (daily ed. July 30, 1996). We believe that this statement in the conferees' report cannot be taken as controlling.

As noted above, "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.'" Cardoza-Fonseca, 480 U.S. at 442-43 (citations omitted). Here, this rule cannot plausibly give way to contrary legislative history. Both houses of Congress deleted the definition of "federal means-tested public benefit": the Senate did so on the basis of the CBA, and the House acceded to the Senate. A conference committee cannot essentially overrule those decisions by including contrary language in its report. To permit this to occur not only would run counter to the canon against construing a statute to include terms that Congress had earlier discarded, id., but, even more fundamentally, would undermine the rules that were established with such care in section 313, which permit a Senator to object to extraneous material that the conference might include in the legislation itself, but provide no mechanism for correcting the conference's

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[17] In fact, during Senate consideration of the conference version of the bill, Senator Graham confirmed, for himself and for any other members that might not have analyzed the list of excepted programs, that the post-conference version of the bill was consistent with the Senate's earlier Byrd rule objections, defining "federal means-tested public benefit" as applicable only to mandatory programs. See infra note 20.

[18] As a result, we do not believe it to be significant that the final version of the PRA also included exceptions for two discretionary programs that did not appear in the Senate version of the PRA from which the broad definition of "federal means-tested public benefit" had been deleted. Specifically, the Head Start and Job Training programs were only included in the House's final list of exempted programs, and not the Senate's, even though they do appear in the final version of § 403(c)(2). The inclusion of these two additional exceptions does not change our conclusion because there is no reason to believe that the inclusion of exceptions for these particular discretionary programs, more than the exceptions for the other discretionary programs, was intended to do more than safeguard them from further definitional disagreements. In any event, the inclusion in the final bill of two additional discretionary programs seems to us a most oblique means for Congress to reinsert a definition of "federal means-tested public benefit" that had previously been struck.

explanatory statement.[19] Finally, subsequent Senate colloquy -- admittedly an insubstantial grounding for legislative intent if standing alone -- confirms the understanding that a definition that would have extended the term to encompass discretionary programs was deleted because it was outside the subject matter scope of the reconciliation process.[20]

We thus conclude that the legislative record provides strong support for the proffered construction of the PRA and that the inconsistencies noted above, while giving rise to some

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[19] Section 313 permits a Byrd rule objection to be made at various points throughout the legislative process, including after the bill has been reported out of conference. 2 U.S.C. § 644(c). Thus, the statute allows for the possibility that Congress might attempt to reinsert a deleted provision into a bill during conference, and provides the Senate with the opportunity to renew its Byrd rule objection if it insists upon the deletion. However, because a Byrd rule objection can be raised only against legislative language, not against explanatory statements in the conference report, see § 644(a), allowing a conference report statement to act as the equivalent of legislative language effectively abolishes the statutory mechanism established to ensure the integrity of the Byrd rule process.

[20] Specifically, in the debate over the conference report on the Senate floor, Senator Graham sought to confirm the exact scope of the term "federal means-tested public benefit." After reviewing the history of the Byrd rule objection and the Parliamentarian's ruling, Senator Graham engaged Senator Kennedy in the following colloquy:

> Mr. Graham: . . . [W]ould the Senator agree that, when the Senate struck these sections as violating the Byrd rule, the Senate's intent was to prevent the denial of services in appropriated programs such as those that provide services to victims of domestic violence and child abuse, the maternal and child health block grant, social services block grant, community health centers and migrant health centers? . . .
>
> Mr. Kennedy: Yes. Under the Byrd rule, the budget reconciliation process cannot be used to change discretionary spending programs. Only mandatory spending is affected.

142 Cong. Rec. S9400 (daily ed. Aug. 1, 1996).

Senator Graham subsequently asked Senator Exon, who was one of the Senate conferees on the bill, whether "the version of the bill recommended in this conference report is consistent with this understanding." Id. Senator Exon confirmed that it was. Later during the debate, Senator Graham raised this issue again with another conferee, Senator Chafee:

> Mr. Graham: I wonder if my colleague could address one point on this bill. I notice that the term "Federal means-tested public benefit" was defined in previous versions of the bill. However, in this conference report, no definition is provided.
>
> Mr. Chafee: . . . [W]hen the bill was considered in conference, I understand that there was an intentional effort to ensure this provision complied with [the] Byrd rule by omitting the definition of that particular term.
>
> In other words, then, the term "Federal means-tested public benefit" -- if it is to be in compliance with the Byrd rule -- does not refer to discretionary programs . . . .

Id. at S9403.

ambiguity, are insufficient to rebut the evidence that Congress intended to reach only mandatory spending programs. We, accordingly, turn to the second step of the Chevron inquiry.

II. Chevron Step II

Under the second step of the Chevron analysis, two questions arise. First, it is necessary to determine whether Congress intended for agencies or courts to resolve the ambiguity that Congress, either intentionally or inadvertently, failed to resolve. See Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("[a] precondition to deference under Chevron is a congressional delegation of administrative authority"); see also Johnson v. United States R.R. Retirement Bd., 969 F.2d 1082, 1088 (D.C. Cir. 1992) ("If agencies are simply interpreting a statute, but have not been granted the power to 'administer' it, the principle of deference applies with less force."), cert. denied, 507 U.S. 1029 (1993). Second, if Congress intended for agencies to resolve the ambiguity, then it is necessary to determine whether the proposed agency interpretation is "permissible." Chevron, 467 U.S. at 843.[21] If Congress intended for the agencies to resolve the interpretive ambiguity, and the agency resolution is permissible, then the agency construction is binding.[22] See id.

A.

Congress need not expressly authorize agencies to construe ambiguous statutory terms in order for courts to be bound by agency constructions. In Chevron itself, for example, the Court deferred to an Environmental Protection Agency ("EPA") construction of the Clean Air Act, even though no statutory language expressly empowered that agency to impose a binding interpretation of the term "stationary source." The Court simply inferred that Congress must have intended for the EPA, as the agency entrusted with administering the Clean Air Act, to resolve the policy choices that inhere in the interpretation of ambiguous statutory language. See Chevron, 467 U.S. at 843. The Court explained that this inference was reasonable because agencies generally possess superior expertise and greater political accountability than courts. See id. at 865-66.

On the other hand, Congress may impliedly authorize courts to interpret a particular statutory provision, even though an agency has been generally charged with administering the

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[21] Although the Court stated in Cardoza-Fonseca that Chevron-deference does not apply to pure questions of law, such as the one at issue here, it has subsequently retreated from this position. Our memorandum proceeds on the assumption that Chevron applies to such questions. Cardoza-Fonseca, 480 U.S. at 454-55 (Scalia, J., concurring).

[22] Even if Congress has not entrusted the interpretative function to an agency, courts should still give careful consideration to agency constructions that are based on expertise and to which they have consistently adhered. See, e.g., Atchison, Topeka and Santa Fe Ry. v. Pena, 44 F.3d 437, 445 (7th Cir. 1994) (Easterbrook, J., concurring), aff'd sub nom, Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry., 116 S. Ct. 595 (1996).

statute as a whole. In Adams Fruit Co., for example, the Court refused to defer to the Department of Labor's resolution of the question whether exclusivity provisions in state worker compensation laws trumped a federal private right of action under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 ("Worker Protection Act"). Even though the Department was responsible for administering the Worker Protection Act generally, the Court concluded that Congress intended for the judiciary, not the agency, to construe the contours of the private right of action that the Worker Protection Act created. See Adams Fruit Co., 494 U.S. at 649. The Court based that conclusion primarily on the fact that the Department was not required to interpret the private right of action provisions as an incident of its general administration of the Worker Protection Act, as those provisions established a parallel and independent enforcement mechanism. See id. at 649-50.

In our view, the delegation question presented here is more analogous to Chevron than to Adams Fruit Co. Although the PRA does not expressly delegate general administrative authority to HHS, HUD, or, for that matter, to any other particular agency, the PRA effectively amends the statutes that establish the assistance programs over which HHS, HUD and other federal agencies have already been delegated administrative authority. Because those agencies possess general administrative authority to interpret eligibility criteria set forth in statutes enacted prior to the PRA, we believe it to be a fair inference that Congress intended for the changes effected by the PRA to be administered in the same manner.

In an analogous context, the Third Circuit deferred to HHS' construction of the Hyde Amendment, even though, as the dissent in that case pointed out, the Hyde Amendment does not expressly delegate administrative authority to any agency. Compare Elizabeth Blackwell Health Ctr. for Women, 61 F.3d at 182, with id. at 196 (Nygaard, J., dissenting). The court concluded that HHS' authority to administer the Medicaid statute necessarily included the authority to construe legislation that amended the Medicaid statute's eligibility requirements. Id. at 182; see also Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n, 977 F.2d 358, 365 (7th Cir. 1992) (deferring to Postal Service's construction of a criminal statute on the ground that it was "intimately connected" to the purposes of the statute that Postal Service was charged with administering), cert. denied, 510 U.S. 826 (1993); Associated Third Class Mail Users v. United States Postal Serv., 600 F.2d 824, 826 n.5 (D.C. Cir.), cert. denied, 444 U.S. 837 (1979) (same).

The case for deference is even stronger here, moreover, because the PRA not only amends the eligibility requirements for the programs that these agencies administer, but also expressly assigns these agencies the responsibility of informing the public of the changes in those eligibility requirements that the PRA effects. Section 404(a) of the PRA requires federal agencies that administer assistance programs to provide the public with information

about how the PRA changes the eligibility requirements for those programs.[23] This assignment, we believe, impliedly delegates to these agencies the authority to resolve the meaning of the phrase "federal means-tested public benefit": agencies must first interpret the meaning of the term "federal means-tested public benefit" in order to comply with section 404(a)'s mandate to inform the public of the PRA's impact on eligibility requirements. Only by determining whether that term applies to both mandatory and discretionary assistance programs (among other questions of application) will agencies be able to determine who is eligible for the programs that they already administer pursuant to separate statutory delegations. Section 404(a)'s notification requirement serves a useful function, moreover, only to the extent that the agencies are able to provide accurate information about the eligibility changes that the PRA mandates. If courts are free to reject reasonable agency interpretations of that term, then agencies will be forced to risk providing inaccurate eligibility information or to refrain from providing complete eligibility information altogether. Because neither result seems consistent with the purpose behind section 404(a), it is proper to infer that Congress intended for the agencies to provide the authoritative construction of the term "federal means-tested public benefit" when it assigned them the notification task set forth in section 404(a).

In light of the agencies' statutorily assigned responsibilities, the agencies cannot fairly be viewed as "trying to 'bootstrap' [themselves] into an area in which [they have] no jurisdiction" in seeking deference for their construction of the term "federal means-tested public benefit." Wagner Seed Co. v. Bush, 946 F.2d 918, 923 (D.C. Cir. 1991), cert. denied, 503 U.S. 970 (1992) (citation omitted). Rather, they are offering an interpretation that results from the "intimate connection" between the purposes of the statutes that the agencies already administer and those of the PRA generally, Fort Wayne Community Schools, 977 F.2d at 365, and that arises in connection with the "special duty" that section 404(a) of the PRA assigns them. See FLRA v. Department of Treasury, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990).

We are aware of those cases that assert that courts should not defer to statutes that are "general" in nature or that are subject to interpretation by more than one agency. See, e.g., Johnson v. United States R.R. Retirement Bd., 969 F.2d at 1088 (citing cases). We do not believe that this rule of construction should apply here. The rule has been invoked primarily in cases in which agencies seek Chevron deference for their construction of statutes that have been expressly entrusted to other agencies for administration, see id.; Cheney R.R. v. Railroad Retirement Bd., 50 F.3d 1071, 1073-74 (D.C. Cir. 1995), that are designed to ensure that agencies remain publicly accountable or proceed in a fair manner, see, e.g., Professional Reactor Operator Soc'y v. United States Nuclear Regulatory Comm'n, 939 F.2d 1047, 1051 (D.C. Cir. 1991); see Air North Am. v. Department of Transp., 937 F.2d 1427, 1436 (9th Cir. 1991), or that are not intimately connected to the mission of the agency that

[23] "Each Federal agency that administers a program to which section 401, 402, or 403 applies shall, directly or through the States, post information and provide general notification to the public and to program recipients of the changes regarding eligibility for any such program pursuant to this subtitle." 110 Stat. at 2267.

seeks deference. See, e.g., Professional Airways Sys. Specialists v. FLRA, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). The results in these cases are, therefore, best explained as particular applications of the justifiable presumption that Congress does not intend for courts to be bound by agency constructions that are beyond agency expertise, see, e.g., Colorado Nurses Ass'n v. FLRA, 851 F.2d 1486, 1488 (D.C. Cir. 1988), or that concern provisions that are designed to ensure agencies proceed in a fair and accountable manner, see Air North Am. v. Department of Transp., 937 F.2d at 1436. These cases do not establish, in our view, a general presumption in favor of judicial resolution of all statutory ambiguities that confront more than a single agency.

Indeed, Chevron's emphasis on the greater political accountability of agencies counsels against a rule of construction that would afford judges the last word on the meaning of any statute that does not authorize a single agency to administer it. See Chevron, 467 U.S. at 865-66. Where, as here, a statute assigns a group of agencies a particular task that is related to the duties that the agencies already have been assigned by their governing statutes, Congress may be presumed to have intended for these agencies to resolve any ambiguities that may arise. That the PRA does not assign any particular agency primary interpretive responsibility does not change the analysis. Congress may have intended for the courts to resolve the meaning of the term "federal means-tested public benefit" in the event of unresolved interpretive conflicts among the agencies identified by section 404. There is no reason to suppose, however, that Congress intended for unelected judges to countermand a unanimous resolution of the policy question by the agencies closest to it. Cf. American Fed'n of Gov't Employees v. FLRA, 2 F.3d 6, 10 (2d Cir. 1993) ("[W]hen two agencies, each examining statutes they are charged with administering, agree as to the interplay of the statutes, there is no more reason to mistrust their congruent resolutions than there is to mistrust action taken by a single agency[.]"); see also Salleh v. Christopher, 85 F.3d 689 (D.C. Cir. 1996) (suggesting that joint agency interpretations may deserve deference); cf. Lieberman v. FTC, 771 F.2d 32, 37 (2d Cir. 1985) (declining to defer to joint agency construction but noting that Congress may delegate "dual lawmaking authority"). So long as the agencies identified by section 404(a) concur in their interpretation of the term "federal means-tested public benefit," therefore, we believe that courts would be bound to accord that interpretation Chevron deference.

Finally, we do not believe that the deference that the agencies receive under Chevron should turn on whether their construction of the term "federal means-tested public benefit" would be deemed an "interpretative" or "legislative" rule under the Administrative Procedure Act. We agree with those courts that have concluded that Chevron deference turns solely on whether the agency's interpretation may fairly be understood to be one for which Congress intended judicial deference to apply, see, e.g., Elizabeth Blackwell Health Ctr. for Women, 61 F.3d at 182; id., at 190-96 (Nygaard J., dissenting) (reviewing conflicting caselaw); Kelley v. EPA, 15 F.3d 1100, 1108 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 900 (1995); see generally Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1 (1990), and not on whether the proposed construction is

"interpretative" or "legislative" in nature.[24] The latter determination, in our view, relates only to the procedural question whether the agency's rule may be promulgated outside the process of notice and comment rulemaking. That determination should have no bearing on the entirely separate question whether Congress intends for courts or agencies to resolve the interpretive ambiguity at issue.[25]

B.

Given that Congress impliedly delegated to the agencies the responsibility for resolving the interpretive question raised by the PRA's use of the phrase "federal means-tested public benefit," the only remaining issue under step two of the Chevron analysis is whether the answer provided by the agencies "is based on a permissible construction of the statute." Chevron, 467 U.S. at 843. If it is, that construction is binding. Id.

A definition of the term "federal means-tested public benefit" that includes only mandatory assistance programs is manifestly "permissible." The second step of the Chevron analysis arises only if Congress failed to resolve whether the term "federal means-tested public benefit" applies to discretionary assistance programs. The conclusion that Congress left that question open is possible only if the phrase admits of the proffered construction. The same reasons that led us to conclude that there is strong evidence to support the HHS and HUD proffered definition of "federal means-tested public benefit," see supra at 4-13, therefore, also show that the proffered definition is a "permissible" one. Moreover, HHS and HUD assert that their reading "best balances our Departments' other statutory obligations with Congressional goals embodied in the [PRA]." Rabb/Diaz Letter at 1. Under Chevron, agency constructions based on reasonable assessments of statutory purposes are entitled to deference. See Chevron, 467 U.S. at 858.

CONCLUSION

We accordingly conclude that the HHS/HUD proffered definition constitutes a permissible and legally binding construction of the PRA.

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[24] The Supreme Court has stated in post-Chevron dicta that interpretive rules are entitled to less weight than "norms that derive from the exercise of the Secretary's delegated lawmaking powers." See Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991). More recently, however, the Court has intimated that interpretive rules may be entitled to Chevron-style deference. See Reno v. Koray, 115 S. Ct. 2021, 2026-27 (1995).

[25] Of course, there are clearly some instances in which informal agency interpretations may be presumed to be undeserving of full Chevron deference. There are sound reasons, for example, to presume that Congress does not intend for courts to defer to agency litigating positions. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988). Here, however, the agencies proffer their construction outside the litigation context. Moreover, we note that the very existence of the Bowen rule, which precludes the application of Chevron deference to agency litigating positions, would be unnecessary if all "interpretative" rules -- including those fashioned outside the litigation process -- were already precluded from receiving such deference.

FORTUNA_D @ A1
01/22/97 05:42:00 PM

Record Type: Record

To: Bruce N. Reed, Elena Kagan

cc: WARNATH_S @ A1@CD@LNGTWY
Subject: Definition of means tested benefit

You should know that we are almost ready to issue a definition of the term "means tested benefit." The states and immigration advocates have been anxious to hear our interpretation of this term for months.

The practical relevance of this definition is that most legal immigrants who entered the country after 8/96 are not eligible for "federal means tested benefits" for the first 5 years after their arrival.

The agencies, DOJ's Office of Legal Counsel, OMB, DPC, and Elena in her old role worked at some length to come to the agreement that this term refers only to "mandatory" spending programs, like Medicaid, food stamps, SSI, and TANF; and not many others.

DOJ's OLC has now issued a written opinion that this is a good definition.

Advocates will be very happy to hear this, since they feared a far more expansive definition that would have included all kinds of discretionary spending programs. Under our approach, the major difference between those who arrive before vs. after 8/96 is that states have the option to extend TANF and Medicaid to the former group, while they don't have that option for the latter group.

We have always assumed we would take some criticism from the Hill on this position; I am doing some checking to get more specifics on who, how loud, etc.

Anyway, our tentative plan is to roll this out quietly, letting the agencies do it rather than doing it centrally. It will be ready next week. Let me know if you have any questions or concerns. I will let you know more about the potential congressional reaction.

From: Bruce N. Reed@EOP@LNGTWY@EOPMRX@LNGTWY
*To: FORTUNA_D@A1@CD@LNGTWY
Date: 1/23/97 9:35am
Subject: Re: Definition of means tested benefit
Message Creation Date was at 23-JAN-1997 09:35:00

Check with Rich Tarplin on the congressional piece. Thanks.