

COMMENT

REVIEW OF "JURISDICTIONAL" ISSUES UNDER THE BUMPERS AMENDMENT

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The proposed Bumpers Amendment to the Administrative Procedure Act would encourage courts to be less deferential than they have previously been toward federal agencies' views on issues of law. With regard to "jurisdictional" questions, the amendment would go further: it would invite courts not only to assert their independence, but also to disfavor agencies' positions. Professor Levin regards this special rule of construction for jurisdictional questions as an attempt to achieve deregulation through judicial review. He criticizes this strategy as poorly conceived and calls attention to several weaknesses in the draftsmanship of the jurisdiction provision.

The past few years may well be remembered as a time when concern about "overregulation" and enthusiasm for "deregulation" reached a high-water mark in public discourse and political rhetoric. Two recent manifestations of the deregulation movement¹ are the regulatory reform bills, S. 1080² and H.R. 746,³ that almost passed in the Ninety-Seventh Congress.⁴ Both bills contained a version of the

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The author served from 1979 to 1981 as consultant on the Bumpers Amendment to the Administrative Conference of the United States, and some of the preliminary work for this comment was used in the preparation of the Conference's recent statement opposing the amendment. See Current Versions of the Bumpers Amendment (Recommendations of the Ad. Conf. of the United States), 1 C.F.R. §305.81-2 (1982). The comment itself, however, has not been presented to the Conference and expresses only the author's views.

1. For a survey of the ways in which the regulatory reform movement has come to represent, in part, a drive for deregulation, see Strauss, *Regulatory Reform in a Time of Transition*, 15 SUFFOLK U.L. REV. 903, 910-11, 921-32 (1981).

2. S. 1080, 97th Cong., 2d Sess. (as amended), 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982).

3. H.R. 746, 97th Cong., 2d Sess. (as amended), reprinted in H.R. REP. NO. 435, 97th Cong., 2d Sess. 1 (1982) [hereinafter cited as 1982 HOUSE REPORT].

4. When Congress adjourned, the Senate had passed S. 1080 by a vote of 94-0, and H.R. 746 had been reported out of the House Judiciary Committee. During the fall of 1982, negotiations between representatives of the Business Roundtable and of Speaker of the House Thomas P. O'Neill led to a comprehensive compromise proposal to amend H.R. 746. See ANTITRUST & TRADE REG. REP. (BNA) No. 1082, at 521 (Sept. 23, 1982); Legal Times of Wash., Sept. 20, 1982,

Bumpers Amendment, a proposal to amend section 706 of the Administrative Procedure Act (APA), which governs the scope of judicial review.⁵ As this comment will demonstrate, an awareness of Congress' desire for deregulation is indispensable to understanding the meaning and purpose of at least one provision of the Bumpers Amendment.

The S. 1080 version of the Bumpers Amendment would make four substantive⁶ changes in section 706. First, it would add the word "independently" to the opening sentence of the section, instructing reviewing courts that they should "independently decide all relevant questions of law."⁷ Second, the amendment would require the agency to provide "substantial support in the rule making file" for fact findings in informal rulemaking proceedings.⁸ Two new sentences that would become subsection (c) of section 706 constitute the third and fourth changes. They read as follows:

at 4, col. 1. (For the text of the O'Neill compromise bill, see Daily Rep. for Execs. (BNA), Sept. 17, 1982, at B-1.) The House Rules Committee prevented this measure from reaching the floor during the lame-duck session of Congress in December. ANTITRUST & TRADE REG. REP. (BNA) No. 1095, at 1125 (Dec. 23, 1982).

The O'Neill bill has been reintroduced this year as H.R. 220, 98th Cong., 1st Sess., 129 CONG. REC. H45 (daily ed. Jan. 3, 1983). The Senate's current regulatory reform bill is identical in number and wording to the bill it passed last year. See S. 1080, 98th Cong., 1st Sess., 129 CONG. REC. S4909 (daily ed. Apr. 19, 1983).

5. Section 706 now reads as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be

— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1976).

6. In addition, the amendment would designate as subsection (b) the last sentence of existing section 706; the preceding text would become section 706(a).

7. 128 CONG. REC. S2717 (daily ed. Mar. 24, 1982).

8. This provision, which would become clause (d) of section 706, reads as follows: "In making a finding under subsection (a)(2)(A) of this section, the court shall determine whether the factual basis of a rule adopted in a proceeding subject to section 553 of this title is without substantial support in the rule making file." *Id.* at S2718.

In making determinations concerning statutory jurisdiction or authority under subsection (a)(2)(C) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.⁹

Subsection (c) aims to provide guidance to the courts as they resolve "questions of law." Issues of "jurisdiction or authority" (a vague term presumably denoting certain statutory issues that are deemed especially fundamental or critical¹⁰) would be governed by the first sentence, and "other" issues of law by the second. In this comment, the first section of section 706(c) will be called the "jurisdiction" provision; the second sentence will be called the "no-presumption" provision.

The academic literature contains a fair amount of commentary on the concepts underlying the addition of "independently," the "no-presumption" provision, and the "substantial support" provision.¹¹ In contrast, the Bumpers Amendment's special standard of review for jurisdictional issues has remained largely unexplored.¹² It deserves more;

9. *Id.* Subsection (a)(2)(C), mentioned in the first sentence of section 706(c), corresponds to section 706(2)(C) of the present APA. See *supra* note 6.

10. For analysis of the meaning of the term "jurisdiction or authority," see *infra* notes 76-106 and accompanying text.

11. For comment on the addition of "independently" and the no-presumption provision, see, e.g., *Proceedings of the Forty-first Annual Judicial Conference for the District of Columbia Circuit*, 89 F.R.D. 169 (1980) [hereinafter cited as *Proceedings*]; Levin, *Judicial Review and the Bumpers Amendment*, 1979 RECOMMENDATIONS & REFS. OF THE AD. CONF. OF THE UNITED STATES 565 (1981); Kennedy, *The Bumpers Amendment: Regulating the Regulators*, 67 A.B.A.J. 1639 (1981); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1162-68 (1977); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1189-95 (1981); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329 (1979). A forthcoming article by the author will deal with issues raised by these provisions.

The "substantial support" clause reflects a decade of controversy over the appropriate scope of review of agency fact findings. See, e.g., DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979); Gifford, *Rulemaking and Rulemaking Review: Struggling Toward a New Paradigm*, 32 AD. L. REV. 577 (1980); Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

12. But see O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 773-76 (1980); May, *Some Preliminary Observations on the Effect the Bumpers Amendment Would Have on the Federal Communications Commission*, 27 FED. B. NEWS 165 (1980). O'Reilly also analyzes the other changes effected by the Amendment. O'Reilly, *supra*, at 768-73, 776-78.

in some ways it is the most original and intriguing part of the proposal. In particular, the jurisdiction provision is notable because it seems to embody a substantive point of view: it is intended to convey to the courts a distinct preference for relatively narrow construction of regulatory statutes. In effect, it constitutes a congressional effort to achieve a mild degree of deregulation through judicial review. This comment outlines the development of the jurisdiction provision, explores some of its ambiguities, and considers whether, on balance, it is likely to make a constructive contribution to judicial review of agency action.¹³

I. THE MEANING OF THE PROVISION

On the surface, the jurisdiction provision is puzzling. It instructs courts to resolve issues of statutory jurisdiction using the language of the statute and other evidence of legislative intent. Yet courts have always purported to do this. The literal meaning of the provision is so banal that one can hardly believe it fully expresses the message that the supporters of the amendment want to convey. To make sense of this seemingly insignificant provision, it will be necessary to examine the legislative history of the amendment and then to juxtapose the jurisdiction provision with the other provisions of the amendment.

A. *A Brief Tour of the Legislative History.*¹⁴

In 1975 Senator Dale L. Bumpers, a Democrat from Arkansas, introduced a bill that would have directed courts reviewing administrative action to decide all questions of law "de novo" and to forswear any "presumption of validity" associated with rules and regulations.¹⁵ The Senate ignored the bill for several years. In September 1979, however,

13. As passed by the Senate, S. 1080 contained only one of several versions of the Bumpers Amendment that circulated through the Ninety-Seventh Congress. The S. 1080 version was a compromise between the approaches favored by the Senate Judiciary and Government Affairs Committees. See *infra* note 39. The House Judiciary Committee version, *supra* note 3, would have entirely eliminated the "no-presumption" sentence of section 706(c). But in the O'Neill-Business Roundtable compromise, see *supra* note 4, which was subsequently submitted to the House, section 706(c) appeared in much the same form as in S. 1080. (In the O'Neill version, the two sentences appeared in opposite order from the Senate version, and the jurisdiction provision did not refer to issues of "jurisdiction or authority" but only to issues of "jurisdiction.") Minor variations in the "substantial support" provision also appeared in these competing drafts.

This comment examines the S. 1080 wording of section 706(c) because that version was the result of a compromise between the two major contending forces, Senator Bumpers and the White House. See *infra* note 39. The adoption of very similar language by the representatives of Speaker O'Neill suggests that the House would have found the Senate's ultimate version of section 706(c) acceptable.

14. The events summarized in the next few paragraphs are reviewed at length in O'Reilly, *supra* note 12, at 747-67.

15. S. 2408, 94th Cong., 1st Sess., 121 CONG. REC. 29,956 (1975).

shortly after the American Bar Association had unexpectedly endorsed the bill, Senator Bumpers was emboldened to offer his proposal as a floor amendment to an unrelated bill. Apparently persuaded by his denunciations of the foibles of the bureaucracy,¹⁶ the Senate accepted the amendment on a 51-27 vote.¹⁷ Agencies and their supporters were stunned and began a strong campaign to stop the amendment's progress toward enactment. Business groups were delighted that the antiregulatory movement had displayed such strength, but at the same time they were concerned that the amendment might be overbroad and simplistic. As a result, friends of the amendment formed an alliance with the Senator for the purpose of revising the proposal to ensure its success.¹⁸

During the meetings of this alliance, the idea of giving special status to issues of jurisdiction first emerged. A memorandum prepared by the ABA and the Business Roundtable as a basis for negotiations¹⁹ "explained" the amendment as directing courts to resolve "questions as to the agency's interpretation or application of the substantive law it has jurisdiction to administer" and "questions of procedure" by "using their own best judgment, without a built-in bias either for or against the government."²⁰ For "questions as to the agency's jurisdiction," a different principle would operate: "courts . . . should apply a rule of strict or narrow construction where the agency's action has been challenged as outside the scope of its authority or as contrary to express statutory limitations on its authority."²¹ Senator Bumpers promptly embraced the ABA-Business Roundtable position, claiming that it was what he had meant all along: "My intent was to allow the court to use its own judgment on whether or not to defer to agency expertise on [most] legal questions but not to allow any deference in the case of jurisdictional legal questions."²² The proponents had thus articulated their purposes in two ways that are still useful for an understanding of the jurisdiction provision of the amendment: courts should construe jurisdictional boundaries strictly against agencies, and they should ac-

16. See 125 CONG. REC. 23,479-81 (1979).

17. *Id.* at 23,499. This vote was on a motion to table; when the motion failed, the opponents acquiesced and allowed a voice vote approval of the amendment. See *id.* at 23,504.

18. See O'Reilly, *supra* note 12, at 758-59.

19. *Regulation Reform Act of 1979: Hearings on H.R. 3263 Before the Subcomm. on Administrative Law and Gov'tal Relations of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 1101-08 (1979-80) [hereinafter cited as 1979-80 HOUSE HEARINGS].

20. *Id.* at 1103.

21. *Id.*; see also *id.* at 1080 (testimony of Richard D. Wood, Business Roundtable) ("agency's authority must be spelled out in its organic statute directly or by clear implication"), 1089 (amendment should "establish a rule of 'clear statement' or strict construction").

22. *Id.* at 746 (testimony of Senator Bumpers).

comply with this by refusing to give weight to the agency's view of where those boundaries lie.

Events of 1980 reveal that the alliance's views were widely shared and that various parties were engaged in a search for the right way to cast those views into suitable statutory language. The Senate Judiciary Committee adopted a version of the amendment calling for reviewing courts to "require that the agency's statutory jurisdiction or authority has been granted expressly or, in light of the statute and other relevant materials, by clear implication."²³ The White House proposed a standard that would uphold jurisdiction findings that were "consistent with ascertainable legislative intent."²⁴ The Senate Government Affairs Committee staff thought that a "reasonable implication" drawn from the legislative materials should be sufficient support.²⁵ These negotiations culminated in September 1980, when Senator Bumpers and the ABA-Business Roundtable representatives arrived at a version of the amendment that they felt was at least somewhat responsive to White House and agency concerns. The House Judiciary Committee adopted their formulation in its principal regulatory reform bill, H.R. 3263.²⁶

The negotiators' compromise specified that "the court shall require that action by the agency [be] within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent."²⁷ This phrasing has remained substantially unchanged in all subsequent drafts of the amendment. In view of the preceding versions of the bill, one can readily understand the point that the jurisdiction provision makes (however obliquely the text expresses it): somehow, the court must insist that an agency action have a greater degree of support in statutory language or other legislative materials than has heretofore been required.

The legislative history materials prepared in the House to accompany H.R. 3263 cast further light on the purposes of the jurisdiction

23. S. 262, 96th Cong., 2d Sess. §216 (as amended), *quoted in* S. REP. NO. 1018 (pt. 2), 96th Cong., 2d Sess. 157 (1980) [hereinafter cited as 1980 SENATE JUDICIARY REPORT]. The Judiciary Committee wrote:

The need for such an independent check on an agency's assertion of its own authority or jurisdiction has long been a mainstay of administrative law. . . . As Congress continues to delegate broad grants of authority to agencies, the Committee believes that there is increasing need for vigilant scrutiny of the limits of that authority.

Id. at 66.

24. O'Reilly, *supra* note 12, at 763.

25. *Id.* at 775.

26. H.R. 3263, 96th Cong., 2d Sess. §207 (1980) (as amended), *reprinted in* H.R. REP. NO. 1393, 96th Cong., 2d Sess. 17 (1980) [hereinafter cited as 1980 HOUSE REPORT].

27. *See id.*

provision. A statement filed by Representative Synar declared that the bill would direct courts to "play a more active role in policing legislative delegations of power by closely construing statutes which transfer regulatory authority to administrators."²⁸ Courts would "take a hard look at assertions of regulatory jurisdiction or authority."²⁹ Representative Synar's statement has special significance because it was drafted in cooperation with Senator Bumpers and his allies, and was evidently meant to be an authoritative explication of the amendment.³⁰ Representative McClory, who joined Synar in sponsoring the revised amendment within the Committee, described the court's task as "tak[ing] a scrutinous look at whether or not the agency has acted within its specific statutory authority."³¹

In 1981 and 1982 the Senate and House committees handling the regulatory reform bills made no revisions in the language of the jurisdiction provision, but they did generate fresh legislative history interpreting it. In addition to repeating the language of the Bumpers-Synar statement, quoted above,³² the Senate Judiciary Committee report commented:

[A]n extension of an agency's jurisdiction or authority beyond that expressed in the language of the statute must be based on facts or materials in the statute's legislative history that can be discerned, identified, and discussed by the reviewing court. . . .

. . . [U]nder this amendment, a reviewing court could not properly uphold an extension of agency authority . . . on the ground that the extension "is reasonable and is not prohibited by the statute" or that the extension "is reasonable and is consistent with the statute." Subsection (c)'s requirement of affirmative evidence is not met by an absence of contradictory evidence. Reasonableness and consistency

28. 1980 HOUSE REPORT, *supra* note 26, at 124.

29. *Id.* at 125.

30. Senator Bumpers introduced the same statement into the Congressional Record a few days later and has continued to refer to it as the primary expression of legislative intent regarding the compromise amendment. See *Regulatory Procedures Act of 1981: Hearings on H.R. 746 Before the Subcomm. on Administrative Law and Gov't Relations of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 60, 919 (1981) [hereinafter cited as 1981 HOUSE HEARINGS]; 127 CONG. REC. S4239 (daily ed. April 30, 1981); 127 CONG. REC. S112 (daily ed. Jan. 6, 1981); 126 CONG. REC. S13,879 (daily ed. Sept. 30, 1980).

31. 1980 HOUSE REPORT, *supra* note 26, at 110. McClory also noted: "Courts are directed to make an independent determination as to whether or not an agency's action is based upon power expressly granted in the relevant statute or may be readily ascertained from the legislative intent." *Id.* Although McClory did not explicitly limit this remark to jurisdictional issues, his emphasis on "expressly granted . . . or readily ascertained" statutory authority suggests that he had the jurisdiction provision of the amendment in mind.

32. S. REP. NO. 284, 97th Cong., 1st Sess. 169 (1981) [hereinafter cited as 1981 SENATE JUDICIARY REPORT]; see also S. REP. NO. 305, 97th Cong., 1st Sess. 91 (1981) [hereinafter cited as 1981 SENATE GOV'T AFFAIRS REPORT] (similar).

with the statutory purpose are not the equivalent of evidence of ascertainable legislative intent.³³

The House Judiciary Committee's report seems generally in accord:

This provision is intended to assure that the courts determine the limits of an agency's power to act solely by reference to legitimate indicia of congressional intent. This requirement will foreclose reliance upon the agency's interpretation or a practice concerning the limits of its power to act, unless the legislative history indicates that Congress intended to embrace that interpretation or practice.³⁴

B. *The Provision in the Context of the Entire Amendment.*

As the preceding account shows, the drafters of the amendment have promoted the jurisdiction provision as a means of inducing courts to require an agency to produce stronger justifications for its actions than some courts have demanded in the past. Yet, to a considerable extent, this description of the intent of the provision would apply just as well to the other sections of the amendment dealing with review of "legal" questions. A brief examination of these other sections will permit a more precise statement of the role that the drafters intended the jurisdiction provision to play.

The other proposed changes in section 706 that deal with questions of law can be traced back to the original Bumpers Amendment.³⁵ The addition of the word "independently" to the APA's mandate that courts should "decide all relevant questions of law" is intended, the committee reports say, to "reemphasize the primary role of the courts in interpreting all sources of law."³⁶ The second sentence of section 706(c) is basically an elaboration of this theme of judicial neutrality. In mandating that a court may not "presume" that an agency's view on a nonjurisdictional legal issue is correct, the second sentence is "designed to ensure that, as to questions of law, the agency and those seeking review stand on equal footing before the court without bias, preference, or deference to either . . ."³⁷

The ultimate Senate version of the second sentence spells out the role that the amendment envisions for administrative interpretations in the court's "independent" decisionmaking: the court shall "give the

33. 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 169.

34. 1982 HOUSE REPORT, *supra* note 3, at 74; *see also id.* at 75 (court must determine whether Congress conferred the asserted power "either expressly or by reasonable implication").

35. *See supra* text accompanying note 15.

36. 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 165; *see* 1980 HOUSE REPORT, *supra* note 26, at 124 (Bumpers - Synar statement) (similar); *see also id.* at 53 (report of Committee majority) (courts "should take an independent look at the legal issues presented for review, and reach their own judgment regarding them"); 1982 HOUSE REPORT, *supra* note 3, at 73 (same).

37. 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 170; *accord*, 1980 HOUSE REPORT, *supra* note 26, at 126 (Bumpers - Synar statement).

agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.”³⁸ This language was added very late in the negotiation process,³⁹ but it seems to be merely a clarification of what the committee reports had said earlier.⁴⁰ The amendment thus recognizes the traditional view that an agency’s legal position can often be persuasive as to the position the court should adopt—for example, if it has been followed consistently by the agency for many years,⁴¹ if it is an outgrowth of the agency’s practical experience in implementing the statute,⁴² if affected persons have relied on it,⁴³ or if Congress has signaled acceptance of it.⁴⁴ Taken as a whole, the no-presumption sentence of section 706(c) adopts a moderate and appropriate stance: agencies’ views on legal questions are frequently instructive, but courts bear responsibility for the correctness of the ultimate decision.⁴⁵

38. See *supra* text accompanying note 9.

39. The Senate Judiciary and Governmental Affairs Committees reported out contrasting versions of the amendment in 1981. The Judiciary version of section 706(c) was like the ultimate S. 1080 version, but lacked the language beginning with “but”; the Government Affairs Committee proposed deleting the second sentence entirely. The ultimate wording then emerged from negotiations between Vice President Bush (representing the White House) and Senator Bumpers. It was added to S. 1080 by consensus. See 128 CONG. REC. S2406 (daily ed. March 18, 1982) (remarks of Senator Bumpers).

40. The no-presumption rule of section 706(c) “does not mean that a court cannot, on the basis of its careful evaluation of the statute and the circumstances of a case, give weight to an agency’s interpretation of its authorizing legislation.” 1980 HOUSE REPORT, *supra* note 26, at 54. Instead, such an interpretation “will be one element of the process of independent judicial reexamination.” *Id.* at 126 (Bumpers - Synar statement); 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 170-71.

41. See, e.g., *Steadman v. SEC*, 450 U.S. 91 (1981); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

42. See, e.g., *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953), cited with approval in 1980 HOUSE REPORT, *supra* note 26, at 54.

43. See, e.g., *National Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 485-86 (1979) (dicta); *Train v. NRDC*, 421 U.S. 60 (1975).

44. See, e.g., *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979).

According to Justice Jackson’s well-known dictum, the weight accorded to a particular agency interpretation should depend on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). This formula has been cited with approval by the amendment’s proponents. See 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 171; 1980 HOUSE REPORT, *supra* note 26, at 127 (Bumpers - Synar statement).

45. In my view (which will be elaborated in a subsequent article), what makes the “no-presumption” sentence of S. 1080 tolerable in its final version is that it deals only with “questions of law.” Such questions are contrasted in the legislative history with questions of “fact or policy.” See, e.g., 128 CONG. REC. S2406 (daily ed. March 18, 1982) (statement of legislative intent by Senator Bumpers and Vice President Bush); 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 171; 1981 HOUSE HEARINGS, *supra* note 30, at 919 (testimony of Senator Bumpers). Thus, the abolition of a presumption of validity applies only to issues that the court has determined—

Assuming that the second sentence properly recognizes that courts speak with primary authority on legal issues in general, it is not immediately clear how a court can be expected to apply a different standard of review to jurisdictional legal issues. The legislative history asserts that the jurisdiction provision will cause courts to take a "hard look" at agency assertions about their powers.⁴⁶ Yet it is difficult to understand how any look could be "harder" than the scrutiny prescribed for nonjurisdictional issues, whereby the court must act "independently" and consider agency views only for their persuasive value. Thus, to the extent the jurisdiction provision simply enjoins courts to be careful, critical, or diligent in their work, it adds nothing. The second sentence recognizes "deference" only by saying that an agency's view should be granted "such weight as it warrants"; the first sentence seems peculiar indeed if it is meant to suggest that the courts, when resolving jurisdictional issues, should *not* give agency views the weight they "warrant." Nevertheless, if section 706(c) is to make even minimal sense, the two sentences must somehow be read as prescribing different standards of review.

The amendment's dual standard⁴⁷ becomes explainable if the jurisdiction provision is interpreted as containing a substantive message. So read, the provision would require that grants of jurisdiction to agencies—like penal statutes,⁴⁸ antitrust immunities,⁴⁹ and Freedom of Information Act exemptions⁵⁰—be narrowly construed.⁵¹ To be sure, the

through pre-existing modes of analysis that the amendment does not purport to regulate—to be of a type that may appropriately be placed primarily in judicial hands.

46. See *supra* note 23; text accompanying notes 29, 31-32; see also 1981 HOUSE HEARINGS, *supra* note 30, at 925 (testimony of Senator Bumpers); *Proceedings, supra* note 11, at 200 (remarks of Stephen Breyer).

47. The Senate Government Affairs Committee and the House Judiciary Committee voted to delete the second sentence of section 706(c); thus, one might argue, they did not actually endorse a double standard. The House Judiciary Committee did, however, favor the provision instructing courts that they should "independently decide all relevant questions of law." Moreover, the Government Affairs Committee's position on this point was displaced by the restoration of the second sentence on the Senate floor, and there is an excellent chance that the full House would have followed the Senate's lead. See *supra* note 13.

48. See, e.g., *United States v. Campos-Serrano*, 404 U.S. 293 (1971).

49. See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).

50. See, e.g., *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

51. Some passages in the legislative history describe the jurisdiction provision as creating a principle of statutory construction, see *supra* note 21 and accompanying text; others describe it as imposing a "burden of persuasion [on] the person asserting that agency jurisdiction exists." 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 170; see 1980 HOUSE REPORT, *supra* note 26, at 126 (Bumper - Synar statement); 1979-80 HOUSE HEARINGS, *supra* note 19, at 746 (testimony of Senator Bumpers). The latter characterization is controversial, because other authoritative legislative history sources flatly assert that the amendment does not shift any burden of proof, 1980 HOUSE REPORT, *supra* note 26, at 55 (report of Committee majority); 127 CONG. REC. S4234 (daily ed. April 30, 1981) (remarks of Senator Laxalt), and, more specifically, that under the jurisdiction

step is meant to be a small one; the legislative history contains numerous assurances that no drastic break with the past is contemplated⁵² and that courts remain free to use all traditional canons of construction.⁵³ It is difficult to escape the conclusion, however, that the amendment is intended to launch a *new* principle of construction, under which courts are expected to “lean” slightly toward deregulation.

The legislative history suggests two possible ways in which this principle of construction may be translated into practical terms. First, recall the reports’ emphasis on the need for “affirmative evidence” of congressional intent, or at the very least a “reasonable implication” in

provision the “burden rests, as it does under existing law, with the party challenging the agency action to show that the agency has acted outside [statutory] limits.” 1982 HOUSE REPORT, *supra* note 3, at 76.

The “burden of proof” characterization is confusing and should be avoided. As I have written concerning a similar language problem in an earlier version of the amendment, “terminology drawn from the law of evidence is not well suited for use in this context. When a judge [analyzes nonfactual issues], he will perhaps consult logic, experience, tradition, precedent, or his conscience; these decisional tools can hardly be equated with the intellectual processes by which an evidentiary dispute is resolved.” Levin, *supra* note 11, at 587, citing B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); see also Recommendations of the Ad. Conf. of the United States, 1 C.F.R. § 305.79-6 (1982) (“a court, when passing on the validity of a regulation, does not receive evidence but, rather, hears argument”). Indeed, the courts’ “independence” on questions of law, which the amendment aims to foster, is undermined if the resolution of a construction issue depends on who fails to come forward with arguments for or against the agency’s construction. It is much more natural to say that courts should apply their own legal reasoning to statutory issues, guided by whatever principles of construction Congress may prescribe.

Moreover, the stated reasons for shifting a “burden of persuasion” under the first sentence of section 706(c) do not withstand scrutiny. The Senate Judiciary Committee explained:

This is not a revolutionary change. It is consistent with the Constitutional premise that delegations of legislative power to unelected officials are to be narrowly construed. It is also far easier to prove the affirmative, that an agency has jurisdiction, than to prove the negative, that it does not.

1981 SENATE JUDICIARY REPORT, *supra* note 32, at 170. One might agree with the Committee that the defenders of agency jurisdiction can normally be asked to take the initiative in citing sources of statutory authority that allegedly support the administrative action. Once these arguments have been put on the table, however, it is not intrinsically “easier” for one side to win than the other. As for the extraordinary “Constitutional premise” cited by the Committee, that proposition has literally no support in any modern court decision of which I am aware. The most that one can extract from the cases is that delegations are to be narrowly construed in a few unusual sets of circumstances, such as when a broad interpretation might make the statute unconstitutional. See *infra* notes 67-68 and accompanying text.

52. See, e.g., 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 167, 171; 1981 SENATE GOV’T AFFAIRS REPORT, *supra* note 32, at 88-89; 1980 HOUSE REPORT, *supra* note 26, at 128 (Bumpers - Synar statement); 1981 HOUSE HEARINGS, *supra* note 30, at 919 (testimony of Senator Bumpers).

53. See 1981 SENATE GOV’T AFFAIRS REPORT, *supra* note 32, at 91 (endorsing “application of the full range of canons of statutory construction that have evolved in the courts”); 1980 SENATE JUDICIARY REPORT, *supra* note 23, at 66 (similar); 1980 HOUSE REPORT, *supra* note 26, at 54 (“The Committee takes note of, and does not intend to change, the normal canons of statutory construction that have evolved through the years.”).

the legislative materials, as support for jurisdictional rulings.⁵⁴ This may mean that the agency's defense of its jurisdiction to act in a given situation must rely on *more explicit* indications of "legislative intent" than judges (or at least some judges) would have considered adequate before the amendment. Second, recall the intimations in the legislative history that courts should place no reliance on an agency's views when resolving jurisdictional issues.⁵⁵ Here, the sponsors are not necessarily denying that an agency's insights can be logically relevant to a court's search for the meaning of an administrative statute. Rather, they evidently assume that if judges are forbidden to use agency views as a basis for resolving jurisdictional disputes, the result will be statutory interpretations that correspond more closely to the social agenda of the current Congress. Thus, the weight that the agency's position might "warrant" according to the court's own judgment is *not* the weight it "warrants" in light of the mildly anti-regulation policies of the Act.⁵⁶

II. A CRITIQUE

The sponsors' reasons for including the jurisdiction provision are somewhat difficult to discern. To be sure, the committee reports contain many passages indicating that the provision will reaffirm the "conventional responsibility of the judiciary to prevent agencies from exceeding their powers."⁵⁷ Arguing that the bureaucracy may become dangerous if allowed to operate without checks on its power,⁵⁸ the reports also emphasize that lawmaking is preeminently the province of elected legislators, who must rely on the courts to ensure that agencies will conform to congressionally-prescribed policies.⁵⁹ Arguments of

54. The language of the Senate Judiciary Committee quoted in the text at *supra* note 33 is the best illustration. See also *supra* notes 21, 23, 25, 31, 34, and accompanying text.

55. See *supra* text accompanying notes 22, 34.

56. One could conceivably interpret the first sentence of section 706(c) as a legislative finding that an agency's views concerning its own jurisdiction have no probative force at all, and for that reason "warrant" no weight. See *infra* notes 99-104 and accompanying text. But this hypothetical finding is not explicitly advanced anywhere in the legislative history and cannot be regarded as more than a secondary rationale for the jurisdiction provision. Consideration of its implications will therefore be postponed until later. See *id.*

57. 1981 SENATE GOV'T AFFAIRS REPORT, *supra* note 32, at 88; *accord*, 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 167; see, e.g., *id.* at 165 ("courts must do their duty by holding invalid actions which are not authorized by [a] statutory delegation"); *id.* at 178 (separate statement of Senator Grassley); 1980 HOUSE REPORT, *supra* note 26, at 125 (Bumpers - Synar statement) ("provision is intended to underscore that the courts must exercise their proper role in ensuring that agencies do not transgress the outer boundaries of the authority given them by Congress").

58. See 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 164, 173.

59. See *id.* at 164, 172; 1981 SENATE GOV'T AFFAIRS REPORT, *supra* note 32, at 88.

this kind, revolving around the traditional independence of the courts, have been important selling points for the jurisdiction provision.

For two reasons, however, these arguments cannot be taken at face value. First, they do not go far enough. The theme of judicial neutrality does not explain why a reviewing court should be expected to look for "affirmative evidence" of the legislature's will or to give agencies' interpretations less weight than the court thinks they deserve. Second, if the only purpose of the jurisdiction provision of section 706(c) were to require the courts to interpret statutes conscientiously and be receptive to anti-agency arguments, as the above passages might suggest if read in isolation, the provision would be unnecessary. The *second* sentence of section 706(c), as well as the addition of "independently" to the opening sentence of section 706, are already designed to fulfill that desire.⁶⁰ The sponsors must have some additional reason for endorsing, in the case of issues of statutory jurisdiction, a standard of review that is not only independent but downright resistant to agencies' interpretations.

It seems reasonable to assume, and the reports themselves occasionally suggest,⁶¹ that this additional purpose behind the jurisdiction provision is nothing more complicated than an urge to curtail the breadth and stringency of contemporary regulation. Senator Bumpers spoke for many of his colleagues when, in one of his earliest speeches on the Amendment, he declared: "The theme of overregulation recurs with as much frequency [in congressional mail] as any other . . . Citizen groups of all kinds . . . are unanimous in complaining that Government, most often manifested in regulations issued by executive or administrative agencies, has become too intrusive."⁶² Similar passages pervade the legislative history of the Bumpers Amendment.⁶³

This conclusion about the sponsors' motives is troubling, however, because the jurisdiction provision would promote the goal of deregulation in an essentially indiscriminate fashion. The provision would nul-

60. See *supra* notes 36-37 and accompanying text.

61. See 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 164 ("These amendments are premised on . . . a growing discontent with the degree to which Congress has delegated this power to administrative agencies."). Elsewhere in the same report, however, the Committee stopped short of unequivocally endorsing the proposition that there is "too much" regulation. After surveying the "overregulation" literature in detail, the report concluded only that, whether or not the compliance costs of regulation are actually excessive, the concerns raised by the literature are significant enough to warrant making improvements in the regulatory process. See *id.* at 49-50.

62. 125 CONG. REC. 778 (1979) (remarks of Senator Bumpers).

63. See, e.g., 1981 HOUSE HEARINGS, *supra* note 30, at 16-17, 18-19 (remarks of Senator Grassley); *id.* at 65 (remarks of Representative McClory); *id.* at 67 (statement of Representative Pease).

lify agency actions that are arguably ultra vires but that would have been upheld were the court not directed to apply a principle of narrow construction. Yet agency decisions that are arguably ultra vires are not necessarily the most benighted ones, nor the most burdensome, nor the most controversial. At least the amendment's proponents have never made any kind of case for one or more of these propositions.⁶⁴ The provision would turn rules and orders challenged on jurisdictional grounds into objects of suspicion simply because they were the actions of an administrative agency. To apply a principle of restrictive construction so broadly risks condemning beneficial programs along with harmful ones.⁶⁵

A telling indication of the crudity of this reform strategy is the weakness of the sponsors' attempt to invoke precedent to justify the jurisdiction provision.⁶⁶ The committee reports relied on cases in

64. Conceivably the sponsors have indeed concluded that when an agency ventures beyond the authority that Congress *clearly* gave, the results are usually more harmful than the results of other administrative actions. If this is in fact their view, the proposition should be greeted with considerable skepticism. Naturally a Congressman would prefer to believe that the regulations and orders about which his constituents so often complain are ones that he did not anticipate when the underlying statutes were passed, but this convenient assumption may not correspond to reality. One is reminded of the oft-noted propensity of legislators to shift blame for questionable policies from themselves to administrators. According to the usual account, Congress passes a vague statute, and loads the legislative history with ultimately inconsistent assurances that are calculated to soothe all affected interest groups; the actual tradeoffs between competing values are made later by those who implement the statute, and the individual legislator is then free to assure his constituents that he never intended the statute to be used *that way*. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 131-32 (1980); J. Davis, *Regulatory Reform and Congressional Control of Regulation*, 17 *NEW ENG. L. REV.* 1199, 1232-33 (1982); cf. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 *V.A. L. REV.* 253, 267-93 (1982) (a thorough treatment in a related context). The issue of "who bears the greater blame" will not be pursued here, however, because of the absence of any indication that the particular agency actions that would be affected by the "jurisdiction" provision have been "targeted" on any basis at all.

65. See generally Gellhorn, *Deregulation: Delight or Delusion?*, 24 *ST. LOUIS U.L.J.* 469 (1980) (cautioning against excessive efforts to achieve deregulation). For an analysis of how the FCC's authority would be affected by a principle confining the Commission to those powers that Congress has "clearly" expressed, see May, *supra* note 12. Similar inquiries could be pursued in connection with other regulatory schemes but are beyond the scope of this article. One further example may prove illuminating, however. The Federal Trade Commission's authority over "unfair methods of competition," 15 *U.S.C. §45(a)* (1976), was conferred about seventy years ago. Should a court delimit the Commission's antitrust jurisdiction by consulting "the language of the statute and other evidence of ascertainable legislative intent"? There is certainly much to criticize in the FTC's recent antitrust record, but fixating on the views of the Sixty-Third Congress seems a most unpromising solution to those deficiencies.

66. See 1981 *SENATE JUDICIARY REPORT*, *supra* note 32, at 166-67; 1980 *HOUSE REPORT*, *supra* note 26, at 124-25 (Bumpers-Synar statement). In addition to the cases discussed in the accompanying text, the reports cited *FCC v. Midwest Video Corp.*, 440 *U.S.* 689 (1979). This reliance was certainly ill-founded, since the decision in *Midwest Video* was based on a specific statutory policy embedded in the Communications Act and did not articulate any principle of narrow construction at all. Moreover, *Midwest Video* seemed to assume the correctness of United

which the Supreme Court has followed what is sometimes called a "clear statement" approach,⁶⁷ holding administrative actions unauthorized because Congress had not *explicitly* conferred the powers the agency claimed. These cases do not, however, support the policy of the jurisdiction provision. In each of them, the Court was dealing with subjects that it viewed as unusually sensitive.⁶⁸ The Court has not remotely suggested that the entire spectrum of administrative conduct should be regarded with disfavor in the same sense that these unusual examples were. To ignore this distinction is to miss the central point about the "clear statement" line of authority.⁶⁹

The Senate Judiciary Committee also optimistically predicted that "closer judicial reading of the statutory authority of agencies, perhaps producing decisions that agencies have no authority to act in some situations, will be an incentive for the Congress to 'canalize' more specifically its delegations of law making power to agencies."⁷⁰ The Committee's theory of legislative behavior is novel, to say the least. Considering how often Congress now yields to the temptation to avoid responsibility,⁷¹ one can only assume that an aggressive judicial assault on "overregulation" would simply provide members of Congress with an additional excuse to sit back and watch judges relieve them of having to cope with vexing regulatory issues. It is unrealistic to assume that Congress would frequently address those issues on "remand" and make the final decisions. Moreover, if the first sentence of section 706(c) brought about a sizable increase in the number of judicial deci-

States v. Southwestern Cable Co., 392 U.S. 157 (1968), one of the all-time classic illustrations of *expansive* interpretation of regulatory legislation.

67. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 288-89 (1978); Krent, *Avoidance and its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 CONN. L. REV. 209 (1983); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1680-81 (1975).

68. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (avoidance of serious first amendment issues); *National Cable Television Ass'n v. FCC*, 415 U.S. 336 (1974) (avoidance of constitutional question of whether Congress could transfer its taxing power to an agency); *Kent v. Dulles*, 357 U.S. 116 (1958) (avoidance of serious intrusion on civil liberties).

69. In this connection the Bumpers-Synar statement cited Professor Richard B. Stewart's observation that a judicial "policy of narrow construction of regulatory statutes might usefully be followed," so that Congress would "have to take a fresh look at the agency's mandate before its powers were extended." 1980 HOUSE REPORT, *supra* note 26, at 124, citing Stewart, *supra* note 67, at 1697. It must be pointed out that Stewart's remark, read in context, is a tentative and almost offhand comment, not a thesis developed at any length. Later in the same article, Stewart expresses strong reservations about the wisdom of an essentially equivalent proposal. See *id.* at 1788-89.

70. 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 172; *accord, id.* at 63.

71. See *supra* note 64.

sions holding agency actions to be ultra vires, the chances of Congress' acting on any given one of them would be small indeed.⁷²

The prospect that the narrow-construction policy of section 706(c) might actually remove pressure for Congress to step into regulatory disputes suggests a particularly discouraging thought about the jurisdiction provision. The preeminent task of a legislature is to provide direction on matters of fundamental government policy. In the context of a national commitment to reducing regulation, that task ought to entail identifying particular agencies or programs that are not performing satisfactorily. The jurisdiction provision, however, embodies a fundamentally different strategy—it merely identifies the antiregulation goal and leaves unelected federal judges the entire responsibility for deciding how to achieve that goal. Thus revision of the scope-of-review section of the APA is not only one of the least efficient ways by which Congress might promote “regulatory relief,” but is also one of the least consistent with democratic ideals.⁷³

III. SOME PROBLEMS OF DRAFTSMANSHIP

Reasonable persons might disagree about the fundamental wisdom of the jurisdiction provision. At a minimum, however, the Bumpers Amendment ought to be worded so that courts will have adequate guidance about what Congress expects them to do. This section of the comment will explore whether the jurisdiction provision, as now written, provides such guidance.

Although three legislative committees voted to adopt the jurisdiction provision in 1981 without altering it, that unanimity is misleading. Shcer inertia in the deliberative process undoubtedly limited the possibility of improvements in the provision's language.⁷⁴ In addition, the committees evidently decided that they could appease critics by tinkering with the legislative history, instead of improving the terms of the

72. See Stewart, *supra* note 67, at 1788-89; cf. McGowan, *supra* note 11, at 1145-46 (arguing that an across-the-board power to “veto” administrative rules would not give Congress an effective tool of oversight because of the vast number of regulations published each year); Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG., Nov.-Dec. 1979, at 19 (same).

73. It might also be argued that because the amendment is nothing but a mild “signal” to the courts, it does not matter that the “jurisdiction” provision is imprecise in its thrust; the narrow-construction policy will be only one of the judge's considerations and common sense will in no event be displaced. There is certainly force to the premise of this argument. Although I disagree with commentators who regard scope-of-review theory as an empty exercise, see Levin, *supra* note 11, at 579-81, fine adjustments in the statutory standard of review for jurisdictional issues probably could have no more than a slight impact on the institution of judicial review. Nevertheless, if the narrow-construction policy is an unsound strategy of reform, the “signal” should not be sent, whether its impact proves large or small.

74. See 1981 HOUSE HEARINGS, *supra* note 30, at 97 (remarks of Representative Danielson).

proposed statute.⁷⁵ As a result, the draftsmanship of the jurisdiction provision remains decidedly imperfect.

A. "Jurisdiction or Authority."

Although the nature of the principle of construction that the first sentence of section 706(c) imposes may be elusive, there at least is no doubt that the amendment applies that principle only to issues of statutory "jurisdiction or authority." One can predict with almost complete confidence that the courts will have a difficult time identifying the particular issues that fall into this category.⁷⁶

The negotiators who drafted section 706(c) in 1980 did not prepare any legislative history to explain this phrase. They may have assumed that there is a well-established or generally recognized category of jurisdictional issues in administrative law.⁷⁷ If they did, they were mistaken. The Supreme Court has occasionally written administrative law opinions suggesting special consideration for jurisdictional matters,⁷⁸ but these suggestions have not taken hold, and there is no indication that the original drafters had any of these obscure doctrines in mind when they referred to issues of jurisdiction. If anything, these intimations in the case law illustrate the slipperiness of the "jurisdiction" label.⁷⁹

75. Curiously, the same sort of manipulation of legislative history has been common throughout the development of the APA. See *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (Freedom of Information Act); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 5:3 (2d ed. 1978) (same); Conard, *New Ways to Write Laws*, 56 *YALE L.J.* 458, 461 & n.13 (1947) (original APA).

76. See 1981 HOUSE HEARINGS, *supra* note 30, at 913-15 (testimony of Judges McGowan and Arnold).

77. See 1979-80 HOUSE HEARINGS, *supra* note 19, at 746 (testimony of Senator Bumpers); *id.* at 1103 (ABA—Business Roundtable memorandum). Both of the cited statements appear to take the distinction between "jurisdictional" and "other" legal questions for granted, evidently because the spokesmen assumed that the necessity of drawing a distinction between these two types of questions would not be especially troublesome.

78. The most famous example is the holding in *Crowell v. Benson*, 285 U.S. 22, 64-65 (1932), that "jurisdictional facts" found by an agency may be retried by the courts in *de novo* evidentiary proceedings. This much-scorned ruling has never possessed vitality beyond its facts, *see generally* B. SCHWARTZ, *ADMINISTRATIVE LAW* §§ 228-29 (1976), and its holding has recently been specifically disapproved. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2877 n.34 (1982) (plurality opinion); *id.* at 2891 n.12 (dissent). Elsewhere the Court has indicated that one may challenge an agency's action on a "jurisdictional" ground without having previously raised the issue at the administrative level, *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952) (dictum); *City of Yonkers v. United States*, 320 U.S. 685 (1944), and has entertained challenges to actions that would have been considered unreviewable if a "jurisdictional" defect had not been alleged. See *Leedom v. Kyne*, 358 U.S. 184 (1958); *Estep v. United States*, 327 U.S. 114 (1946).

79. *City of Yonkers v. United States*, 320 U.S. at 695 (Frankfurter, J., dissenting) (jurisdiction concept is "one of the most deceptive of legal pitfalls"); *see also* *United States v. L.A. Tucker*

The legislative committees that reviewed the bill in 1981 and 1982 recognized the need for definitional guidance, but their efforts to arrive at a consensus about the reach of the first sentence of section 706(c) were unsuccessful. All three of the committee reports supporting the bill agreed that the word "jurisdiction" in section 706(c) should be given its "conventional meaning"⁸⁰—it would "encompass only threshold questions as to the power of an agency to act with respect to the subject matter or persons to be regulated."⁸¹ The committees disagreed, however, on whether the word "authority" in the first sentence of section 706(c) adds anything to the breadth of the provision. The Senate Government Affairs Committee and the House Judiciary Committee maintained that it did not,⁸² and thus adopted the view that the first sentence of section 706(c) deals only with issues of "jurisdiction" in the conventional sense. The Senate Judiciary Committee, on the other hand, apparently interpreted the term "authority" in the provision as coming into play whenever "an agency's action is alleged to be in ex-

Truck Lines, 344 U.S. at 39 (Frankfurter, J., dissenting) (jurisdiction is "a verbal coat of too many colors"); *ICC v. Northern Pacific Ry.*, 216 U.S. 538, 544 (1910) (Holmes, J.). Nor have attempts to identify the term in ordinary civil litigation been particularly satisfactory. See RESTATEMENT (SECOND) OF JUDGMENTS § 11 comment c (1982); *id.* § 69 comment b.

The experience of British administrative law is also instructive. Traditionally, "excess of jurisdiction" has been one of the few grounds on which King's Bench would control by certiorari or prohibition the decisions of administrative tribunals. "In practice the distinction between matters going to jurisdiction (collateral and preliminary matters) and matters within jurisdiction (or going to the merits) is often almost impossible to draw." S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 552 (1971); see S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 114-15 (J. Evans 4th ed. 1980). Central in recent controversy has been the leading case of *Anisimic Ltd. v. Foreign Compensation Comm'n*, [1969] 2 A.C. 147. The case dealt with a preclusion-of-review statute construed as permitting review of "jurisdictional" errors only. The legal error of which *Anisimic* complained, however, was picayune. (The Commission was authorized to grant compensation to persons whose property had been expropriated by the Egyptian government, provided that the victim "and any person who became successor in title of such person . . . were British nationals . . ." *Id.* *Anisimic*, a British firm, had sold most of its assets to an Egyptian company but had retained a compensation claim. Thus, the substantive question was whether, as the Commission had held, the nationality of the victim's "successor in title" was material even if title to the claim itself had not shifted.) The House of Lords held that the Commission had exceeded its jurisdiction by asking itself the wrong question and basing its decision on an irrelevant consideration. See *id.* at 171, 195, 210 (opinions of, respectively, Lord Reid, Lord Pearce, and Lord Wilberforce). Prestigious English jurists have maintained that *Anisimic's* notion of jurisdictional error is so sweeping that the distinction has, in effect, been obliterated. See *Racal Communications Ltd.*, 1981 A.C. 374, 383 (Lord Diplock); *Pearlman v. Keepers of Harrow School*, 1979 Q.B. 56, 70 (C.A.) (Lord Denning, M.R.). See generally H. WADE, ADMINISTRATIVE LAW 264-67 (5th ed. 1982).

80. 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 168.

81. 1982 HOUSE REPORT, *supra* note 3, at 75; *accord*, 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 168; 1981 SENATE GOV'T AFFAIRS REPORT, *supra* note 32, at 89.

82. 1981 SENATE GOV'T AFFAIRS REPORT, *supra* note 32, at 89; 1982 HOUSE REPORT, *supra* note 3, at 75.

cess of its statutory authority”—whenever the agency’s reading of its statutory mandate is claimed to be too expansive.⁸³ When the “consequence of the [agency’s] conclusion would be a lessening rather than an increase of regulation,” the Committee said, the first sentence would not be triggered.⁸⁴

The Senate Judiciary Committee’s notion that the applicability of the phrase should turn on whether the agency is expanding regulation or reducing it is entirely unacceptable. This interpretation would require the courts to give the phrase “jurisdiction or authority” a meaning that is drastically at odds with common usage. It would mean, for example, that if the NLRB decides in one case that foremen are beyond the reach of the National Labor Relations Act, and in another case that buyers are within the Act’s reach,⁸⁵ the latter decision would implicate “jurisdiction or authority,” but the former would not. Yet these two cases are self-evidently similar, and if one of them triggers section 706(c), the other should as well. The Senate Judiciary Committee’s construction would also mean that if the Board decides in one case that buyers are exempt from the Act, and later changes its mind and decides that they are covered,⁸⁶ only the latter ruling would involve “jurisdiction or authority.”⁸⁷ This distinction is so artificial that it is unlikely to find favor in the courts.

The Senate Judiciary Committee apparently rested its interpretation on the premise that when a litigant alleges that an agency has violated its mandate by engaging in too little regulation, the grievance does not involve “jurisdiction or authority” but instead is a claim that the agency’s action is “short of statutory right.”⁸⁸ The Committee was

83. See 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 168.

84. *Id.*

85. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 270, 277-78 (1974).

86. This actually happened in *Bell Aerospace*. See 416 U.S. at 285-87.

87. A practical difficulty with the Senate Judiciary Committee’s approach is that the reviewing court sometimes will not know whether sustaining an agency’s statutory interpretation would lead to more regulation or less. The court cannot make such an assessment intelligently unless it knows how the agency would react to a repudiation of its favored construction. It is erroneous to assume that if a given approach to a regulatory problem is held to be *ultra vires*, more stringent approaches are also necessarily foreclosed. See, e.g., *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) (majority held that EPA lacked statutory power to impose moderate restraints on demolition companies’ emissions of asbestos insulation and fireproofing, even though, as Justice Stevens’ dissent pointed out, *id.* at 297, the agency would have had clear statutory authority to ban the emissions entirely); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619 (1944) (remanding Wage-Hour Administrator’s regulation classifying companies by size, because the Administrator had been obliged to classify them in terms of geography only; Court noted that it would be “sheerest guesswork” to assume that the defendant company would be better off under the new regulation than under the old one).

88. See 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 168.

referring to section 706(2)(C) of the APA, which instructs courts to set aside agency actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."⁸⁹ This language has never before been read to suggest that "jurisdiction" and "authority" refer to statutory ceilings on agency action, and "rights" to statutory floors. Linguistically, an agency's infringement of someone's statutory "rights" could always be described as a violation of its "authority."⁹⁰ If section 706(2)(C) does contain any language supporting the Committee's distinction, that language is the words "in excess" and "short of"—words that do *not* appear in the Bumpers Amendment.⁹¹

The approach of the Senate Government Affairs Committee and the House Judiciary Committee (hereinafter called "the House approach") seems more promising. Under this approach, the first sentence of section 706(c) refers only to "threshold questions as to the power of an agency to act with respect to the subject matter or persons to be regulated."⁹² A fair paraphrase may be that the controversy must relate to whether Congress authorized the agency to regulate the person or subject at all—not to whether the agency is regulating in the *manner* Congress specified. This definition has the virtue of corresponding roughly to ordinary conceptions of a jurisdictional question, but it still is extremely vague.⁹³ For example, the two committees endorsing the House approach apparently considered it self-evident that *FCC v. National Citizens Committee for Broadcasting*⁹⁴ did not involve "jurisdiction" according to their usage.⁹⁵ In *National Citizens Committee* the Court held that the FCC may prohibit any broadcast licensee from acquiring a newspaper that is published in the same locality as the broad-

89. 5 U.S.C. § 706(2)(C) (1976). It will be renumbered § 706(a)(2)(C) if the amendment is enacted.

90. Trying to distinguish actions "in excess of statutory authority" from actions "short of statutory right" on the basis of the natural meaning of these words could prove a frustrating endeavor. For example, intuition might well suggest that if the IRS erroneously includes a sum of money in a taxpayer's income, it is acting beyond its authority; if it erroneously disallows a deduction, it is withholding a statutory right. But would anyone seriously argue that the standard of review for tax cases involving income should differ from the standard for tax cases involving deductions?

91. The Committee also seems to have overlooked the word "limitations," which—like "statutory right"—appears in section 706(2)(C) but not in the first sentence of proposed section 706(c). The Committee's attempt to bifurcate the language of section 706(2)(C), as a guide to the applicability of the Bumpers Amendment's narrow-construction rule, would apparently force courts to determine whether a given action is "in excess of statutory authority" or merely "in excess of statutory limitations." The Committee did not explain how such determinations could be made.

92. See *supra* text accompanying notes 81-82.

93. See authorities cited *supra* note 79.

94. 436 U.S. 775 (1978).

95. See 1981 SENATE GOV'T AFFAIRS REPORT, *supra* note 32, at 90; 1982 HOUSE REPORT, *supra* note 3, at 75.

caster's listening audience. The two committees probably reasoned that this holding was not jurisdictional because a broadcast licensee is a *person* who is obviously subject to FCC regulation. But one could argue no less logically that since the *subject* of cross-ownership of newspapers and broadcast stations was a matter that the Commission had never before regulated, the FCC's initiative did expand its jurisdiction.⁹⁶

The main reason courts are likely to have difficulty classifying issues as jurisdictional or otherwise, under the House approach, is that the distinction it posits appears to be arbitrary. Why is there a special need to curb agencies' extensions of authority to new persons or new subject areas, but less need to curb agencies' adoption of stringent policies that are plainly within their jurisdiction?⁹⁷ The committee reports supporting the House approach contain no satisfactory answer.⁹⁸ It is possible, however, to identify a rationale that could have led the drafters of the amendment to devise a special rule of construction for "jurisdictional" issues in the House's sense. The first sentence of section 706(c) can be interpreted as reflecting an accommodation of two con-

96. As though to underscore the depth of the disagreement among the committees, the Senate Judiciary Committee cited *National Citizens Committee* as its principal example of a situation that had involved a question of the FCC's "jurisdiction or authority." 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 168.

97. It would be difficult to argue that jurisdictional issues, as the House approach defines them, are intrinsically more significant than other statutory issues in administrative cases. In the important and celebrated *Cotton Dust* case, *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981), for example, no one doubted that OSHA was acting within its legitimate sphere of activity—its "jurisdiction"—when it addressed the health risks of cotton dust. The question was whether OSHA acted in a statutorily authorized *manner* when it refused to weigh costs against benefits.

98. The only attempt to justify this distinction came from the House Judiciary Committee, which offered the following explanation:

Most challenges to agency action do not involve a question of "jurisdiction" or "authority" under the Committee's understanding of those terms, because the agency's power to deal with the subject matter is often apparent from the statute and therefore is undisputed. Instead litigation commonly focuses on the interpretation of a statutory standard by the agency—on how the agency should fulfill its responsibilities to regulate in a certain area, not whether it has the jurisdiction to regulate in that area. In these cases, of course, the special review standard of subsection (c) does not apply. Indeed, it could not meaningfully be applied, because many, perhaps most, questions involving the manner in which an agency has exercised its power are not answered by the language of the statute or a specific statement in the legislative history. Often such questions can only be resolved by determining whether the agency interpretation is reasonable and consistent with the legislative purpose. This determination often entails some deference to the agency's status as administrator of the statute and to its experience in implementing it on a day-to-day basis.

1982 HOUSE REPORT, *supra* note 3, at 75-76. If the Committee meant that deference to agencies should be prohibited in jurisdictional disputes alone because those disputes are relatively uncommon, that is not an intelligible justification. If, however, the Committee meant that deference is especially helpful or appropriate in nonjurisdictional disputes, it may have been alluding obliquely to the considerations discussed in the next few paragraphs of text.

flicting attitudes toward judicial deference to agencies' interpretations of statutes.⁹⁹

On the one hand, the drafters may have been influenced by the frequently-heard accusation that agencies tend to be biased in favor of expanding their jurisdiction.¹⁰⁰ One could thus understand the first sentence of section 706(c) as an attempt to counterbalance the "mission-oriented" character of the bureaucratic mind.¹⁰¹ The amendment would be read as saying that jurisdictional questions should be answered without regard to agencies' views because on those issues administrators deserve no deference.

Standing alone, however, this reasoning would not satisfactorily explain the limitation of the narrow-construction rule to jurisdictional matters. After all, it is not clear that the bias toward expanding jurisdiction is any more pronounced than agencies' bias in favor of policies that are within their jurisdiction but are arguably stricter than the governing statute allows.¹⁰² The amendment certainly does not forbid courts to give weight to administrators' views concerning the latter type of issue.

It is therefore necessary to posit a second, offsetting premise: the drafters may have believed that in the case of nonjurisdictional issues of statutory construction, an agency often requires flexibility if it is to protect its programs from failure. Especially in highly technical areas,

99. The reasoning that follows owes much to the unpublished remarks of Professor Thomas O. McGarity at an Association of American Law Schools Workshop on Teaching Administrative Law, March 5, 1982. Professor McGarity, it should be noted, was discussing the standards of substantive review that he himself might prefer—not analyzing the Bumpers Amendment. He deserves no blame for my adaptation of his remarks to the present context.

100. See, e.g., *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981); Wilson, *The Rise of the Bureaucratic State*, 41 *PUB. INTEREST* 77, 81, 97 (1975); Jaffic, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 *HARV. L. REV.* 1105, 1113-19 (1954). This generalization about administrators' attitudes is, of course, not universally reliable, especially under the Reagan Administration, but it may, nevertheless, have been a source of inspiration for the Bumpers Amendment.

101. Cf. Stewart, *supra* note 67, at 1785 (suggesting that the Court's disdain for the Transportation Department's interpretation of highway legislation in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), may have reflected a similar perceived need for a counterweight to agency singlemindedness). Stewart himself does not recommend that the courts' technique of construing administrative statutes so as to counteract agency biases be used more frequently. He argues that this device would often be ineffective; that it might unduly restrict agency flexibility; and that "creative" judicial efforts to refashion regulatory mandates might sometimes turn the agency's organic statute into a muddle. See Stewart, *supra*, at 1785-86.

102. See generally E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982) (condemning excessively stringent enforcement policies, most of which would appear to have raised no jurisdictional issues in the House's sense of that term). Thus when the Senate Judiciary Committee commented on what it believed was agencies' "mission-orientation," 1981 *SENATE JUDICIARY REPORT*, *supra* note 32, at 60-61 (collecting sources), its discussion did not especially emphasize jurisdictional issues.

regulation can be a complex chore. The agency's technical insights and involvement with the subject matter may reveal to it a need for implementation strategies that might appear, in the abstract, to be slightly at variance with the instructions of Congress. The point of the *second* sentence of section 706(c) may be that the agency should be allowed, in this situation, to make "improvements" on Congress' choice of implementation strategies, because strict compliance with the historical legislative intent might cause it to fail in the achievement of the very goals Congress instructed it to further. A judge who tries to supervise an agency's choice of methodology too closely may venture well beyond his technical depth.¹⁰³

This reasoning, one might argue, normally has less force when a jurisdictional determination is involved. An agency's decision as to which persons or activities it will regulate is generally more clearcut. There is comparatively little risk that judicial rejection of the agency's position on such an issue will sabotage an intricate regulatory mechanism. The argument would run, therefore, that Congress prefers in these situations to be skeptical about the worth of agencies' views on statutory issues; its fear of administrators' institutional biases overshadows any possibility that the agency might have useful insights to which weight should be given in resolving the jurisdictional issue.¹⁰⁴

The reasoning of the preceding paragraphs implies that a court following the House approach should be inclined to treat a statutory

103. For expressions of this reasoning in the existing case law, see, e.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979) (dictum); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 134 & n.25 (1977). Professor McGarity, *see supra* note 99, regards the *Benzene* case, *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980), as a decision in which the plurality failed to heed this principle, and thereby strayed into a reading of the OSHA statute that rested upon misconceptions about the art of risk assessment.

The rationale offered in the text has force even when the Court is engaged in relatively pure statutory construction—unequivocally a "question of law." Thus, the analysis can be accepted without any need to explore the methods by which a court copes with "mixed" questions of law, fact, and discretion.

104. Another way to express the argument developed in the text is that section 706(c) recognizes the cogency of some of the traditional axioms the courts have used to justify deference, but rejects others as unpersuasive. In the latter category would fall those maxims that do not distinguish jurisdictional from nonjurisdictional issues, such as that a court should give weight to an agency's interpretation simply because it is charged with administering the statute, *see, e.g.*, *Blanding v. DuBose*, 454 U.S. 393, 401 (1982), or that the interpretation deserves weight because the agency has followed it continuously or for many years, *see, e.g.*, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). A logical corollary of Congress' stance—or so private counsel could reasonably argue—would be that courts should no longer follow these latter maxims even when the issue of construction is *not* jurisdictional. The only deference principles that courts should observe (the argument would run) would be those that have special application to nonjurisdictional issues. *But see supra* note 44 (congressional endorsement of *Skidmore* formula).

issue as jurisdictional when (a) there is maximal likelihood that the agency's viewpoint was colored by a desire to aggrandize its power, and (b) there is minimal risk that an adverse decision will interfere with the internal coherence of the agency's program. This attempt to understand why the narrow-construction rule is limited to jurisdictional issues admittedly involves some crude generalizations.¹⁰⁵ It is a start, however, and if the courts prove to be sufficiently creative,¹⁰⁶ they may be able to extrapolate arguments of this kind into a usable definition. At least this attempt avoids the conclusion that Congress adopted the "jurisdiction" limitation without any coherent analytical justification at all. That pessimistic view ought to be resisted—even if it does accord with the historical facts.

B. *The Types of "Agency Action" Covered.*

This section explores a few specific respects in which the overbreadth of the jurisdiction provision is especially apparent. It also examines a minor change in the amendment that might go far to

105. For example, when the Court upheld the FCC's authority over cable television operators in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the issue was clearly jurisdictional, but the Court's rationale was similar to the argument supporting deference in cases dealing with implementation: "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities." *Id.* at 173. This reasoning was critical to the Court's holding, since the language and legislative history of the organic statute were conspicuously unhelpful to the FCC's position.

106. Also suggestive are these comments about the jurisdiction provision from the Bumpers-Synar statement:

In making such determinations, the court undoubtedly will be influenced not only by the statute's legislative history but also by the nature of the asserted power. If, for example, the agency is seeking to assert a basic or significant extension of authority, especially one which bears on personal liberties, or heralds significant involvement of the agency in a new area or imposes significant costs, the reviewing court should not uphold the extension unless it is conscientiously convinced that the statute and relevant legal materials demonstrate that Congress specifically or generally addressed the issue, and that the statute does contain the authority asserted by the agency. On the other hand, if the asserted authority at issue relates to an interstitial or minor matter, the reviewing court might well conclude that although Congress had not really addressed the issue, the matter is of such a character that sensible administration necessarily requires exercise of such an implementing authority.

1980 HOUSE REPORT, *supra* note 26, at 125; *accord*, 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 169-70; 1981 SENATE GOV'T AFFAIRS REPORT, *supra* note 32, at 91-92. This passage is not explicitly directed toward the question of how jurisdictional issues may be distinguished from other statutory issues, but there is something to be said in favor of the courts' adapting it to this context. Read critically, the passage seems to be saying that if the court regards the case at bar as exceptionally important, its standard of review should be stricter than if the court finds the case relatively mundane. As a general proposition I do not favor the somewhat circular view that courts reviewing agency action should decide on an ad hoc, subjective basis what standard of review they will use. With regard to allocating questions between the first and second sentences of section 706(c), however, the text of the amendment is so perplexing that recognition of broad discretion in the courts to make this classification as they see fit may be the lesser evil.

ameliorate, if not eliminate, the overkill inherent in the first sentence of section 706(c).

First, the language of the provision affords no basis for distinguishing between agencies' efforts to expand their sphere of regulation and their efforts to restrict it. Suppose, for example, that an agency adopts an unexpectedly narrow interpretation of its own jurisdictional limits.¹⁰⁷ If the second sentence of section 706(c) were applicable, that determination would be entitled to whatever persuasive weight it "warrants" during judicial review. But by hypothesis the issue is jurisdictional; therefore, the second sentence does not apply. Instead, the first sentence of section 706(c) applies, and directs the court to look only to the language of the statute and "other evidence of legislative intent." Thus, to the extent that the first sentence of section 706(c) forbids courts to accord special weight to the enforcing agency's views, it may serve to slow rather than to facilitate deregulation. This effect scarcely comports with the antigovernment rhetoric with which the amendment has been promoted. It is on this ground that Professor (now Judge) Scalia, a solidly conservative observer, has criticized the amendment.¹⁰⁸ By legitimizing activism on the part of the federal judiciary, he argues, the bill might actually reduce the ability of a conservative executive branch, such as the Reagan Administration, to respond to public pressure to rescind unwise regulations.¹⁰⁹

Apparently stung by this line of argument, proponents of the amendment have publicly argued that the "primary thrust" of the jurisdiction sentence is to discourage "positive" or "affirmative" agency ac-

107. For cases in which agencies have been ordered to exercise jurisdiction, see, e.g., *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974) (dictum); *Office Employees Int'l Union Local 11 v. NLRB*, 353 U.S. 313 (1957); *Kingsbrook Jewish Med. Center v. Richardson*, 486 F.2d 663 (2d Cir. 1973); *Stewart & Sunstein, Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1197 n.13 (1982) (citing thirteen additional cases); cf. *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 622-23 (1944) (recognizing judicial power to require agency to exercise jurisdiction). Although some of the cases collected by Stewart & Sunstein might be best described as finding agency inaction to be an abuse of discretion, and thus as not implicating section 706(c), others do appear to turn on jurisdictional determinations. E.g., *Carpet, Linoleum & Resilient Tile Layers, Local 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

108. Scalia, *Regulatory Reform—The Game Has Changed*, 5 REG., Jan.-Feb. 1981, at 13, 13-14. As Scalia elsewhere points out, the "common law of judicial review" does distinguish between agency action and inaction. Scalia, *Rulemaking as Politics*, 34 AD. L. REV. v, vii (Summer 1982). The Bumpers Amendment, however, at least in its jurisdiction provision, breaks with the case law. Whether the courts would read into the amendment the judicially developed asymmetry to which Scalia refers is difficult to predict.

109. For a survey of court challenges to the Reagan Administration's efforts at deregulation, see Wines, *Administration, Critics Play Legal Cat and Mouse Game on Agency Rules*, 14 NAT'L J. 2157 (1982).

tion, as opposed to action by which the agency declines to regulate.¹¹⁰ These assurances, however, ignore the language of the APA, which expressly defines "agency action" to include "failure to act"¹¹¹ and thus militates strongly against any distinction between positive and negative administrative decisions. Considering how conspicuously the text of the jurisdiction provision seems to favor statutory language over extrinsic aids to construction,¹¹² it is ironic to observe the sponsors trying to use legislative history to negate what the APA says on its face.

Even if the jurisdiction provision is somehow construed as inhibiting only extensions of administrative activity rather than contractions, it may reach too far. The sponsors of the amendment seem to have overlooked the applicability of the APA review standards to much more than "regulation" in the everyday sense. Section 706 also applies to the dissemination of government benefits.¹¹³ People who want a passport, a research grant, or a Social Security check do not come to court trying to "get the government off their backs." On the contrary, such people are likely to complain if the government fails to give them the benefits they want.

The first sentence of section 706(c) could only work to the disadvantage of people seeking such benefits. The facts of *Morton v. Ruiz*¹¹⁴ can be used to illustrate the point. Ruiz, a Papago Indian who lived near his tribe's reservation, applied for general assistance benefits under the Snyder Act.¹¹⁵ The Bureau of Indian Affairs (BIA) denied the application, believing that Congress had limited eligibility to Indians living on reservations. The Supreme Court reversed, finding that Congress had imposed no such restriction. Now suppose the Bumpers Amendment had been law at the time *Ruiz* was decided. Because section 706(c) would require the courts to insist on more statutory support for an extension of jurisdiction than has previously been necessary, the government would more likely have cited the amendment against Ruiz than the other way around. The same logic would operate in other situations in which disputes over an agency's authority to withhold

110. See, e.g., 1981 HOUSE HEARINGS, *supra* note 30, at 55-56 (testimony of Senator Bumpers); 1980 HOUSE REPORT, *supra* note 26, at 126 (Bumpers - Synar statement).

111. "[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . ." 5 U.S.C. § 551(13) (1976). The definition applies to the APA's judicial review provisions by virtue of section 701(b)(2).

112. See *infra* notes 123-30 and accompanying text.

113. See, e.g., *Batterton v. Francis*, 432 U.S. 416 (1977).

114. 415 U.S. 199 (1974). The administrative law pronouncements in the case have been poorly received in the press, see, e.g., Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823 (1975), but its substantive holding has escaped similar criticism.

115. 25 U.S.C. § 13 (1976).

funds arise, including various types of individual welfare programs,¹¹⁶ as well as grant-in-aid programs such as construction grants.¹¹⁷ It is hard to see how any reading of the jurisdiction provision could permit the courts to differentiate between welcome and unwelcome governmental action.¹¹⁸ Here again, the jurisdiction provision of the amendment appears to extend further than its supporters have seriously contemplated. What member of Congress would like his constituents to learn that he voted to build an anticlaimant bias into the system for judicial review of Social Security rulings?

The sponsors of the amendment could ameliorate the problems just mentioned if they were to change the word "action" in the first sentence of section 706(c) to "sanction." A little-known provision of the APA defines "sanction" to include a "prohibition, requirement, limitation, or other condition affecting the freedom of a person; . . . imposition of penalty or fine;" and other specifically named types of "compulsory or restrictive action."¹¹⁹ "Sanction" is used as a comple-

116. See, e.g., *Schweiker v. Gray Panthers*, 453 U.S. 1 (1981) (Medicaid); *Lopez Diaz v. Secretary of HEW*, 585 F.2d 1137 (1st Cir. 1978) (Social Security disability benefits); *Griffis v. Weinberger*, 509 F.2d 837 (9th Cir. 1975) (Social Security disability benefits); *Bermudez v. USDA*, 490 F.2d 718 (D.C. Cir.), cert. denied, 414 U.S. 1104 (1973) (food stamps); *Knowles v. Butz*, 358 F. Supp. 228 (N.D. Cal. 1973) (food stamps).

117. See, e.g., *Train v. City of New York*, 420 U.S. 35 (1975) (pollution control funds); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 136 (1947) (highway construction funds); *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977) (airport construction funds).

118. The most promising argument for Ruiz would be that the first sentence of section 706(c), by its explicit language, comes into play only when agency action is alleged to be "in excess of statutory jurisdiction [or] authority" under section 706(2)(C), not where it is alleged to be "short of statutory right" as used in the same subsection. To be sure, there is no difficulty fitting his grievance into the "short of statutory right" category of section 706(2)(C). But this characterization does not show that an attack on the statutory foundation of a denial of monetary benefits cannot also be described as raising a question of the agency's jurisdiction. In fact, the Court in *Ruiz* explicitly referred to the issue before it as implicating the BIA's "jurisdiction," 415 U.S. at 229 n.24. This is not an inescapable description, perhaps, but it is by no means a strained one, either. The case law has simply never drawn distinctions among the various categories of section 706(2)(C), and, as noted earlier, the drafters of the Bumpers Amendment experienced great difficulty trying to fashion workable distinctions. See *supra* notes 88-91 and accompanying text. In any event, none of the committee reports indicated that the notion of jurisdiction should turn on whether the agency expands its power by spreading "good news," such as money, or "bad news," such as a regulation constraining the freedom of those it addresses.

119. The full definition of "sanction" is:

the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges or fees;

(F) requirement, revocation, or suspension of a license; or

ment to "relief," which the APA defines as action "beneficial to . . . a person," such as a "grant of money . . . [or] exemption."¹²⁰ These terms have never received any serious attention, because the operative provisions of the APA almost always treat sanctions and relief identically.¹²¹ But the jurisdiction provision of the Bumpers Amendment presents a situation in which the sanction-relief distinction would be helpful. Limiting that provision to sanctions would go far to ensure that the courts' implementation of the provision would not detract from an agency's willingness to relax regulations or to grant benefits.¹²²

C. The "Plain Meaning" Rule.

The principal thrust of the jurisdiction provision is to require courts reviewing an agency action to seek a stronger foundation in legislative intent than has previously been necessary. But, on the surface at least, the provision does more. It appears to evince a definite preference concerning the means by which the legislature's intent should be ascertained—authorizing the court to consult legislative history and other indicia of Congressional intent *only* "in the event of ambiguity"

(G) taking other compulsory or restrictive action;

5 U.S.C. § 551(10) (1976).

120. The full definition of "relief" is:

the whole or part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

Id. § 551(11) (1976).

121. Almost the only section of the APA that treats sanctions differently from relief is section 558(b), which declares: "A sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." *Id.* § 558(b). If Congress makes the change in section 706(c) suggested in the text, it should consider amending section 558(b) to contain language duplicating the jurisdiction provision of the amendment. One of the most curious characteristics of the Bumpers proposal is that it aims to "send a message" to the agencies by altering the review standards used by the courts. Presumably the sponsors anticipate that administrators will take the hint after enough reversals; but if the command is to be issued, would it not be more logical to insert it in a part of the APA that is addressed to agencies themselves? Just as "it is implausible to think that the drafters of the APA would place a scope of review standard in the middle of a statutory provision [section 556(d)] designed to govern evidentiary issues in adjudicatory proceedings," *Steadman v. SEC*, 450 U.S. 91, 100 n.20 (1981), it is odd for Congress to rely on an alteration in the scope of review section to convey a message that is surely intended as much for agencies as for the courts.

122. Jurisdictional rulings underlying a grant of relief would, of course, have to pass muster under the second sentence of section 706(c). Admittedly, some agency actions will be difficult to classify. For example, what a polluter calls relief may be a sanction in the eyes of environmentalists. *Cf.* L. TRIBE, *supra* note 67, at 288 n.14 (in the face of competing claims of right, a "clear statement" approach to construction simply does not work). Nevertheless, the term "sanction" appears to come much closer to the meaning intended by the drafters than does the present language of section 706(c).

in the statutory language. So interpreted, the amendment would amount to a partial codification of the so-called "plain meaning" rule of statutory construction.

Read in this manner, the amendment takes an extreme position in a longstanding and unresolved argument over the proper relationship between the language of a statute and extrinsic aids to construction. The Supreme Court usually rejects the "plain meaning" rule, and has often declared: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."'"¹²³ To be sure, the Burger Court has in some recent cases taken a less permissive rhetorical position, stressing that the plain meaning of a statute should be dispositive except in "rare and exceptional circumstances."¹²⁴ Yet, even in the latter cases, the Court has not taken as uncompromising a position as the Bumpers Amendment seems to take; the Court has not intimated that a judge may not even look at legislative history if the meaning of the text appears to be unambiguous.

Congress should not embrace the plain meaning dogma. Since courts do ordinarily accept and consider legislative history that is tendered to them, they should not have to go through the motions of purporting to find a surface "ambiguity" in a statute, so that they will then have the "right" to examine extrinsic evidence of meaning. The only result of such ritualism would be a less than straightforward account of what decisional factors the court deemed important. Moreover, if a court actually did refuse to examine legislative history because the terms of the statute seemed clear, it would risk frustrating the legislature's will. As the history of the Bumpers Amendment itself illustrates, the processes of negotiation and compromise in legislative drafting occasionally cause Congress to say one thing ("unambiguously") when it

123. *E.g.*, *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222 n.20 (1981); *Train v. Colorado PIRG*, 426 U.S. 1, 10 (1976); *Cass v. United States*, 417 U.S. 72, 78-79 (1974); *see also* *Watt v. Alaska*, 451 U.S. 259 (1981); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972). On this point the Court in *Colorado PIRG* cited *Murphy, Old Maxims Never Die: The "Plain Meaning" Rule and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975), a very effective defense of the Court's stance. 426 U.S. at 10. *See also* *Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 196-99 (1983).

124. *Rubin v. United States*, 449 U.S. 424 (1981); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978); *cf.* *United Airlines, Inc. v. McMann*, 434 U.S. 192, 199 (1977). All three of these opinions were written by Chief Justice Burger, who might thus be regarded as a leader in "plain meaning" analysis. But the Chief Justice does not shrink from criticizing such analysis when it is used to support results to which he is opposed. *See* *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980) (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

means another.¹²⁵ Codification of the plain meaning rule would ignore the flexibility that courts must have in order to deal with these admittedly unusual situations.

The notion that the amendment will codify the plain meaning rule may, however, be too alarmist. When the possibility of such a result was called to the legislative committees' attention in 1981, they responded by minimizing the significance of the phrase "in the event of ambiguity."¹²⁶ These disclaimers are fairly credible, because adoption of a plain meaning approach would not necessarily promote the underlying purpose of the amendment—to curb the power of administrative agencies. Sometimes the plain meaning approach would frustrate that purpose: the courts often use extrinsic evidence of legislative intent to overcome a literalist but expansive statutory interpretation favored by an agency.¹²⁷ In all likelihood, the drafters of the amendment had no particular views about the relative reliability of statutory language versus legislative history. They probably inserted the words "in the event of ambiguity" simply because they thought they were reaffirming a generally accepted principle of construction.¹²⁸

Probably, then, the soundest reading of the amendment is that it is not intended to prohibit the courts from consulting the legislative history or other extrinsic sources whenever they see fit to do so.¹²⁹ If that is true, however, why include the distracting phrase "in the event of ambiguity" at all? The legislative history contains absolutely no efforts

125. See *supra* notes 27, 107-18 and accompanying text. See also *Cass v. United States*, 417 U.S. 72, 83 (1974) ("In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process.'").

126. Where Congress anticipated the issue and squarely dealt with it in the language of the statute, or when an agency has egregiously acted beyond its delegated power as clearly delineated in the language of the statute, the court need not go beyond that language to resolve the issue. Given the general nature of most statutory grants of authority delegated by Congress, however, the Committee expects that the occasions in which courts will encounter totally unambiguous statutory language will be rare. If a colorable challenge to an agency's power to act in a certain area can be mounted, it is unlikely that the limits of that power will be clearly apparent from the face of the statutory language. Rather, such challenges will frequently require courts to go beyond the language of the statute to discern congressional intent.

1982 HOUSE REPORT, *supra* note 3, at 76; 1981 SENATE GOV'T AFFAIRS REPORT, *supra* note 32, at 90-91. The Senate Judiciary Committee met the issue less forcefully, but still reflected a not inhospitable attitude toward the use of legislative history. See 1981 SENATE JUDICIARY REPORT, *supra* note 32, at 168-69.

127. See, e.g., *United Housing Fed'n, Inc. v. Forman*, 421 U.S. 837, 848-51 (1975); *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 71-72 (1964); *Trustees of Indiana Univ. v. United States*, 618 F.2d 736, 739 (Ct. Cl. 1980).

128. See *supra* note 53 (congressional professions of adherence to traditional canons of construction).

129. See 1981 HOUSE HEARINGS, *supra* note 30, at 935, in which a panel of distinguished jurists—Judges McGowan, Ainsworth, Breyer, and Arnold—indicated that they regarded the amendment as quite innocuous in this respect.

by anyone to justify its presence.¹³⁰ Economy of draftsmanship, if nothing else, argues in favor of deletion.

IV. CONCLUSION

This comment has analyzed the jurisdiction provision on the basis of materials prepared by the congressional sponsors of the Bumpers Amendment. Although it is trite to remark that a reform proposal cannot be satisfactorily evaluated until the courts have interpreted it, in this instance the cliché applies with special force. After all, the amendment imposes no tangible responsibilities on anyone and deals only with ethereal issues of "mood."¹³¹ When and if the courts confront the jurisdiction provision, they may ignore it entirely. Or they may conclude, as some passages of the legislative history suggest,¹³² that the provision is merely an innocuous admonition urging them to act conscientiously and to construe regulatory legislation according to their own best judgment. Or they may treat the jurisdiction provision as a principle of narrow construction, whereby a court must seek clear indications from Congress that the agency is correct and must ignore the persuasive force it would otherwise attribute to the agency's viewpoint.

This comment has maintained that the last of these alternatives is probably a fair account of the intended meaning of the jurisdiction pro-

130. The committees' observation that a statute's language is sometimes entirely convincing standing alone, *see supra* note 126, does not show how the statute would operate any differently if the phrase "in the event of ambiguity" were omitted.

131. Proponents of the amendment often allude to Justice Frankfurter's opinion in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), as an example of the kind of signal they hope the courts will receive. *See, e.g.*, 1981 SENATE GOV'T AFFAIRS REPORT, *supra* note 32, at 92; *Proceedings, supra* note 11, at 200 (remarks of Stephen Breyer). Frankfurter noted that the substantial evidence test of the APA, 5 U.S.C. § 706(2)(E) (1976), embodied a congressional "mood". 340 U.S. at 487. Since this mood was expressed "not merely by oratory but by legislation," *id.*, it had to be taken seriously; therefore, "courts must now assume more responsibility for the reasonableness and fairness of [agency] decisions than some courts have shown in the past." *Id.* at 490.

The analogy to *Universal Camera* may be telling in a way that the proponents did not anticipate. *Universal Camera* actually had three holdings. The first was that the substantiality of the evidence must be determined by reference to the "whole record," not just the evidence supporting the government's case. *Id.* at 487-88. The second was the "mood" holding quoted above. The third was that the hearing examiner's report should be given "such probative force as it intrinsically commands." *Id.* at 493-97. The first and third holdings, which provide reasonably coherent guidance to a reviewing court, have certainly been influential in the case law. But it is not at all clear that the nebulous second holding effected any strengthening of judicial review. On the contrary, reviewing courts of the fifties are generally considered to have been exceptionally deferential towards administrative agencies. Not until the middle or late sixties, or perhaps the early seventies, did a period of real judicial skepticism toward agencies set in—obviously not as a result of Congress' prodding by "mood" in the APA. *See, e.g.*, Shapiro, *On Predicting the Future of Administrative Law*, REG., May-June 1982, at 18, 20. The "mood" message of the Bumpers Amendment may turn out to be equally futile.

132. *See supra* note 46 and accompanying text.

vision, but that this reading raises several troubling concerns. Because it speaks indiscriminately to virtually the entire spectrum of federal administrative agencies, the provision gives the courts no genuine policy direction. This across-the-board coverage reflects a failure of congressional leadership. It also creates a sizeable risk that, if the courts do apply the provision vigorously, they will invalidate worthwhile initiatives along with ill-advised ones. In addition, the jurisdiction provision contains some particularly imprecise, awkward language that may foster confusion and unforeseen holdings.

Of course, the amendment may never be enacted, and these difficulties never faced. Even if that proves true, however, the story of the jurisdiction provision's journey through Congress may be of continuing interest.¹³³ It is a lesson in what is likely to emerge when a scope-of-review statute is proposed as part of a regulatory reform movement whose "impetus . . . is less distinctively legal, and more commercial or economic," than the movement giving rise to the original APA almost four decades ago.¹³⁴ The objective of the jurisdiction provision—to a greater extent, it would seem, than the other parts of the Bumpers Amendment—is more to promote "deregulation" than to enact enduring notions of fairness concerning the court-agency relationship. It should be no surprise, therefore, if administrative lawyers detect defi-

133. Portions of this article's critique of the jurisdiction provision may have a bearing on an analogous provision in Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (Supp. 1982), the blueprint for President Reagan's regulatory oversight program. According to the Order, each executive branch agency issuing a "major" rule must "make a determination that the regulation is *clearly* within the authority delegated by law and consistent with congressional intent." *Id.* § 4(a) (emphasis added). The natural reading of this provision would seem to be that if an agency head believes he *probably* has authority to issue a given rule, but that he does not *clearly* have it, he cannot proceed to adopt the rule without disobeying the President's directive. The administrative history of section 4(a) suggests that the White House may not have intended this implication, or at least may not view it as an important component of the oversight program. See Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1239 n.24 (1981). If the Administration does decide to treat the word "clearly" as a significant restriction, some of this article's doubts about the wisdom of so broad-ranging a condemnation of marginally authorized agency action would be pertinent. See *supra* notes 64-73 and accompanying text. (I would not, however, go as far as Learned Hand, who once suggested that enforcing agencies have a positive *duty* to test the outer limits of their authority. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785 (2d Cir.), *aff'd*, 328 U.S. 275 (1946).) This construction by the White House, as yet only hypothetical, would also raise an intriguing separation-of-powers question: if the President abrogates executive agencies' power to act in subject areas in which their authority to act is uncertain, has he frustrated Congress' intent to confer policymaking discretion on those agencies? The symposium in which Shane's article appears is a stimulating guide to the general problem. See Symposium, *Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1195 (1981).

134. Scalia, *Chairman's Message*, 33 AD. L. REV. v, ix (Fall 1981).

ciencies in the final product.¹³⁵ A statute that prescribes the scope of judicial review for an entire government's activities is not a suitable battleground for a campaign against "overregulation."

135. Professor (now Judge) Scalia reaches a similar conclusion concerning the recent regulatory reform drive as a whole. *See id.* at *x*. A more optimistic opinion about the utility of scope-of-review legislation is offered in Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 538. Their assessment, however, is largely based on scrutiny of state-level administrative procedure acts, which have been low-visibility measures promoted mainly by lawyers.