



Recommendation 79-6

Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment

(Adopted December 14, 1979)

Symptomatic of concern that reviewing courts do not probe as deeply as they should into the legality of agency action and that, as a consequence, administrative rules may be too broad in their reach is the so-called Bumpers Amendment to S. 1477, the Federal Courts Improvement Act of 1979.

The Bumpers Amendment in its principal operative part amends 5 U.S.C. Sec. 706 to insert after the first sentence of the section a sentence that reads, "There shall be no presumption that any rule or regulation of any agency is valid," and a court in which the validity of a rule or regulation is drawn in question "shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown."

For reasons stated below the Conference opposes the enactment of the Bumpers Amendment. Concern about the broad substantive reach of the administrative rules of a host of agencies cannot be effectively addressed by legislatively imposing across-the-board procedural rules for judicial review.

1. The wording of the amendment raises numerous interpretative questions that are compounded rather than answered by its legislative history. Previous versions of the amendment proposed to insert the phrase "de novo" into the first sentence of Section 706, as follows: "To the extent necessary to decision and when presented, the reviewing court shall [*de novo*] decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Although that change was not a part of the amendment as approved by the Senate, statements of its sponsors nonetheless indicate that they intend by the amendment to eliminate the doctrine under which courts reviewing agency action pay deference to the agency's views concerning interpretation of the statute it administers. Because of the discrepancy between this history and the terms of the amendment as adopted, which contains no words that explicitly indicate the intent to eliminate the deference doctrine, the amendment in its present form would generate troubling problems of construction.



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2. The text of the amendment does clearly reflect the sponsors' desire to eliminate any presumption of validity of an agency rule or regulation. In actuality, no presumption of validity today shields a rule or regulation from the close scrutiny to which judicial review now subjects agency action. Courts may properly give weight to agency expertise in some circumstances, as, for example, where complex scientific or technical issues are involved.

3. The amendment would require the government to establish the validity of a challenged rule or regulation "by a preponderance of the evidence shown." No need has been shown for such an alteration of what has been understood to be the burden of persuasion in judicial proceedings in which the validity of Federal regulations may be drawn into question. The alteration would probably foster additional litigation over the validity of regulations, and no substantial public benefit could be expected to flow from the additional litigation. Moreover, the use of the term "preponderance of the evidence" is inappropriate because a court, when passing on the validity of a regulation, does not receive evidence but, rather, hears argument. At worst the wording might be read to require a reviewing court to make an independent, fresh assessment of the circumstances and data underlying the rule. On that construction, courts would find themselves obligated to redecide factual (and policy) issues affecting the validity of rules or regulations in all the myriad areas of governmental activity and not merely to decide whether rules or regulations are rationally supported. This would be a burdensome task for which courts are not suitably staffed or well-equipped by training or experience.

4. The amendment uses the phrase "rule or regulation." "Rule" by itself is defined in the Administrative Procedure Act, 5 U.S.C. Sec. 551(4), but "regulation" is not, thereby creating the potential for considerable litigation to establish the meaning of the entire phrase. Furthermore, because the amendment adds to the government's burden in defending the validity of rules or regulations while it leaves unchanged the burden in defending challenges to the validity of other types of agency action, the amendment might have some tendency (the magnitude depending on the issues held to be encompassed by "validity") to cause agencies that have freedom of choice to proceed case-by-case rather than by adopting rules of general applicability. Any such discouragement of rulemaking would be undesirable. See Conference Recommendation 71-3.



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1. Congress should not enact the so-called Bumpers Amendment to Section 706 of the Administrative Procedure Act or, by any similar legislation, at this time alter or reverse any presumption of validity that attaches to agency rules or regulations.

2. An across-the-board judgment that judicial deference to agency expertise or to an agency's interpretation of its statutory mandate is never warranted, would be unwise, and Congress should not enact legislation precluding such deference.

Citations:

45 FR 2308 (January 11, 1980)

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Note: Legislation opposed by the Conference in this recommendation was not enacted by the Congress.