



## Recommendation 81-2

### **Current Versions of the Bumpers Amendment**

---

(Adopted December 11, 1981)

In Recommendation 79-6, adopted in December 1979, the Conference criticized the then current version of the so-called Bumpers Amendment to Section 706 of the Administrative Procedure Act. At that time, the Conference, expressing its belief that concern about the broad substantive reach of the rules of a host of agencies cannot be effectively addressed by legislation prescribing new across-the board standards for review, made the following two recommendations:

1. Congress should not enact the so-called Bumpers Amendment \* \* \* or, by any similar legislation, at this time alter or reverse any presumption of validity that attaches to agency rules or regulations; and
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.

The Conference continues to believe that Congress should not, through across-the-board legislative measures, alter the weight reviewing courts afford agency statutory interpretations or expertise, and it therefore maintains the position taken in Recommendation 79-6. Since that recommendation was made, however, the Bumpers Amendment has been substantially revised. Accordingly, we believe it appropriate to address the current text of the amendment, as embodied in three pending versions: section 5(b) of S. 1080, as reported by the Senate Judiciary Committee; section 5 of S. 1080, as reported by the Senate Governmental Affairs Committee; and section 203 of H.R. 746, as reported by the House Judiciary Committee. The Senate Judiciary Committee version of S. 1080, which includes the most new material of the three proposals, would divide section 706 into three subsections and make three changes in the present text of section 706:

(1) It would insert into what is now the opening sentence of the undivided section, which would become the opening sentence of subsection (a), the word "independently." It would thereby make the section provide that the reviewing court shall "independently" decide



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action.

(2) It would add to section 706(a)(2) a new clause (F) reading as follows:

[The reviewing court shall \* \* \* hold unlawful and set aside agency action, findings, and conclusions found to be \* \* \* ]

\* \* \*

(F) without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553 of this title \* \* \*

Old clause (F) of the present section 706(2) would become clause (G) of section 706(a)(2).

(3) It would add a new subsection (c), to read as follows:

(c) In making determinations concerning statutory jurisdiction or authority under clause (2)(C) of subsection (a) of this section [the clause that says that the reviewing court is to hold unlawful and set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"] 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.<sup>1</sup>

For the reasons discussed below, the Conference opposes adoption of the Bumpers Amendment in any of its current forms (with the exception of the provisions concerning

---

<sup>1</sup> The House Judiciary Committee version of the bill would add the word "independently" and the first sentence of new subsection (c), revised to read: "In making determinations under paragraph (2)(C) of subsection (a) of this section, the court shall require that action by the agency is within the scope of agency jurisdiction or authority on the basis of the language of the statute and, in the event of ambiguity, other evidence of ascertainable legislative intent." Instead of the new clause (F) that is quoted in the text of the recommendation, it would add to section 706 a new subsection (d), reading: "In determining whether an agency action in adopting a rule in a proceeding subject to section 553 of this title is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the court shall consider whether there is substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis of the rule." The Senate Governmental Affairs Committee's version would not add "independently" or clause (F); it would add only the first sentence of subsection (c), as it reads in the Senate Judiciary Committee's version.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

substantial support in the rulemaking file, also discussed below). If Congress does enact legislation of this type, however, we recommend certain revisions of the Amendment's current provisions.

A. The extent to which a reviewing court should take into account an agency's interpretation of a statute is a subtle and complicated issue. The Conference agrees that the courts are the ultimate authority on questions of statutory interpretation that arise in the review of an agency action, and that the proper exercise of this authority calls for an independent examination of all relevant materials that would contribute to a correct resolution of such questions. The primary sources for the resolution of questions of statutory interpretation are the statutory text and other manifestations of Congress' intent in enacting the law. The Conference does not believe that in the resolution of such questions the legal position taken by the administering agency is *automatically* entitled to special weight, but the Conference does believe that special weight may be justified by the circumstances surrounding the agency's adoption of or adherence to such position. These circumstances may include the fact that the agency interpretation was "a contemporaneous construction of the statute by [those] charged with the responsibility of setting its mechanism in motion," *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); or that the agency interpretation has been asserted consistently, that it has received Congressional approval or acquiescence, that affected interests have relied on it, and that the interpretation is a direct outgrowth of the agency's experience in implementing the statute, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Conference does not favor legislation that would require courts to disregard such circumstances in reviewing the actions of agencies for conformity with the statutes they administer.

Many of the perceived problems with regulatory statutes and related agency practices are caused by statutory provisions and accompanying reports thereto which are imprecisely drafted or which fail to provide adequate guidance for application. Judicial review is, at best, an imperfect corrective for agency action that goes beyond an unarticulated mandate of the political processes. Further, by its very nature, it is insulated and removed from the legislative process, which is more directly responsive to the popular will on a given subject. Sounder policy judgments in the organic laws and other statutory grants of administrative power, more precise delegation, and systematic oversight and reevaluation of agency missions are far better ways to address these perceived problems than changing the standards of judicial review.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

B. The current versions of the Bumpers Amendment contain ambiguous provisions that are susceptible of various interpretations. As a result, enactment of this legislation may produce undesirable consequences:

(i) To the extent that the insertion of the word "independently" in the first sentence of section 706(a) is intended simply to emphasize that the reviewing court is free to reject an agency interpretation or legal position with which it disagrees and to remind the court of its duty to undertake its own inquiry into the legal issues, we have no objection to the amendment, although we are not persuaded that such an admonition is needed. If the insertion of the word "independently" is intended to address the question of the weight that courts should accord to agency interpretations, we believe this question may be too subtle and difficult to be handled in such an elliptical manner.

(ii) We find the provisions of proposed section 706(c) confused and confusing in several respects, and believe that they should not be enacted.

a. The first sentence directs the courts to require that agency action 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." The thrust of this direction is ambiguous. If it is intended to set forth a rule of construction that statutory grants of authority are to be construed narrowly, we believe such an indiscriminate rule would invite unintended results by failing to take into account particular statutory schemes. The preferable approach, in our view, is to permit the courts to interpret each statutory grant in the light of the terms and purpose of the statute and the specific intent of Congress. On the other hand, the sentence may be addressed solely to the question of what sources the courts may consult in determining the meaning of a statutory grant of authority. So interpreted, the sentence would further the professed goals of the proponents of the Bumpers Amendment by emphasizing reliance on statutory terminology and evidence of legislative intent in implied contradistinction to agency interpretation and practice, but some clarification of its intended effect is called for. The phrase "or, in the event of ambiguity, other evidence of ascertainable legislative intent" raises an additional problem, for it suggests that a court is to be directed to confine its consideration to the statutory language unless it first concludes that that language is ambiguous. The Conference believes the better rule is that stated by the Supreme Court in *Train v. Colorado PIRG*, 426 U.S. 1, 10 (1976): 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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

its use, however clear the words may appear on superficial examination. *See also Watt v. Alaska*, 101 S. Ct. 1673, 1677-78 (1981); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

b. The two sentences of subsection (c) strongly imply that the courts, in making determinations concerning statutory jurisdiction or authority under section 706(a)(2)(C), are to apply a standard of review different from that to be applied in making determinations on "other questions of law." Yet it is by no means clear how the two categories are to be distinguished or how the two standards of review differ. For example, is the application of an assertedly erroneous legal standard to a fact situation within the agency's jurisdiction to be reviewed under the first sentence or under the second? *See, e.g., American Textile Mfrs. Institute, Inc. v. Donovan*, 101 S. Ct. 2478, 2489 (1981).

c. The meaning of the second sentence of subsection (c), directing that no presumption be accorded "in favor of or against agency action" as to "other questions of law," is unclear. The reference to presumptions as to questions of law is confusing, since presumptions, properly speaking, concern evidentiary matters, not legal questions. Moreover, if the sentence's purpose is to eliminate the weight courts now give to agency views on various legal questions, it would apparently reach issues such as the correctness of the agency's interpretation of its own regulation, *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945), and the procedural regularity of agency action, *see Braniff Airways v. CAB*, 379 F.2d 453, 460 (D.C. Cir. 1967). Thus interpreted, its scope is far too broad.

C. Both proposed new clause (F) of section 706(a)(2) and the alternative formulation, proposed new subsection (d) of section 706, promote the goals of Paragraph 3 of Conference Recommendation 74-4. We applaud these efforts to provide courts that review administrative regulations clearer guidance than is afforded by the present clause (2)(A) of section 706. We prefer proposed subsection (d) to proposed clause (F) because clause (F) can be read to create an independent ground for reversal of an agency rule. The better approach, in our view, is to direct the courts to consider whether the rule has substantial support in the rulemaking file as one factor in determining whether the agency's adoption of the rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Recommendation

1. Congress should not enact the so-called Bumpers Amendment in any of its current versions, or any similar across-the-board legislation altering the weight reviewing courts afford agency statutory interpretations or expertise.

2. If Congress nevertheless believes it necessary to enact legislation directed to the weight to be accorded administrative interpretations, it should substitute for the currently pending provisions the following clearer, more effective formulation:

(a) Amend section 706(a) of the Administrative Procedure Act by adding the word "independently"; and

(b) Either eliminate proposed section 706(c) altogether or adopt the following version of the section, similar but not identical to the current House Judiciary and Senate Governmental Affairs versions:

(c) In making determinations concerning statutory jurisdiction or authority under clause (2)(c) of subsection (a) of this section the court shall determine whether action by the agency is within the scope of the agency jurisdiction or authority on the basis of the terms of the statute and other evidence of legislative intent.

3. Congress should amend section 706 of the Administrative Procedure Act by adding a new subsection, to read as follows:

In determining whether an agency action in adopting a rule in a proceeding subject to section 553 of this title is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the court shall consider whether there is substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis of the rule.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Citations:**

46 FR 62806 (December 29, 1981)

\_\_ FR \_\_\_\_ (2012)

1981 ACUS 7

### **Note:**

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