REPORT IN SUPPORT OF RECOMMENDATION 79-6

JUDICIAL REVIEW AND THE BUMPERS AMENDMENT*

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I. INTRODUCTION

It is reported that Congressional staff members handling S. 1477, the proposed Federal Courts Improvement Act, were "shocked"[1] when Senator Dale L. Bumpers of Arkansas recently succeeded in persuading the Senate to attach to the bill a far-reaching amendment to the Administrative Procedure Act (APA). The Bumpers Amendment would replace the first sentence of the scope-of-review section of the APA (5 U.S.C. Sec. 706) with the following language:

> 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 the agency action. There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown. *Provided, however,* That if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution or action for civil penalty shall have sustained the burden of proof normally applicable in such actions.[2]

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* This study, published in Current Issues and Regulatory Reform, Rosenberg, M.L. and McGovern, B.B., Federal Bar Assn., 1980, p. 264, builds upon a report prepared by this writer, in collaboration with David R. Woodward, for the use of the Administrative Law Section of the American Bar Association. That report, which analyzed the Bumpers Amendment in the form in which it was originally proposed, has been published as Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action,* 31 Ad. L. Rev. 329 (1979).

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1. Legal Times of Washington, September 10, 1979, at 1.

2. 125 Cong. Rec. S12145 (daily ed. Sept. 7, 1979). The last "or" in the proviso clause does not appear in the Congressional Record, due to a typographical error, but does appear in the version passed by the Senate.

The first sentence of the proposed statute duplicates the current opening sentence of Section 706, except that the third-to-last word has been changed from "an" to "the." One would assume that this change results from inadvertence, and nothing in the legislative history suggests otherwise.

The sudden prominence of the Bumpers Amendment has generated widespread speculation and apprehension about the manner in which it would transform administrative law if enacted. The purposes of this report are to offer hypotheses concerning the meaning of the Amendment, to evaluate the Amendment's impact on current scope-of-review principles, and to suggest some of the practical consequences that the Amendment seems likely to engender if it becomes law. The intellectual challenge associated with these tasks should be apparent: Senator Bumpers' proposal forces us to confront anew a number of fundamental administrative law issues that seemingly had been resolved long ago.

II. LEGISLATIVE HISTORY OF THE AMENDMENT TO DATE

The Bumpers Amendment was first introduced in 1975 as S. 2408.[3] In its original form it would have replaced the current first sentence of Section 706 with the following language:

> 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. There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is clearly and convincingly shown: *Provided, however,* that if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution or action for civil penalty shall have sustained the burden of proof normally applicable in such actions.

It will be noticed that S. 2408 differed from the Amendment approved by the Senate in two particulars. First, it would have inserted the words "de novo" into the present first sentence, so that courts would be instructed to "de novo decide all relevant questions of law." Second, it would have forbidden courts to uphold a rule or regulation unless its validity was "clearly and convincingly shown," in contrast to the present Amendment's requirement that the validity of the rule be "established by a preponderance of the evidence shown."

Senator Bumpers delivered a speech to the Senate supporting S. 2408[4] and also testified before the Senate Administrative Practice and Procedure

3. S. 2408, 94th Cong., 1st Sess. (1975).
4. 121 Cong. Rec. 29956 (1975).

Subcommittee on its behalf.[5] He introduced the same bill in 1977[6] and again in January 1979.[7] For purposes of analysis it is relevant to observe that the speeches he gave on these occasions were in essence slightly rewritten versions of a single address.

That was the totality of the legislative history of the Amendment until the proposed Federal Courts Improvement Act came before the Senate on September 7, 1979. Senator Bumpers offered his proposal, with the revisions mentioned above, as an unpublished amendment,[8] apparently having given his colleagues and the agencies no more than twenty-four hours' advance notice of his intention.[9] His remarks in support of the Amendment again incorporated substantial passages from his prior floor speeches. During the debate,[10] Senators Domenici, Morgan, Chiles, and Exon also spoke in favor of the bill, while Senators Kennedy, Ribicoff, Dole, Muskie, Culver, and Schmitt spoke against it. A motion to table the Amendment failed by a vote of 27 to 51,[11] whereupon the opponents of the Amendment acquiesced and allowed it to be approved by voice vote.[12]

III. DIFFICULTIES OF INTERPRETATION

It seems desirable to commence our analysis of the Bumpers Amendment by identifying precisely what changes in review standards the Senate intended to make. That task, however, is not an easy one. The text of the Amendment immediately raises questions such as these: What "presumption" does the bill purport to abolish? What kind of challenge to a regulation constitutes an attack on its "validity" within the meaning of the Amendment? What showing would satisfy the "preponderance of the evidence" standard the Amendment prescribes? The legislative history, if anything, aggravates the interpretive difficulties. Various statements made in support of the bill appear to reflect only a sketchy comprehension of the administrative law issues that normally arise during judicial review of agency action. Indeed, some of these remarks in the legislative history seem drastically at odds with the text of the statute itself. Such discrepancies, which might be expected in a long, technical piece of legislation, are rather disquieting when encountered in a bill that is only a paragraph long.

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5. *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary* 150 (1976). *See also* 122 Cong. Rec. 22012 (1976), where Senator Bumpers made a short speech about S. 2408 and introduced a statement by the Direct Selling Association supporting it.

6. S. 86, 95th Cong., 1st Sess., 123 Cong. Rec. S286 (daily ed. Jan. 10, 1977).

7. S. 111, 96th Cong., 1st Sess., 125 Cong. Rec. S411 (daily ed. Jan 23, 1979).

8. 125 Cong. Rec. S12145 (daily ed. Sept. 7, 1979).

9. *See id.* at S12155 (Sen. Muskie).

10. *Id.* at S12146-65.

11. *Id.* at S12166.

12. *Id.* at S12171.

A. Does the Amendment Deal Only With Questions of Law?

A close reading of the floor debates yields the surprising conclusion that most, if not all, of the proponents of the Bumpers Amendment interpreted the Amendment in a manner quite at variance with what the plain words of the statute appear to say. The text of the proposed statute seems to tell the courts that they should grant no deference to the agencies when reviewing a rule—"There shall be no presumption that any rule or regulation of any agency is valid . . . . " The proponents, however, seem to have believed that courts would abandon their existing deference on only one issue—whether the rule was consistent with the agency's statutory authority. Yet they never explained how the words of the Amendment would support that construction. It is almost as though the qualifying phrase "on questions of law" had been inserted into the bill in some fashion that rendered the phrase invisible to all but the bill's supporters.

Senator Bumpers, for example, told the Senate that under the bill "(c)ourts could still defer to administrative expertise, if there is such a thing, when deciding issues of fact . . . . As to questions of law, however, the supremacy of the courts would be restored."[13] He commented that "(o)nly if a court were persuaded by a preponderance of evidence that a given rule or regulation was within the power delegated by Congress, would the rule or regulation be upheld," and that regulation writers will be more cautious if they "know that they must assume the burden of proving that a regulation is within its scope of authority, that is, within the intent of Congress."[14] He also said that courts "may not presume anything under this amendment, or, so far as review of the law is concerned, they will not presume anything."[15]

Other proponents spoke of the bill in similarly limited terms. Senator Domenici understood the Amendment to mean that "when in litigation the agency would bear the burden of proving that its regulations are within the congressional mandate rather than the individual proving they are not."[16] He favored this approach because "it is the duty of the courts to decide whether or not the executive branch has exceeded the authority delegated by the legislative branch."[17] Senator Morgan repeatedly framed the issue as one of assigning the burden of proving whether the agency was acting within "its statutory competence" or "the statutory authorization" or "the mandate given by the people's representatives."[18] He asserted that under

13. *Id.* at S12146.
14. *Id.*
15. *Id.* at S12150.
16. *Id.*
17. *Id.*
18. *Id.* at S12153.

the Amendment "the courts would reclaim their responsibility under our system of Government—interpreting the law."[19] Senator Exon declared: "The Bumpers Amendment is simple. It takes away the now court-recognized principle that a Federal agency's interpretation of Federal law is presumed to be correct."[20]

To be sure, the gloss which floor remarks like those just quoted seem to place on the Amendment can be discerned only with liberal use of negative inferences. Moreover, these comments must be viewed in the context of an overall debate in which the proponents often referred to the Amendment in general terms, giving no indication as to whether or not the proposal dealt solely with questions of statutory authority. Further, the above-quoted remarks must be compared with a few instances in which proponents seem to have indicated that they expected the burden to shift on questions *other* than issues of statutory authority—such as when Senator Bumpers stated that the Amendment would cause the courts to look at "the record" more carefully.[21] Nevertheless, the many references to statutory authorization as the basic question that courts would examine with greater intensity under the Amendment are too striking to ignore. And if the Amendment moves forward in Congress, one may see even more explicit legislative history along these lines. Indeed, an assistant to Senator Bumpers recently confirmed in an interview with this writer that the Amendment is only intended to charge agencies with the burden of proving that their regulations are consistent with the statutes they purport to implement; it does not, she stated, alter existing law governing challenges to rules on factual, policy, or procedural grounds.[22]

The peculiar discrepancy between text and legislative debates is not a mystery to one who is familiar with the complete history of the Amendment. It will be recalled that the original version of the Amendment, S. 2408, would have revised the courts' mandate in Section 706 to "decide all relevant questions of law" by inserting the phrase "de novo" just before those words. Senator Bumpers' speeches leave no doubt that the "de novo" language was intended as the vehicle by which judicial deference on legal questions would be eliminated. Thus, as recently as last January, he explained that "the meaning of the phrase 'de novo' is plain and obvious. It means that the courts will decide issues of law anew, without deference to previous agency determinations."[23] But a funny thing happened between

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19. *Id.*

20. *Id.* at S12165.

21. *Id.* at S12154, S12165. *See also* Senator Domenici's curiously equivocal prescription: "Make it more difficult for (agencies) to be arbitrary or, put it the other way, they better be more careful in construing congressional intent . . . " *Id.* at S12151.

22. Telephone interview with Rebecca Newman of Senator Bumpers' staff, October 4, 1979.

23. 125 Cong. Rec. at S413.

January and September. Senator Bumpers apparently forgot why the words "de novo" had been placed in the bill. When he introduced the proposal as an amendment to S. 1477, he removed the "de novo" phrase—but solely, he explained, to remove any implication that the bill would require courts reviewing a rule to conduct evidentiary hearings of their own.[24] He thus continued to discuss the bill in terms of its special effects on review of questions of law, even though there was nothing left in the bill that would suggest such an interpretation to the average reader. The other Senators who spoke in favor of the bill apparently accepted Senator Bumpers' representations about its import without analyzing its language for themselves.

If and when the courts are asked to construe the Bumpers Amendment, they may decide that it cannot properly be confined to review of questions of law. With the deletion of the "de novo" clause, the only language on which such a distinction could readily be founded is gone. The ordinary meaning of the Amendment's words seems to require elimination of any presumption in favor of agencies when a rule is being challenged.

On the other hand, the courts may decide to give effect to the Senators' apparent purposes. Even though the "de novo" language is gone, the words of the Amendment can—with effort—be made to support such a narrow construction.[25] The argument would be that the terms "valid" and "validity" in the Amendment do not implicate all of the many grounds on which a rule may, under current standards, be upheld or struck down (*e.g.*, whether the agency used correct procedure, whether the rule rests on rational policy judgments and sufficient factual findings, whether the rule

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24. In a colloquy with Senator Kennedy, 125 Cong. Rec. at S12150, the sponsor explained his reasons for the deletion:

> The term "de novo" could mean that the appellate court would have to try the whole thing over again.
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> It is my thought that if the court needed additional evidence, it could remand the case to the agency or the administrative law judge, for the taking of additional testimony, if it were necessary, to reach a decision.
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> . . . (Under the amendment, courts) would be forced to look at the evidence and would be forced to look at the application of the law based on that evidence, but such actions would not constitute, literally, a trial de novo.

Another Colloquy *id.* at S12154, is to the same effect:

> Mr. CHILES. . . . My understanding is that the amendment as first proposed would have required a trial de novo or sort of a new trial to take place on these matters when they went to the Federal District Court.
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> Mr. BUMPERS. That is correct.
>
> Mr. CHILES. But that is not in there now. Is that correct?
>
> Mr. BUMPERS. The Senator is correct. De novo has been removed from the amendment.

25. The full import of the prior "de novo" clause cannot be duplicated by any construction of the Amendment in its current form, because the "de novo" review formerly proposed would not have been confined to "rules and regulations." How much difference this makes is considered in Part V.A.2. below.

departs unjustifiably from past agency precedents, etc.). Instead, the argument would run, an agency trying to establish that its regulation is "valid" would merely have to show that it is not inconsistent with the underlying statute.[26] Under this construction, since the "presumption of validity" would be rescinded, courts would appraise the rule without deferring to the agency's construction of the statute it administers—but judicial review practices would otherwise be completely untouched. For convenience, this construction will be denominated the "Statutory Validity Approach" in this report.[27] The approach may embody a decidedly unconventional application of the term "presumption of validity"[28]; yet one can easily contemplate that courts might construe the Bumpers Amendment this way, out of indulgence for the manifest intentions of its sponsors (especially since the interpretation is less far-reaching, and thus less potentially disruptive, than others).[29]

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26. An effort to implement the proponents' intent runs into conceptual difficulty when one notices that the phrases "questions of law" and "questions concerning the rule's consistency with the underlying statute" have somewhat different connotations. Some would define a "question of law" as any issue that a court has competence to decide in a review proceeding—for example, the issue of whether the factual premises of a rule are supported by substantial evidence. To make sense out of the legislative history, however, it is necessary to ascribe a narrower meaning to "question of law"—although, as will be seen, its borders are not easy to trace.

One particularly confusing point is whether a challenge to the substance of a rule on constitutional grounds would raise a "question of law." (With respect to procedural challenges, see note 85 *infra*.) Ordinary usage would call for an affirmative answer. However, there is technically no principle requiring deference to agencies on constitutional issues. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973). Thus, these issues are somewhat peripheral to the Senators' main concerns and will not be discussed further in this context.

27. If the Amendment is construed to affect only questions of a rule's consistency with the congressional will, it is admittedly hard to see how the agency can be expected to establish the "validity" of the rule by "a preponderance of the *evidence*," as the Amendment literally requires. Whether a statute precludes the adoption of a regulation is a matter on which "evidence" is rarely, if ever, material. Yet this inelegance would also exist under any other construction of the Amendment. There appears to be no escape from the conclusion that the "preponderance of the evidence" language is simply an awkward way of expressing the thought that the defender of the regulation bears the risk of nonpersuasion, but need not demonstrate the regulation's validity "clearly and convincingly," as the original version of the Bumpers Amendment would have required.

28. *See* note 91 *infra* and accompanying text.

29. When so disposed, the courts will make due allowance for the imprecision that often plagues Congressional draftsmanship. *See, e.g.*, Train v. Colorado PIRG, 426 U.S. 1, 9-10 (1976); Cass v. United States, 417 U.S. 72, 78-79, 83 (1974) (" 'In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process.' "); United States v. Bass, 404 U.S. 336, 344, (1971).

As the Supreme Court remarked in construing another clause of Section 706 in Universal Camera Corp. v. NLRB, 340 U.S. 474, 489-90 (1951):

> "(T)he fair interpretation of a statute is often 'the art of proliferating a purpose' . . . revealed more by the demonstrable forces that produced it than by its precise phrasing. . . . We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

However the above debate may be resolved, it seems clear that the Statutory Validity Approach constitutes the least common denominator of all possible constructions of the Bumpers Amendment. No matter how the Amendment is interpreted, agencies must expect to have to demonstrate to reviewing courts, without resort to deference doctrines, that the legal underpinnings of their rules are correct. This becomes especially clear if one pictures a case in which an interpretive rule is being reviewed. Under the APA, agencies do not have to issue an interpretive rule on the basis of evidence; nor do they have to follow any particular procedures in formulating the rule.[30] Unless the court proposes to evaluate the correctness of the rule—meaning the correctness of the interpretation it contains—it is hard to imagine any sense in which the rule could possibly be termed "valid" or "invalid". Since the Amendment, whatever else it may do, at least forbids courts to defer to agencies on questions of law, the merits of such a prohibition will be examined in some detail in Part IV.A. of this report.

B. How Closely Will Questions of Fact, Policy, and Procedure Be Reviewed?

Let it be assumed that the courts will not artifically define "validity" to refer only to legal questions, in the manner described above. How does the reviewing court apply the Amendment to a rule whose "validity" may depend on questions of law, fact, and policy?

There may be a number of possibilities, but it appears useful to consider two contrasting alternatives. One, which will here be called the "Simple Burden-Shift Approach," assumes that the basis standards of review in Section 706(2) of the APA are unaffected by the Amendment. In other words, the rule would still be upheld if, on the record considered as a whole, it is not arbitrary and capricious, not lacking in substantial evidentiary support, not infected by procedural irregularity, etc. The Amendment would merely assign to the agency the burden of proof with respect to these review standards, and remove any "presumption" in the agency's favor. The other alternative, which may be called the "Zero Deference Approach," would give the courts carte blanche to decide as an original matter all of the issues of "validity" that the regulation posed; that is, the court would supply its own answers to all of the questions the agency had resolved for itself earlier.

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30. They are merely directed to publish the rule in the Federal Register after issuing it, 5 U.S.C. Sec. 552(a) (1976), a requirement that could hardly generate many controversies over the "validity" of the rule. (Even this modest requirement is of doubtful force after Morton v. Ruiz, 415 U.S. 199 (1974). In that case the Court refused to treat a Bureau of Indian Affairs policy as equivalent to a legislative rule because the Bureau had not complied with the Federal Register publication requirement. Then the Court went on to consider the policy as though it were an interpretive rule. Although deeming the Bureau's statutory interpretation unpersuasive in any event, the Court curiously failed to suggest that the interpretation should be ignored or discounted because it had not been published.)

(This could also be called a "De Novo" approach, but that term is avoided here because of the ambiguities it has already generated).

Plausible arguments can be made on behalf of either construction. The Simple Burden-Shift Approach is supported by the fact that the Amendment does not expressly repeal or qualify Section 706(2), in which are found such familiar standards of review as "arbitrary and capricious," "abuse of discretion," and "substantial evidence." Indeed, Senator Bumpers explicitly acknowledged that the substantial evidence test would continue to govern judicial review of the facts underlying a regulation,[31] and that concession can be interpreted to confirm that the judicial deference inherent in Section 706(2) continues in full force. The Simple Burden-Shift Approach also squares with the proponents' repeated declarations that the Amendment would have its primary impact upon "questions of law." The courts' current deference to administrative expertise on "questions of law" is a matter of judicial self-restraint, not of any command in the existing APA; thus, one may conclude, the amendment is not designed to affect the types of deference that the APA *does* prescribe in Section 706(2).[32]

On the other hand, the Zero Deference Approach—under which the reviewing court would make a fresh reappraisal of all the legal, factual, and policy issues raised by the rule—represents another plausible reading of the statute. It apparently corresponds to the most natural reading of the Amendment's language: "There shall be no presumption that any rule or regulation of any agency is valid," and the rule cannot stand unless "(its) validity is established by a preponderance of the evidence shown." The suggestion that the validity of the regulations must be "shown" or "established" through "evidence" can be read to imply that courts are being instructed to draw their own conclusions from the administrative record, rather than being instructed to appraise the rationality of the agency's conclusions.[33] Legislative history also gives some support to the Zero Deference Approach. If, as will be suggested in Part IV.B.1. of this report, the Simple Burden-Shift Approach would have very little impact on judicial review, one may contend that the Zero Deference Approach more fully realizes the Senators' intention to accomplish a major broadening of judicial review

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31. 125 Cong. Rec. at S12146, S12150. Actually, the substantial evidence test does not apply to judicial review of most regulations. By and large, it is applicable in rulemaking situations only where a trial-type hearing is held; and after United States v. Florida E.C. Ry., 410 U.S. 224 (1973), few statutes can be construed as requiring such a hearing. The usual standard of review for facts underlying a rule is the "arbitrary and capricious" test. Ethyl Corp. v. EPA, 541 F. 2d 1, 37 n. 79 (D.C. Cir.), *cert denied,* 426 U.S. 941 (1976).

32. If one opts for the Simple Burden-Shift Approach, further interpretive difficulties arise. The concepts of presumption and burden of proof, which attain critical importance under this Approach, are also subject to varying interpretations. Exploration of these ambiguities will be deferred until Part IV.B.2 of this report.

33. The better view would seem to be that the word "evidence" should *not* be taken at face value, *see* note 27 *supra,* but one cannot assume that all courts will accept that view.

standards. Certainly the Senators who opposed the Amendment believed that it portended sweeping judicial second-guessing of agencies on technical and policy issues;[34] and, although their expressions of alarm carry only limited weight under customary principles of statutory construction,[35] the fact that the Amendment's proponents did not squarely deny this charge may appear significant. These factors might lead some courts to suppose that the Bumpers Amendment brings about a *pro tanto* repeal of Section 706(2) where rules and regulations are involved.[36]

There is still another possible approach to construction of the Amendment that deserves at least passing discussion. Although the proponents of the Amendment often stated that they were concerned solely with "questions of law," they at times appeared to take an unusually broad view of the kinds of issues comprehended by that phrase. For example, Senator Bumpers has repeatedly referred to *NLRB v. Hearst Publications, Inc.*[37] as an example of the type of judicial abdication of duty that he would like to curb.[38] Yet the very holding of *Hearst* was that the controversy at issue there—the status of newsboys as possible "employees" under the labor laws— was not a question of law interpretation, but was rather a question of law application, or what is sometimes called a mixed question of fact, law, and policy. Other cases cited with disapproval by Senator Bumpers also implicated issues that usually turn as much upon policy judgments relegated to an agency's sound discretion as upon techniques of statutory construction.[39] If the proponents' evident desire to eliminate all deference on "questions of law" is considered in conjunction with their broad-ranging conceptions of what a "question of law" is, one arrives at an exceedingly broad statute. In other words, if courts read the legislative debates to stand for the proposition that all "mixed" questions, such as the question in *Hearst,* are "questions of law" on which the judiciary should never

34. *See, e.g.,* 125 Cong. Rec. at S12149 (Sen. Kennedy), S12151 (Sen. Ribicoff), S12155 (Sen. Muskie).

35. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 639-40 (1967); United States v. Calamaro, 354 U.S. 351, 358 (1957).

36. A supporter of the Zero Deference interpretation would likely argue that the removal of the words "de novo" from the Amendment was merely intended to avoid forcing the courts to conduct their own evidentiary hearings on the validity of the rule. *See note 24 supra.* Instead, the argument would run, the Bumpers Amendment now directs courts to make a de novo appraisal of the rule on the basis of the existing administrative record.

37. 322 U.S. 111 (1944).

38. 125 Cong. Rec. at S412, S415, S12147. Actually, *Hearst* would not be governed by the Bumpers Amendment in any event, because it dealt with an adjudicative order rather than a rule or regulation. This fact need not alter the basic analysis, however, since the Court's reasoning would apparently have been unchanged if the NLRB had cast its decision in the form of a rule of general applicability.

39. *See, e.g.,* 125 Cong. Rec. at S12146-47, where Senator Bumpers criticized courts for their deference in two *rate-setting* cases: Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973), and Giles Lowery, Inc. v. Department of Agriculture, 565 F.2d 321 (5th Cir. 1977).

defer to administrators, we are indeed left with a statute that closely approaches what has here been called the Zero Deference Approach. Under such a statute, deference would apparently be accorded only to what may be called pure questions of fact—empirical perceptions that embody no element of legal judgment.[40]

As a variant of this last approach, one could hypothesize that the proponents intended only that *some* of the questions now viewed as "mixed" should be reclassified as "questions of law" and decided by the courts on a de novo basis. In other words, the Amendment may be seen as a response to the substantial body of case law in which "mixed" questions have been categorized as either "fact" or "law" issues and thereby assigned to agency or court for decision.[41]

If either of the constructions suggested in the preceding two paragraphs is adopted, the result will be a sort of hybrid combination of the Statutory Validity Approach and the Zero Deference Approach. Any given issue would be treated in accordance with one of these two approaches, the choice between them resting on whether the issue was preceived as "factual" or "legal" in nature. Since the Statutory Validity and Zero Deference Approaches will be analyzed in some detail below, separate discussion of these hybrid approaches seems unwarranted. One comment does seem important, however: In recent years the cases have virtually abandoned attempts to divide the universe of "mixed" questions into factual and legal components, presumably because they recognized the excessive rigidity and artificiality that such conclusional labels introduced. To reinstate the distinction now would breed no end of confusion and litigation as parties struggled with metaphysical arguments over which category applied to their particular questions.

In summary, if the courts construe the word "validity" in the Bumpers Amendment in such a manner as to implicate factual, policy, and procedural issues, they will have to reconcile the Amendment with the review standards of Section 706(2). Their resolution of the relationship between the two provisions may determine whether the Amendment turns out to be a fairly innocuous provision or a fundamental overthrow of the existing allocation of power between judicial and executive branches. As a first step toward clarifying the alternatives at stake, Parts IV.B.1. and IV.B.2. of this report will attempt to analyze the doctrinal implications of the Simple Burden-Shift and Zero Deference Approaches, respectively.

IV. WOULD THE AMENDMENT LEAD TO SOUNDER LEGAL RESULTS?

A. Questions of Law

We have seen that, under even its narrowest reading, the Bumpers Amendment would appear to require courts to give no weight to agency

40. *See generally* L. Jaffe, Judicial Control of Administrative Action 548-53 (1965).
41. *See generally* 4 K. Davis, Administrative Law Treatise, Ch. 30 (1958).

views when they decide whether a given regulation is consistent with the statute underlying it. Central to our inquiry, therefore, is the question of whether the elimination of this decisional factor would be desirable. The question may profitably be approached through an initial inquiry into the existing case law on the subject.[42]

1. The Courts' Present Practices

If the "presumption of validity" that is to be abolished by the Bumpers Amendment means the courts' practice of giving weight to agency constructions, the Amendment is aimed at a complex phenomenon on which there has been extensive judicial commentary. The primary justification for this approach is that agencies tend to be familiar with, and sophisticated about, statutes that they are charged with administering.[43] The expertise is assumed to result not only from the frequency of an agency's contacts with the statute, but also from its immersion in day-to-day administrative operations that reveal the practical consequences of one statutory interpretation as opposed to another. Hence the courts approach agency interpretations with a measure of respect that is distinct from, though not wholly divorced from, their assessment of the inherent persuasiveness of the agencies' arguments. Such deference to administrative constructions has been a feature of American law since its earliest days.[44]

Equally important, however, is the fact that the courts are quite willing to consider arguments that contradict the agency's viewpoint. In other words, the "presumption" of correctness is most definitely rebuttable. As stated in *Volkswagenwerk Aktiengesellschaft v. FMC*:[45]

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." NLRB v. Hearst Publications, 322 U.S. 111, 131; Unemployment Commission v. Aragon, 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the

42. Since a survey of these cases was presented in the author's prior study for the ABA Administrative Law Section, the following subsection of this report draws heavily from the corresponding discussion contained therein. *See* Woodward & Levin, *supra* note*, at 332-35.

43. *See* Wilderness Soc'y v. Morton, 479 F. 2d 842, 866 (D.C. Cir.) (en banc), *cert. denied,* 411 U.S. 197 (1973).

44. *See* Annot., 73 L. Ed. 322 (1928), which lists hundreds of federal and state court decisions recognizing the deference principle, dating back at least to United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1809) (Marshall, C.J.).

45. 390 U.S. 261 (1968).

congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . . " American Ship Building Co. v. NLRB, 380 U.S. 300, 318.[46]

More specifically, the courts have proceeded over the years to develop criteria indicating where deference to an agency's construction of its governing statute is desirable and where it is not. Indeed, the principle of deference is not so much a "presumption" as a collection of rules of statutory construction, any of which may be applicable depending upon the circumstances of the particular case. In this fashion, the case law has yielded a set of considerations designed to assure that no agency interpretation receives more deference than it deserves.[47]

In the first place, courts have concluded that not all agency interpretations stand on the same footing. Special weight is given to a construction which the agency has followed since its governing statute was adopted,[48] especially if the agency participated in the drafting of the legislation.[49] A long-standing or continuous construction receives much more deference than a recently adopted one,[50] especially if a newly announced construction contradicts the agency's earlier view.[51] And an administrative construction may be discounted if the agency espousing it is not the department charged with administering the statute in question,[52] or if two agencies are in disagreement about the proper interpretation.[53]

One especially important factor in the decision of how much deference to accord is the presence or absence of congressional activity with respect to the administrative construction. If it is shown that Congress has implicitly or explicitly endorsed the agency's construction—such as by refusing to amend the construction out of existence, or by reenacting the statute in a manner indicating legislative agreement with the agency—the courts will

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46. *Id.* at 272.

47. For an extensive collection of cases expounding these criteria, see Annot., 39 L. Ed. 2d 942 (1975).

48. *See, e.g.,* Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 152-54 (1960); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

49. *See, e.g.,* Miller v. Youakim, 440 U.S. 125, 144 (1979); Shapiro v. United States, 335 U.S. 1, 12 n. 13 (1948); United States v. American Trucking Ass'ns, 310 U.S. 534, 549 (1940).

50. *Compare, e.g.,* United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694, 719 (1975), *and* NLRB v. Boeing Co., 412 U.S. 67, 74-75 (1973), *with* Leary v. United States, 395 U.S. 6, 25-26 (1969), *and* Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934).

51. International Bhd. of Teamsters v. Daniel, 99 S. Ct. 790, 800-801 (1979); United Hous. Foundation, Inc. v. Forman, 421 U.S. 837, 858 n. 25 (1975); Morton v. Ruiz, 415 U.S. 199 (1974).

52. Alaska S.S. Co. v. United States, 290 U.S. 256, 261-64 (1933); *cf.* United States v. Florida E.C. Ry., 410 U.S. 224, 236 n. 6 (1973).

53. General Electric Co. v. Gilbert, 429 U.S. 125, 144-45 (1976).

recognize a heavy presumption in favor of the correctness of the administrative construction, because Congress's response is a strong indication that the agency's view is correct.[54] On the other hand, the "reenactment doctrine" is not applied in a mechanical fashion. If the court has reason to believe that Congress has reenacted a statute without paying attention to the agency's construction, or has not really focused on the issue, the presumption favoring the agency's view is weaker.[55]

The cases also demonstrate a concern with the comparative qualifications of court and agency in dealing with the subject at hand. In a very technical area, deference to agencies is most prominent.[56] On the other hand, courts are much less willing to defer to an agency interpretation when the meaning of the statute must be determined by reference to subjects in which courts have the greater degree of competence, such as when the statute must be construed by reference to the common law, the Constitution, or prior judicial precedents.[57] In this way the concept of agency expertise provides the basis for a pragmatic determination of which institution is more likely to be able to discern the correct result.

A somewhat different rationale for the court's approach was recently articulated by the Supreme Court in *International Brotherhood of Teamsters v. Daniel*:[58] "This deference is a product both of an awareness of the practical expertise which an agency normally develops, *and of a willingness to accord some measure of flexibility* to such an agency as it encounters new and unforeseen problems over time."[59] Here deference seems to derive not only from a perception of sophistication, but also from a commitment to comity, a conscious desire to achieve a practical accommodation between the judicial and executive branches of government by allowing the latter a measure of autonomy in administering its program. In this respect deference to administrative constructions may be analogized to the long-standing judicial policy of deferring to the legislature through a "presumption of constitutionality."[60] "A decent respect for a co-ordinate branch of government" is cited as the rationale of this latter form of deference.[61]

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54. United States v. Rutherford, 99 S. Ct. 2470, 2476 & n. 10 (1979); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969); United States v. Correll, 389 U.S. 299, 305-06 (1967); Power Reactor Devel. Co. v. International Union of Elec. Workers, 367 U.S. 396, 408-09 (1961).

55. SEC v. Sloan, 436 U.S. 103, 120-21 (1978); Zuber v. Allen, 396 U.S. 168, 192 (1969); United States v. Calamaro, 354 U.S. 351, 359 (1957).

56. E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 134 & n. 25 (1977).

57. Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 n. 27 (1977); Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 268-70 (1960); SEC v. Chenary Corp., 318 U.S. 80, 89 (1943).

58. 99 S. Ct. 790 (1979).

59. *Id.* at 800 n. 20 (emphasis added).

60. *E.g.*, Mathews v. De Castro, 429 U.S. 181, 185 (1976).

61. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1871).

This theme of comity would seem to be the best explanation for the doctrine[62] that courts should be especially deferential to administrative constructions enunciated while the agency members are implementing a new statute and trying to make it work for the first time. For although administrators may not have expertise when they confront a brand new regulatory statute, they do have a distinctive need for "breathing room" within which to address problems for which no one has definite answers—including judges.

Perhaps the most significant factor in the calculus, for present purposes, is this: The agency's chance of prevailing in court depends not only on factors relating to the nature of the administrative construction itself, but also on whether the other commonly used guides to statutory construction outweigh the agency's construction. If these other factors compel the conclusion that the agency is wrong, its interpretation will not be followed. Thus, an interpretation is rejected when it conflicts with the court's interpretation of the explicit language of the statute, with the legislative history, or with the manifest purposes underlying the statute.[63] The more clearly a statute's text, origins, or demonstrable purpose conflicts with an agency construction, the more likely the latter is to be overturned. Sometimes an agency construction is rejected largely because the court considers it to be inherently unreasonable and therefore unlikely to have been intended by the legislature.[64]

In summary, no matter how they may preface their opinions with praise for administrative wisdom, the courts in practice have carefully avoided treating administrative constructions of statutes as conclusive. The agency's views "are only one input in the interpretational equation,"[65] to be considered along with a number of other factors customarily used to determine Congress's intention. Since these other indices of statutory construction can rebut the "presumption", the deference principle is best seen as only the starting point of a court's analysis. Whether it will also be the ending point will depend on how much contrary evidence of legislative intent can be marshalled by the challenging party.

2. *Appraisal of the Deference Principle*

A preliminary question that must be addressed in evaluating the deference principle is whether deference to administrative constructions

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62. United States v. American Trucking Ass'ns, Inc. 310 U.S. 534 (1940); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

63. International Bhd. of Teamsters v. Daniel, 99 S. Ct. 790, 800 n. 20 (1979), Shea v. Vialpando, 416 U.S. 251, 262 n. 11 (1974); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973).

64. SEC v. Sloan, 436 U.S. 103, 121 (1978); United States v. Cartwright, 411 U.S. 546, 550 (1973).

65. Zuber v. Allen, 396 U.S. 168, 192 (1969).

More cynical observers have contended, however, that there is much less to the principle of deference than meets the eye.[66] Their critique—which extends to the entire range of scope-of-review doctrines, not merely those related to agency constructions of statutes—surely contains a measure of truth. A judge who is comfortable with an agency's results loses nothing by adding to his opinion the makeweight argument that he is obliged to give great weight to the agency's views; indeed, the argument gives him an effective means by which he can disclaim personal responsibility for the final result. Probably every judge exploits deference precepts from time to time in order to affirm a weakly supported ruling that he himself favors—just as every judge probably has occasions when he overrides those precepts in order to strike down a ruling that he finds objectionable. It has been recognized from the early days of the APA, and before, the flexible, creative implementation of scope-of-review principles should be expected (and, indeed, commended).[67] To the extent that the skeptical view of deference is an accurate description of reality, the Bumpers Amendment is obviously not necessary.

Yet this line of argument can only narrow—it cannot eliminate—the issue that Senator Bumpers has raised. The true extent of federal courts' deference to agencies is inevitably speculative.[68] No one can say with certainty that judges who profess deference to administrative officials do not

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66. *See, e.g.*, Gellhorn & Robinson, *Perspectives on Administrative Law,* 75 Colum. L. Rev. 771, 780-81 (1975) (suggesting that "the rules governing judicial review have no more substance at the core than a seedless grape"). Compare the remark by Irving R. Kaufman, Chief Judge of the Second Circuit, that "(d)espite our eminently proper obeisance to agency discretion, when we have sifted through all the usual techniques of judicial review and are still convinced that something is amiss, we do somehow find ways to balance agency discretion with some judicial valor." Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening,* 45 N.Y.U. L. Rev. 201, 209 (1970). In the same passage, however, Judge Kaufman does acknowledge his "reliance on . . . the expertise of the agency."

67. *See, e.g.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-89 (1951):

> A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata.

Accord, Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 90-91 (1944).

68. For a notable attempt to measure the degree of deference manifested in judicial opinions, see Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books,* 75 Colum. L. Rev. 800 (1975). Gardner found traces of deference in about half of the random sample of cases he studied. *Id.* at 821. Of course, he was in no position to determine whether judges really meant what they said in their opinions; and still less did his survey provide a basis for concluding that "too much" (or "too little") deference was being accorded.

sometimes mean exactly what they say.[69] Even if courts do at times ride roughshod over established deference guidelines, it does not follow that those guidelines have no impact in other cases, perhaps the majority of cases.[70] Furthermore, the skeptical view of deference leaves Senator Bumpers in an excellent position to argue, as he has, that his proposal would simply hasten the decline in deference that the skeptics have perceived.[71] In short, the challenged raised by Senator Bumpers can be decisively answered only if one assumes that deference rules do indeed influence results. The following discussion, therefore, takes the existence of deference for granted and appraises the justifications for the practice.[72]

The case law, as summarized in the preceding section of this report, itself contains the principal arguments on behalf of the review standards of the status quo. The rationales for deference expounded by the Supreme Court earlier this year in *Daniel*—the agency's "practical expertise" and its need for "flexibility"—simply cannot be dismissed as insubstantial. They should not be treated as conclusive, either, but, as we have seen, the courts do not do so. Instead, they have sought to develop criteria whereby the agency's interpretation will be accorded only as much weight as it deserves, and will be overridden when other tools of statutory construction demonstrate the error of the agency's position. To be sure, deference is sometimes carried to improper lengths; courts are as capable of reaching erroneous decisions in this realm as in any other. Nevertheless, the courts'

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69. *See, e.g.*, McGowan, *Reflections on Rulemaking Review,* 53 Tulane L. Rev. 681 (1979). Only the diehard cynic could doubt the sincerity of Judge McGowan's concern over the legitimate scope of appellate review of agency rules. *See also* Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976), where four other judges of the D.C. Circuit devoted more than a dozen pages to debating scope-of-review issues, an exercise that hardly bespeaks indifference to those issues.

70. One may readily grant that appellate judges sometimes invade the theoretical province of the jury as fact-finder in ordinary civil and criminal cases; but what litigant would not prefer to arrive in the appellate court with the jury's verdict on his side?

71. See 125 Cong. Rec. at S12146, S12147.

72. A related criticism of scope of review doctrines has been that the state of the law is so confused as to be meaningless; there are so many contradictory decisions in this field, it is asserted, that one can cite respectable authority on either side of any case. This criticism seems overstated. The legitimate disagreements that may arise over the proper weight to be given the administrative construction are not dissimilar to arguments over how much importance to attach to legislative history, or subsequent Congressional action, or adjacent provisions of the statute. It would not be sensible to abolish any of these common guides to statutory construction simply because there sometimes is uncertainty over how influential each should be. The appropriate deference to be given to the agency's position may depend on so many variables that it cannot be captured in a few phrases, but the range of ambiguity is by no means so wide as to lack all content. More to the point, it is not nearly so wide as to generate the same results as the Bumpers Amendment, under which there would *always* be a *complete* lack of deference to agency views.

"relatively finely tuned" method of analyzing whether deference is warranted in particular situations seems far more likely to place administrative interpretations in proper perspective than the across-the-board judgment embodied in the Bumpers Amendment—that deference is *never* warranted.[73]

Senator Bumpers argued to the Senate, however, that any such deference must be rejected on principle, because "when a court affirms the interpretation of a statute which it would not have adopted as an original matter, it abdicates one of its most important functions."[74] He asked:

> Finally, why do we have a judiciary? The judiciary says that even if this is wrong, we will not disturb that ruling because of the presumption of expertise of the regulation writers . . .
>
> . . . They do not say "If there is a simple error and we disagree with their conclusion, we are going to reverse it." They say it has to be unreasonable . . .
>
> Under this amendment, the judiciary will simply be required to carry out exactly what their duty is: that is, where they would have reached a different conclusion, it is their duty to reach a different conclusion.[75]

Senator Morgan, another proponent, similarly remarked that under the Amendment "the courts would reclaim their responsibility under our system of Government—interpreting the law."[76]

But the court's practice of accepting administrative interpretations that are "reasonable" (or, as sometimes stated, have a "rational basis in law") should not be misunderstood. Courts do not say that an agency which has misinterpreted the law must nevertheless be affirmed if its construction was "reasonable" in the sense of being arguable. Rather, the deference doctrine instructs courts to accept administrative interpretations that are

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73. *See* McGowan, *Congress, Court, and Control of Delegated Power,* 77 Colum. L. Rev. 1119, 1166 (1977).

74. 125 Cong. Rec. at S12147.

75. *Id.* at S12148. *See also id.* at S12146: "This amendment . . . would restore the courts to their normal law-interpreting and law-applying role in our system of government."

76. *Id.* at S12153. These assertions are reminiscent of Senator Bumpers' appeal, during his speeches on earlier versions of the Amendment, to Chief Justice Marshall's famous pronouncement in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), that "(i)t is emphatically the province and duty of the judicial department to declare what the law is." *See* 122 Cong. Rec. 22012 (1976). Of course, Marshall understood the difference between saying that courts have final responsibility to decide a question and saying that they should give no weight to the position of a coordinate branch of government on that question. *See* note 44 *supra.* In context, after all, Marshall was referring in *Marbury* to the principle that the courts, rather than Congress, must finally determine whether federal legislation is constitutional. One would assume that Senator Bumpers does not take Marshall's quotation as indicating that the presumption of constitutionality of statutes should be abandoned.

"reasonable" in the sense that *they may very well be right.* It is a means of assisting courts that, faced with *uncertainty,* find themselves obliged to "seiz(e) everything from which aid can be derived"[77] and thus use the agency's position as a guide to discovering what is most likely the correct result.[78] The agency's construction is allowed to tip the scales because of factors such as those which have been identified: expertise and comity.

Insofar as one discerns in the deference principle a judicial policy of comity toward the executive branch, one must come to terms with what is, perhaps, the most plausible argument for the Bumpers position. The argument would be that, however much a policy of allowing flexibility to agencies may have been desirable at one time, the public interest now requires its abandonment because in recent years the bureaucracy has, as a general rule, far overstepped legitimate bounds in its regulatory activities.[79] One rejoinder is this: whether one agrees or disagrees with the "overregulation" premise, the Bumpers Amendment is an excessive response, because it would apparently forbid not only deference stemming from comity, but also deference rooted firmly and rationally in other factors such as demonstrable agency expertise.[80]

In any event, relying on the courts to curb "overregulation" is a questionable strategy. When a court refuses to accept an agency's construction of a regulatory statute, the usual consequence is that the statute will be construed more narrowly than the agency had urged. But this is not invariably the case. There are also situations in which a court rejects an agency's decision that the governing statute imposes limitations on administrative power—so that, as a result of the court's decision, regulation becomes more extensive rather than less so. A famous example is provided by *Phillips Petroleum Co. v. Wisconsin.*[81] Until 1954, the Federal Power Commission

77. United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.).

78. This analysis helps one to understand the Supreme Court's frequently quoted remark that " '(t)o sustain the commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is a result we would have reached had the question arisen in the first instance in judicial proceedings.' " Udall v. Tallman, 380 U.S. 1, 16 (1965). At first glance this comment may seem to be a rather blatant invitation to judicial irresponsibility. On close examination, however, the remark states only what is self-evident: for if an administrative interpretation could be accepted only if it were the "only reasonable one," and only if it were the same conclusion that the court would have reached in any event, the deference doctrine would be completely meaningless.

79. *See* 125 Cong. Rec. at S12150-51 (Sen. Domenici).

80. The deference doctrine may rest in part upon policy factors that are rarely if ever mentioned in the case law. For example, one powerful pragmatic consideration supporting deference to IRS interpretive rules is that taxpayers often make important financial decisions in reliance on them. Who is to say that the considerable deference displayed toward IRS interpretations that "implement the congressional mandate in some reasonable manner," *see* United States v. Correll, 389 U.S. 299 (1967), does not derive in part from an awareness of this fact? *See* National Muffler Dealers Ass'n v. United States, 99 S. Ct. 1304, 1307, 1311 (1979) (dicta). And how could one justify a statute that absolutely forbids courts from taking account of it?

81. 347 U.S. 672 (1954).

held that it had no jurisdiction over natural gas producers. *Phillips* held that the Commission's statutory construction was mistaken: natural gas prices charged by producers were indeed subject to regulation under the Natural Gas Act. Thus the *Phillips* decision led to more, not less, regulation. And it is not difficult to find other cases in which agencies have been told that they have misconstrued a statute and must promulgate new and more far-reaching regulations.[82]

Today a mood in favor of "deregulation" is perceptible not only in the United States Senate but in a number of the agencies themselves. The FCC, for example, has proposed sweeping reductions in the obligations it now imposes on such diverse entities as independent common carriers, radio broadcasters, and cable television operators. Each of these proposals has met with resistance from certain entrenched interest groups—groups which can be expected to argue, if the proposed rules ever reach a reviewing court, that the Commission's new policies violate the Communications Act.[83] At the SEC, similarly, most of the Commission's major rulemaking ventures of late have been geared toward making regulation *less* extensive.[84] Parallel moves are occurring at other agencies. It would be ironic indeed if the courts were to stand in the way of this trend, using the Bumpers Amendment as an affirmation that they have far greater authority than administrators on statutory construction questions that may arise in this connection.

B. Questions of Fact and Policy

We have seen that the text of the Bumpers Amendment is not limited to questions of law, and may thus be construed as governing attacks upon the factual and policy underpinnings of a rule. We have also seen that these issues are currently subject to fairly restrained review under the "abuse of discretion" and "substantial evidence" tests of Section 706(2) of the APA. The Amendment may be construed either as perpetuating these tests (the "Simple Burden-Shift Approach") or overriding them (the "Zero Deference Approach"). In this section of the report we will consider, in separate discussions, whether the courts can be expected to produce sounder legal conclusions when reviewing rules under either of these two constructions.

Procedural challenges to a rulemaking proceeding would also fall within the domain of the Bumpers Amendment if the Statutory Validity Approach is not accepted. However, the APA already authorizes the courts

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82. *See, e.g.,* Office Employees Int'l Union Local 11 v. NLRB, 353 U.S. 313 (1957); Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663 (2d Cir. 1973); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971).

83. Telephone interview with Robert Bruce, General Counsel, Federal Communications Commission, October 17, 1979.

84. Interview with Benjamin M. Vandegrift, Attorney-Fellow, Office of the General Counsel, Securities and Exchange Commission, October 8, 1979.

to conduct plenary review of agencies' alleged violations of private parties' constitutional and statutory rights to fair procedures.[85] Consequently, many of the issues discussed in this section of the report have no relevance to procedural matters, and only sporadic references to those matters will be made.

1. The Simple Burden-Shift Approach

Under the Simple Burden-Shift Approach, we are dealing, by hypothesis, with a rule that will ultimately be set aside if it is arbitrary, capricious, an abuse of discretion, or (in formal rulemaking) unsupported by substantial evidence, but that will be sustained if it passes these tests. The Amendment makes a difference only in that it removes the "presumption of validity" concerning the rule and prevents the rule, when challenged, from being upheld under these tests unless its "validity is established by a preponderance of evidence shown." Analysis of this construction points toward the conclusion that such a revision of existing practice would have so little impact as to be virtually meaningless.

At the outset it is important to get a sense of the manner in which Senator Bumpers expects his proposal to operate. His fullest explanation appeared in his remarks in January:

> To correct this trend of power (accumulating in the bureaucracy), even to slow it, will be the work of not a few years. But a start can be made, and *the so-called presumption of regularity, by which the citizen challenging his Government must always play with a deck legally stacked against him,* is a good place to begin . . .
>
> . . . *The proposition that the Government is presumed correct, that a tie, so to speak, alway goes against the individual, is an alien tenet* deserving of a quick death. Let the Government, with its vast resources and superior knowledge, bear the burden of proof. *To be sure, the citizen should still have the burden of raising the issue of a regulation's validity,* by pleading or in some less formal way. *He can still be given the burden of going forward with the evidence.* But on the ultimate issue of whether an agency is lawfully within power delegated by Congress—itself only a creature of the people's Constitution, *it is wrong to give the servant an automatic edge in the guise of a "presumption."*[86]

There are several points to notice here. First, Senator Bumpers does not propose to shift the "burden of going forward with evidence" to the

85. 5 U.S.C. Sec. 706(2)(B) (1976) (constitutional rights); *id.* Sec. 706(2)(D) (other procedural rights); *see* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir 1979) (intensive review of compliance with procedural norms).

86. 125 Cong. Rec. at S414-15 (emphasis added).

government during judicial review of rules. This statement is compatible with the language of the Amendment itself, which takes effect only "whenever the validity of any . . . rule or regulation is drawn in question . . . " Senator Bumpers' staff has confirmed[87] that, in its current form, the bill is not intended to affect the burden of going forward (or burden of production, as it is sometimes called). These disclaimers are important because the cases do sometimes characterize a challenger's burden of going forward in terms of a so-called "presumption of validity" attaching to the agency's action. The operation of this presumption is simple: when the record contains no evidence, or too little evidence, with which a court can decide whether the agency abused its discretion, infringed procedural rights, acted without sufficient knowledge, or whatever, the court will normally resolve its uncertainty in the government's favor.[88] But this type of "presumption of validity" could be eliminated only if Senator Bumpers were proposing to place the burden of going forward on the government. As just observed, that is not his intention. Indeed, it would be most difficult to justify a system in which the government was obliged to offer a refutation of every possible challenge to a regulation without the opponents' having first articulated and in some way substantiated their grievances.[89]

Second, the Senator is propounding two distinct conceptions of the "presumption" he does hope to eliminate. One is the fact that "a tie . . .always goes against the individual," or, in technical terms, that the challenger of the rule has the burden of persuasion. The other is that the agency has an "automatic edge," so that the "deck (is) legally stacked against" the challenger. This concept of the presumption implies something rather different: that the courts, out of respect for agencies' real or assumed expertise, or for some other reason, are reluctant to hold that the challenger's burden of persuasion has been met.[90] In this second sense, the presumption is analogous

87. Newman interview, *supra* note 22.

88. This is the correct interpretation of several cases cited by Senator Bumpers in his speech, 125 Cong. Rec. at S12146-47, including Central Arkansas Auction Sale, Inc. v. Bergland, 570 F. 2d 724 (8th Cir. 1978); Mazalewski v. Truesdell, 562 F. 2d 701 (D.C. Cir. 1977); Maryland-National Capital Park & Planning Comm'n v. Lynn, 514 F.2d 829 (D.C. Cir. 1975); United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D.W. Va. 1975).

89. One can perhaps conceive of a system in which the challenger was merely expected to *identify* the issues he wanted to raise, whereupon the government would have to assume the initial burden of demonstrating that the rule was "valid" in that respect. But this system would simply breed opening briefs composed of sheer boilerplate and would thus be tantamount to placing the entire burden of production on the government. Perhaps this perception accounts for Senator Bumpers' apparent distinction, in the above quotation, between "the burden of raising the issue . . . by pleading" and "the burden of going forward with the evidence"—although one must question whether it is really "evidence" that the party with the burden of production would usually be advancing in this context.

90. Senator Bumpers' recent remarks during the debate on S.1477 re-echoed his view that the Amendment would remove an artificial advantage now enjoyed by the bureaucracy: "Why should not the American citizen, the person who is regulated at least be on an equal footing with the agency? The cards have been hopelessly stacked against the regulated people in this country." 125 Cong. Rec. at S12148.

to the deference doctrine that has been discussed above in connection with questions of law.

Strictly speaking, neither of these two challenged features of judicial review is a "presumption" as federal law now defines that term. Since 1975 the role of presumptions has been governed by Rule 301 of the Federal Rules of Evidence, which provides that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion . . . "[91] However, it is not unlikely that courts would overlook this semantic difficulty if they became convinced that either of these two "presumptions" was what the Amendment was really meant to abolish.[92] Accordingly, they will be evaluated on their merits.

It is hard to see how a mere shift in the ultimate burden of persuasion could change many outcomes. It could make a difference only in the occasional case where the court found that the arguments indicating that the rule *was* an abuse of discretion (for example) stood in exact equipoise with arguments indicating that it was *not* an abuse of discretion. In a few instances this may be the court's view; but, as a matter of common sense, one would suppose that in the usual situation the court, after hearing the parties' arguments, can readily decide that it either is or is not convinced that the appropriate review standards have been satisfied.

The essential weakness in the idea that a shift in the burden of persuasion could be significant is that terminology drawn from the law of evidence is not well suited for use in this context. When a judge is deciding whether a regulation violates a statutory mandate, or embodies unacceptable public policy, or is tainted with procedural irregularity, he will perhaps consult logic, experience, tradition, precedent, or his conscience[93]; these decisional tools can hardly be equated with the intellectual processes by which an evidentary dispute is resolved. Even insofar as the rule depends on the existence of certain facts for its validity, emphasis on allocation of the burden of proof is not very helpful. The party to whom it is allocated does *not* have the responsibility (or even the right) of tendering evidence to the court for its examination. There is no indication that the Bumpers Amendment repudiates the established administrative law principle[94] that a rule must stand or fall on the record that was before the agency when it made its decision. Indeed, Senator Bumpers expressly disclaimed an intention to change this principle.[95] Thus,

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93. *See* B. Cardozo, The Nature of the Judicial Process (1921).

94. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978); Camp v. Pitts, 411 U.S. 138, 143 (1973); Home Box Office, Inc., v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977); DeLong, *Informal Rulemaking and the Integration of Law and Policy,* 65 Va. L. Rev. 257, 267 (1979).

95. *See* note 24 *supra. See also* 125 Cong. Rec. at S12171, where Senator Bumpers agreed with Senator Kennedy's assumption that "you do not intend to affect decisions as to what sort of rulemaking is required and what type of record is necessary."

the success or failure of the challenger's efforts depends exclusively on his persuading the court that the rule is defective when viewed in light of that existing record and pertinent law. It is doubtful that his chances would be very different if the risk of non-persuasion on this issue lies with the government.

More plausible, at least superficially, is the assertion that an agency should not be allowed to rely on a "presumption of validity" as a factor entitled to substantial weight in the decision as to whether the pertinent standards of review have been met. If this is the target of Senator Bumpers' challenge, however, he is attacking a phenomenon that does not exist. Administrative law does not recognize a doctrine of deference over and above the review standards of Section 706(2)—standards which, if the Simple Burden-Shift Approach is followed, would continue to apply to rulemaking review even if the Amendment is enacted. Certainly the courts are deferential when they deal with agencies' factual determinations and discretionary choices, but the deference is based on statutory criteria like the "arbitrary and capricious" test or the "substantial evidence" test. It does not imply that a "presumption of validity" is being weighed in the scales, to the detriment of the party challenging the rule.[96]

In these respects the deference principle in the realms of fact and policy occupies a doctrinal posture that is slightly different from the corresponding principle for questions of law. For legal questions, the APA does not expressly impose any restrictions on the scope of judicial review. Its silence in that respect conforms to the generally accepted position that "courts are the final authorities on issues of statutory construction."[97] Thus, as we have seen in Part IV.A. above, judicial deference to administrative interpretations of a statute is essentially self-imposed. With respect to factual and policy matters supporting a rule, however, the courts are not seen as primary decisionmakers. Their function is to *review* these underpinnings of the rule, and the APA allows them to set the rule aside only if the agency's determinations are "arbitrary and capricious."

Assuming then, that the *standards* of review in factual and policy areas remain unchanged, there is no particular reason to expect that abolition of the "presumption of validity" in those areas will make a meaningful contribution towards the curtailment of "overregulation."

2. *The Zero Deference Approach*

If, on the other hand, the Bumpers Amendment is construed to rescind deference to agencies on all legal, factual, and policy questions touching on

96. Several of the cases cited by Senator Bumpers in his speech, although making passing references to a "presumption of validity," appear to have used that phrase only by way of loosely characterizing the review standards of Section 706(2). *E.g.*, Giles Lowery, Inc. v. Department of Agriculture, 565 F. 2d 321 (5th Cir. 1977) (describing substantial evidence review of agency rate-setting); Certified Color Mfrs. Ass'n v. Mathews, 543 F.2d 284, 293 (D.C. Cir. 1976) (describing abuse of discretion test).

97. Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968).

the validity of a rule, one can hardly quarrel with the appraisal of Senator Culver, who cautioned that the Amendment "would do nothing less than repeal more than 30 years of experience in the area of administrative law and nearly 200 years of common law practice."[98] Indeed, the Amendment would accomplish so complete a departure from prevailing separation-of-powers principles that the student of administrative law would virtually be left without any point of reference from which to critique it. It would be as though an evidence scholar were asked to comment on the desirability of doing away with trials.

One can say, however, that the Zero Deference approach to the Amendment would be a fundamental break with the intentions that have prompted earlier Congresses to authorize agency policy-making in the first place. The rules that raise this question are so-called "legislative" rules—rules that are "not merely interpretative (but) designedly creative in a substantive sense."[99] In this situation, Congress has literally delegated a portion of its standard-setting power, and through that delegation "Congress entrusts to the (agency), rather than to the courts, the primary responsibility for interpreting the statutory term."[100] Such a situation exists when, for example, an administrative agency implements a statute by issuing rules that it believes will serve "the public convenience, interest or necessity,"[101] or by setting rates that it deems "just and reasonable,"[102] or by promulgating regulations "to carry out the purposes of this statute."[103] In any of these situations, the purposes of the underlying legislation would be undermined in a quite fundamental way if the regulations could be upheld only where the

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98. 125 Cong. Rec. at S12156.

99. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 37 n. 40 (1976).

100. Batterton v. Francis, 432 U.S. 416, 425 (1977); *see* 2 K. Davis, *Administrative Law Treatise* Sec. 7:8 (2d ed. 1979): Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,* 58 Harv. L. Rev. 70, 106-07 (1944).

It has been argued that a scope-of-review statute like Section 706 ought to spell out the analytical steps that courts should use in reviewing the permissibility of policy choices that an agency makes when exercising delegated power. Such a statute presupposes that the first step in judicial review should be to identify precisely which issues are governed by this series of inquiries, and which are governed by other tests. *See* Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review,* 1977 Ariz. St. L.J. 537, 553-55, 558-60. The question whether a structured scope-of-review statute of this kind would improve the comprehensibility and consistency of judicial review practices, as its proponents believe, may well deserve serious study. But such a *clarification* of prevailing standards of review is quite different from an attempt to make radical *alterations* in those standards, as the Bumpers Amendment contemplates.

101. *E.g.,* Federal Communications Act Sec. 309, 47 U.S.C. Sec. 309 (1976); *see* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 814 (1978) (upholding FCC cross-ownership regulations as reflecting "a rational legislative-type judgment").

102. *E.g.,* Interstate Commerce Act Sec. 15(1), 49 U.S.C. Sec. 15(1) (1976).

103. *E.g.,* Truth in Lending Act Sec. 105, 15 U.S.C. Sec. 1604 (1976), *discussed in* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369-72 (1973).

agency persuaded a reviewing court "by a preponderance of the evidence" that the regulation was "right."[104]

The legal results of this approach can also be appraised in more pragmatic terms. Plenary judicial review of all regulations would clearly impair the effectiveness of the many substantive statutes that become the subjects of administrative rulemaking. It would lead to inferior regulation because courts simply do not have agencies' constant involvement with administration of the various programs, let alone agencies' technical sophistication. The APA standards of review aim at a balanced scheme whereby the detached perspective of judicial generalists complements the experience and knowledge of agency specialists.[105] A system of review that vests judges with primary responsibility for both functions cannot be as successful. Whether or not Congress could effectively forbid court to rely on agency expertise in factual and policy areas,[106] an effort to do so would be quite ill advised.

V. Practical Consequences of the Amendment

Up to this point, our analysis has focused upon the quality of the "outputs" of the Bumpers Amendment—the legal results that can be anticipated under various constructions of the Senate's proposal. Yet the Amendment must also be judged by its likely effects upon the *process* by which rules are drafted, issued, and ultimately reviewed. The task of making that assessment is complicated by the impossibility of knowing what construction the courts will eventually place upon the Amendment. Nevertheless, the effort must be made.

A. The Decline of Rulemaking

If the Bumpers Amendment is enacted, the first and most obvious consequence that can be predicted is a decline in the role of administrative rulemaking at the federal agencies. In a sense, of course, this is precisely what

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104. Although agencies' reservoir of experience and sophistication in their respective fields gives weight to these observations, the point being made in this paragraph is not logically dependent upon the existence of expertise (whether real or "presumed") at all. Free substitution of judicial for administrative judgment in these realms would offend the statutory scheme in and of itself. *See* McPherson v. Employment Div., 285 Ore. 541,591 P. 2d 1381, 1386 (1979) (Linde, J.) An analogy may be drawn to a finding of negligence by an ordinary civil jury. Except in extreme cases, the appellate court is expected to defer to that finding—not because the jury's opinion about how a reasonable person would act reflects "expertise" (in any but a fictional sense), but because the system designates the jury as primary decisionmaker.

105. For a carefully articulated statement of the manner in which a reviewing court can, under current law, exercise a high degree of supervision over rulemaking activities without attempting to match the administrators' competence in highly technical areas, see Ethyl Corp. v. EPA, 541 F. 2d #1, 135-37 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976).

106. *Cf.* Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 91 (1944): "The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away."

the Senate proponents of the Amendment favor, and what they believe their constituents desire. On closer examination, however, the consequences of such a trend are likely to appear much less attractive. Broadly speaking, two types of undesirable results can be predicted: a loss of guidance to the public if fewer regulations (or less authoritative regulations) are issued; and a loss of regulatory efficiency and fairness if agencies turn from rulemaking to alternative types of governance.

1. Uncertainty

Regulations serve as a guide to those who are seeking to comply with the law. The principles which determine how a regulation will fare in court cannot help but determine, also, the confidence that citizens will be inclined to place in such regulations when they plan their own course of action. Millions of businesses, associations, state and local government units, and individuals depend on agency-published rules for guidance as they carry on their manifold contacts with the federal government. To declare that federal regulations should have no weight is tantamount to saying that people should decide how to comply with federal law by consulting only the language of statutes themselves. It is not at all clear that the Senators who voted for the Bumpers Amendment would have desired, if they had thought about it, to promote such uncertainty concerning the law.

The case of tax regulations brings out the problems in sharp terms. The contemporary complaint about "overregulation" is seldom if ever voiced with regard to the Internal Revenue Service and the Department of the Treasury. On the contrary, taxpayers depend heavily on tax regulations in their planning. Companies entering into a business transaction generally expect that tax consequences will be involved and urgently need to know, with adequate certainty, what those consequences will be. In fact, the demand for tax regulations outruns the supply.[107] Often, pressure on the Treasury Department to publish such rules can be attributed to a conscious decision by the relevant committees of Congress to leave an ambiguity in the Code, so that the Department can work out a solution by regulation.

The need for rulemaking is so manifest in this context that one could reasonably expect the Service to promulgate some rules, as a public service, even if the Bumpers Amendment is enacted. The problem, however, would be that the regulation's lack of authoritative force might frequently render it useless from the taxpayer's standpoint. Inability to secure sufficiently reliable advice from the Service might well lead many trade associations—and individual firms, if powerful enough—to the one place where a definitive decision could be obtained: the tax-writing committees of Congress. Such heightened flow of pleas for legislative relief would be an ironic

107. Telephone interview with David Brennan, Deputy General Counsel, Department of the Treasury, October 17, 1979.

consequence of the Bumpers Amendment, which passed the Senate after its sponsor argued that the courts must assume the responsibility for combatting overregulation because Congress is too busy to handle the job.[108]

The burdens of heightened uncertainty would not be confined to the field of taxation. Naturally, in other areas one could expect to see agencies deciding that they simply will not promulgate regulations that might (depending on how the Bumpers Amendment is ultimately construed) be given no weight in the event of a court challenge. Even where rules were issued, profound uncertainty would of necessity prevail while court review proceedings ran their course. The problem here would arise both because more intensive judicial review would take longer to perform, and because the broadened scope of review would augment the chance of reversal. Again, such reversals are precisely what Senator Bumpers is seeking; but one cannot help wondering whether the diminution in the total quantum of "regulation" is worth the costs of uncertainty.

Not least among those who would bear the costs of uncertainty are the agencies themselves. The Bumpers Amendment poses a substantial obstacle to any agency's ability to plan a coherent regulatory program. This is a further irony of the bill, for several other "regulatory reform" proposals pending in Congress seek to *encourage* more careful planning by agencies (through such devices as regulatory analyses, agenda, deadlines, and planning offices).[109] Interference with agency planning must be counted as an important disadvantage of the Amendment. It is true that a number of agencies are unpopular on Capital Hill today; but at any given time, confusion about the scope of their programs is in the interest of no one.

2. *Alternatives to Rulemaking*

The Bumpers Amendment can also be expected to have a negative impact on rulemaking in the sense that agencies will have an incentive to implement their policies through devices other than a "rule or regulation." Assuming that the Bumpers Amendment is addressed to the same types of agency action that are commonly referred to as "rules",[110] the potential for

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108. *See* 125 Cong. Rec. at S12148 (Sen. Bumpers) (correction of the problems by legislative veto is impractical because "everyone of us is working 15 and 16 hours a day to keep up with what is going on in committee and on the floor (so that) we cannot exercise even 10 percent of our oversight responsibilities now").

109. These include the Ribicoff bill, S. 262, 125 Cong. Rec. S858 (daily ed. Jan. 21, 1979), and the Administration bill, S. 755, 125 Cong. Rec. S3338 (daily ed. March 26, 1979). The Administration bill has also been introduced in the House as H.R. 3263.

110. That assumption is actually rather questionable. The APA does not define the word "regulation". It does define "rule" in 5 U.S.C. Sec. 551(4) as follows:

> The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includ(ing) the

such evasion is broad. Where only a construction of regulatory statute is involved, officials would presumably have a number of alternative media by which they can commit their policies to paper, such as administrative manuals, no-action letters, press releases, and private letter rulings. Where the agency proposes to exercise delegated power, on the other hand, the obvious alternative to a rulemaking proceeding is adjudication.

The choice between rulemaking and adjudication calls for special comment. The Bumpers Amendment does not appear to alter agencies' broad discretion under existing law[111] to develop their programs through case-by-case adjudication rather than rulemaking. One must anticipate, therefore, that the Amendment would prompt many agencies to forsake rulemaking for an alternative approach for which the standard of review would remain untouched. Yet such a development would be most unfortunate. Courts and commentators have long called attention to the benefits of rulemaking, as opposed to case-by-case adjudication. By developing policies through the formulation of regulations having general applicability, an agency can, among other things, (1) investigate conditions in an industry as a whole rather than confining its inquiry to the situation of the individual respondent; (2) allow all interested persons to participate on an equal basis; (3) escape the delay and expense of bringing multiple proceedings against various affected parties; and (4) avoid prejudicing the person who is the first to be subjected to a new prohibition that has not yet been directed at his competitors.[112] Anomalously then, the Bumpers Amendment exerts indirect pressure on the agencies to move in a direction diametrically opposed

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approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accountings, or practices bearing on any of the foregoing.

Unfortunately, the case law construing this definition is in considerable disarray. *See* 2 K. Davis, Administrative Law Treatise Secs. 7:1 to 7:4 (ed ed. 1979). The reason is simple: no operative section of the APA requires a definition. The section that comes closest is the "rulemaking" provision, 5 U.S.C. Sec. 553, but that provision exempts "interpretative rules" and "general statements of policy," and most of the cases concern themselves with the scope of that exemption. *See generally* Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements,* 75 Mich. L. Rev. 520 (1977). When courts are confronted with the Bumpers Amendment, they will be entering almost unexplored territory. They may read Section 551(4) literally, covering any "agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy," in which case the reach of the Bumpers Amendment will be virtually infinite. Or the courts may define "rule or regulation" in accordance with ordinary usage (as Senator Bumpers appears to have done). Or they may do something else. Thus the extent to which agencies will ultimately be able to avoid the Amendment by using something other than a "rule or regulation" is unknowable at this juncture.

111. NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974); Chisholm v. FCC, 538 F. 2d 349, 364-65 (D.C. Cir.), *cert. denied,* 429 U.S. 890 (1976).

112. *See, e.g.,* National Petroleum Refiners Ass'n v. FTC, 482 F. 2d 672, 681-84 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974); K. Davis, Administrative Law Treatise, Sec. 6.15 (Supp. 1970).

to the one that prominent administrative law authorities have for years been urging agencies to pursue.

A separate question is whether a trend away from rulemaking would serve the purposes of the Amendment itself—namely, reduction of deference to agencies in judicial proceedings, and ultimately reduction of agencies' intrusion into citizens' lives. Some agencies will probably be able to accomplish about as much with other devices as with rules; other agencies will find that their freedom has genuinely been constrained, in that rulemaking, which they would otherwise regard as the optimal regulatory device, will be subject to the Amendment. But in either situation, there seems to be no logical basis for the Amendment's distinction between "rules and regulations" and other devices.

B. Impact on the Agency Rulemaking Process

Even though the Bumpers Amendment appears to create strong incentives for agencies to use regulatory devices other than rules, one can hardly expect them to abandon rulemaking entirely. Accordingly, it is relevant to inquire whether the Amendment would lead agencies to alter their methods of formulating rules, and, if so, whether the change would be beneficial or otherwise. The importance of this inquiry becomes apparent when one recognizes that insofar as the mechanics of the process are transformed at all, the alteration will probably be greatest at the agency level rather than at a subsequent (i.e., judicial) level.[113]

It is reasonable to expect that officials will be more concerned about the prospects of judicial reversal and will react in some way to this threat. The question is whether their response will be a constructive one.

Proponents of the Amendment argue that rigorous judicial review will have the salutary effect of inducing bureaucrats to prepare regulations more carefully and conservatively.[114] The argument is not completely without force, but it greatly exaggerates the extent to which one can reasonably rely on judicial review as a tool for inducing any particular kind of change at the

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113. This is a point that seems to have been overlooked by some opponents of the Amendment, who apparently anticipate that courts will be forced to conduct full evidentiary hearings concerning the validity of rules, duplicating the steps taken by the agency. *See, e.g.*, 125 Cong. Rec. at S12152 (Sen. Dole), S12156 (Sen. Muskie). That concern appears to be unfounded, for, as previously discussed, the Amendment apparently preserves the principle that a rule, if it requires a factual foundation to be sustained, must be judged on the basis of the record that was before the agency. *See* notes 94-95 *supra* and accompanying text. Thus, although courts may find themselves taking a closer look at the record—particularly if the Zero Deference Approach or a variant of it is adopted—the contents of the record will be affected only if participants in the rulemaking process act differently while the rule is pending before the agency.

114. *E.g., id.*, at S12146 (Sen. Bumpers), S12151 (Sen. Domenici), S12153 (Sen. Morgan).

agency level. Although the threat of judicial reversal is not insignificant in agencies' eyes, the likelihood that it will occur in the case of any given regulation is often wildly unpredictable, and so are the grounds on which the courts may predicate such a reversal. For this reason, even though the Amendment may heighten the *in terrorem* threat inherent in the prospect of judicial intervention, it does not provide agencies with clear directions on how to avoid that outcome. At the same time, the factors which now lead agencies to promulgate rules will not disappear simply because the Bumpers Amendment has been enacted. Regulations are normally issued because the agencies perceive a Congressional mandate to issue them; or because agency members feel a conscientious commitment to act as they do; or because of the demands of some outside group that expects to benefit from the new rules. These latter considerations ordinarily impinge on agencies as forcibly, or more forcibly, than any calculus about the chances of prevailing in the courts.[115]

In this environment of conflicting pressures, the agencies may respond to the Amendment not so much by promulgating narrower regulations as by conducting more complex rulemaking proceedings, holding more oral hearings, and generating lengthier records, in order to assure that the rule's "validity (can be) established by a preponderance of the evidence shown."[116] These defensive measures can be expected to entail a good deal of overkill, for an agency's assessment of the danger of reversal is always speculative, and the agency has a strong temptation to engage in what would, in retrospect, be seen as excessive precautions. Such an increase in the complexity of rulemaking activities would appear to be sharply contrary to the underlying purposes of the Amendment. If the proceeding becomes more cumbersome, it is likely to be less accessible, in practical effect, to the small businessmen and individual citizens whom Senator Bumpers desires to assist. On the other hand, the relatively strong and well-financed interest groups, which already manage to present their case effectively to the agencies and the courts when necessary, will be able to exploit their existing advantages more effectively if the Amendment is added to their arsenal. Thus, although proponents of the Amendment contend that the burden of proof should rest with the government rather than with relatively powerless groups that lack access to the "resources" enjoyed by federal agencies,[117] the Amendment may actually aggravate whatever inequities are now attributable to disparities in the firepower of the various contending parties.

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115. Nor does the Amendment change the fact that, at least in the larger agencies, the personnel who draft regulations scarcely have to worry about whether courts will uphold them, since any litigation will be handled by the general counsel's office.

116. This response can be foreseen even if the Amendment is construed to affect primarily the courts' review of "legal" issues. It takes no great sophistication about the judicial process to recognize that the facts of a case often have a profound effect on the resolution of controversies that, analytically, involve "questions of law" in the purest sense.

117. *See, e.g.*, 125 Cong. Rec. at S12146 (Sen. Bumpers), S12153 (Sen. Morgan).

The foregoing analysis can be restated in a manner that suggests some broader conclusions about the wisdom of the Bumpers Amendment in comparison with other current reform proposals. Senator Bumpers has a point when he argues that significant segments of our society feel powerless and unable to make a meaningful contribution to the ever-evolving regulatory scene. He is also correct in suggesting that the quality of agency rules often suffers from a lack of insight into the needs and desires of the persons being regulated. But, as we have seen, revision of the scope of judicial review is a markedly inefficient response to these deficiencies. Less ambitious regulation is one possible reaction, but more complicated proceedings are just as likely.

A more fruitful response to these deficiencies would seem to be improvement of the excluded groups' ability to participate at the agency level, before the primary decisionmakers have made up their minds. This, in fact, is the strategy embodied in some of the other "regulatory reform" bills pending in Congress.[118] The precise mechanisms proposed in these bills can be criticized on various grounds, but the underlying approach seems much more sound than the Bumpers approach. Courts are not well equipped to lead a regulatory reform movement. Judicial review works best when it is invoked to curb departures from the body of procedures that the legislature has ordained; the role of the Congress should be to institute whatever changes are needed in the APA rulemaking procedures themselves. Rationalization of the rulemaking process at its roots may be a step towards the ideal of making that process more affordable and more fully available for all. Indeed, if that goal is advanced, regulated persons will be better positioned to resort to the judicial system where necessary—a more promising benefit, from their standpoint, than the perhaps illusory advantages of abolishing an alleged "presumption of validity."

C. Impact on the Courts

We have already noted that the Bumpers Amendment is unlikely to lead to full-blown evidentiary hearings in court concerning the validity of a rule. Nevertheless, the Amendment can be expected to add appreciably to the workloads of the federal courts.[119] One can anticipate more filings;

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118. These include the Kennedy bill, S. 1291, 125 Cong. Rec. S7126 (daily ed. June 6, 1979), and the Ribicoff and Administration bills cited in note 109 *supra.*

119. By its terms the Amendment controls the scope of review not only in federal courts but also in the courts "of any State." This feature of the Amendment may appear peculiar, but it is not necessarily improper: the private rights protected by the APA may be enforced in any "court of competent jurisdiction" if Congress has not provided a forum for review. 5 U.S.C. Sec. 703 (1976). The issues of federalism posed by this aspect of the Amendment are interesting, but their practical significance is nil. Although state-court review of federal agency action is not unprecedented, *see* Seaboard Air Line R.R. v. Daniel, 333 U.S. 118, 123 (1948), it is certainly rare. Research has failed to uncover even one reported decision in which a state court has explicitly applied Section 706 to the actions of any federal agency. Indeed, a suite in state court against a federal officer or agency is almost invariably removable to federal court. 28 U.S.C. Sec. 1442 (a)(1) (1976); *see* Willingham v. Morgan, 395 U.S. 402 (1969). Thus, it is the impact of the Amendment on federal courts that must be examined here.

more challenges to rules in the course of litigation that would have reached the courts anyway; and more exacting scrutiny of a rule when the court actually proceeds to make its decision. The size of the increment would vary depending on what interpretation of the Bumpers Amendment is adopted, but is likely to be substantial no matter how the Amendment is construed.

The Amendment can also be expected to aggravate a nagging administrative problem that has troubled the judiciary for some time. The federal courts are not fungible. For this reason, opposing interest groups seeking review of rulemaking proceedings often engage in a frantic "race to the courthouse," each striving to secure a forum that it considers favorable. Courts have experienced enormous difficulty resolving these struggles, and it is widely believed that the problems are unsolvable without Congressional intervention (which is not now in sight).[120] The Bumpers Amendment would probably make these venue battles even more common and more heated, since the circuit that ultimately assumed jurisdiction would have broader freedom to overrule agencies' judgments. It is questionable policy to vest plenary, or at least appreciable greater, review powers in "the courts" without taking account of the problems of fairness that must arise when more than one court is asked to exercise those powers over a single rule.

D. Confusion Surrounding the Amendment Itself

The numerous ambiguities lurking in the brief text of the Bumpers Amendment are themselves a factor that Congress ought to weigh before proceeding to enact it. Over and above the substantive litigation that the Amendment aims to generate, one can foresee years of uncertainty and conflict in the agencies and courts concerning the Amendment's own meaning.

Among the problems of construction that have been highlighted in this report are the following:

1. In repudiating any presumption of "validity" for rules and regulations, does the Amendment refer only to questions as to whether the agency has acted within its statutory authority?

2. If not, what does "validity" mean?

3. If the Amendment deals only with "questions of law," what *is* a question of law? (This is a problem with which the courts struggled unsuccessfully for many years before the term passed into disfavor. If the Amendment revives it, one can anticipate an endless series of controversies over whether any given issue is a "question of law" in light of its being related in some way to the words of a statute or of the Constitution.)

4. If the Amendment deals with fact and policy questions, how does it square with Section 706(2) of the APA?

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120. *See, e.g.*, United Steelworkers of America v. Marshall, 592 F. 2d 693 (3d Cir. 1979); APGA v. FPC, 555 F. 2d 852 (D.C. Cir. 1976); National L.J., Aug. 6, 1979, at 7.

5. When a rule or regulation raises primarily legal or policy issues, how can its validity possibly be established "by a preponderance of the evidence"?

6. What does the phrase "rule or regulation" mean? (This question probably cannot be settled in a single case or a few cases. It may require a huge number of lawsuits questioning whether a particular form of agency action falls within the definition.)

7. What "presumption" does the Amendment purport to eliminate? Is the agency to be charged with a burden of production, to be assigned the burden of persuasion, to be stripped of the deference that it hypothetically enjoys over and above existing standards of review, or to be affected in some other way?

There may be other interpretive problems not canvassed in this study.[121] But those already recited should be sufficient to suggest that the Amendment exceeds that point beyond which Congress cannot responsibly allow ambiguity to remain in a bill (perhaps in the hope that the courts will make sense out of it somehow). A provision that is as permeated with genuine uncertainties as the Bumpers Amendment ought to be completely rewritten—assuming that it deserves to be enacted in the first place.

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121. It is perhaps appropriate to note that the one significant segment of the Amendment which has not yet been addressed herein—the proviso clause—also raises its share of perplexities. The proviso reads as follows:

> (I)f any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution or action for civil penalty shall have sustained the burden of proof normally applicable in such actions.

First, one must wonder why this provision is necessary. Surely it is rare—it may be completely unprecedented—for the government to initiate prosecutions or civil penalty actions against individuals who have a colorable defense of good faith reliance upon a rule or regulation of a federal agency. Moreover, if the statute underlying the prosecution or penalty action authorizes such a defense, why would that defense vanish if the court should find, after the government has "sustained its burden of proof" (whatever that may mean), that the regulation is invalid? If a good faith reliance defense is to have any meaning, why would not the mere existence of the regulation satisfy it?