File: Reg. Reform

LEGISLATIVE ANALYSIS

Bill No. S-1766 Report No. _____ Companion No. _____

Introduced By: Bumpers Date: August 4

Referred to: Judiciary

STAT Contacts: [redacted], Gen. Counsel [redacted]

Hearings/Mark-up: _____

Conclusion:

- ☐ No Agency objection
- ☒ Monitor
- ☐ Distribute for comment
- ☐ Agency objection and/or needs amendment

Analysis: Bumpers Amendment to Judicial Review provisions of APA

Most of our rules are not published, hence no major objection. Regulatory agencies should take lead in objecting to this bill.

Passage _____ House _____ Senate

17 AUG 1983 D

II

98TH CONGRESS
1ST SESSION

S. 1766

To amend section 706 of title 5, United States Code, to strengthen the judicial review provisions of the Administrative Procedure Act by giving courts more authority to overturn unfair agency action.

IN THE SENATE OF THE UNITED STATES

AUGUST 4 (legislative day, AUGUST 1), 1983

Mr. BUMPERS (for himself, Mr. NUNN, Mr. QUAYLE, Mr. DECONCINI, Mr. HEFLIN, Mr. SIMPSON, and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

Bumpers Amendment 1841

A BILL

To amend section 706 of title 5, United States Code, to strengthen the judicial review provisions of the Administrative Procedure Act by giving courts more authority to overturn unfair agency action.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 706 of title 5, United States Code, is amended to read as follows:

"§ 706. Scope of review

"(a) To the extent necessary to decision and when presented, the reviewing court shall **independently** decide all relevant questions of law, interpret constitutional and statutory

N.B. changes to existing law are marked in yellow

provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

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

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

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

"(D) without observance of procedure required by law;

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

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

"(G) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In making determinations concerning statutory jurisdiction or authority under clause (2)(C) of subsection (a) of this section, the court shall require that the action by the agency is within the scope of the agency jurisdiction or authority on the basis the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action.

○

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REMARKS

- Pls. review S.1766 - "Bumper's Amend." to judicial review provisions of APA
- Since most of our rules are not published per §553, S.1766 is not a major problem from my point of view, Although we certainly oppose any increased stringency in APA judicial review (but let's let other agencies fight this if necessary)
- Any special problems in light of FOIA?

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political dialogue—including the resumption of formal diplomatic relations between the United States and Cuba. Even where there is external support for insurgency, as in El Salvador, the underlying problems are domestic, and no amount of military aid or advisers can remove the problems on which the insurgents feed.

The Administration's Caribbean Basin Initiative and the Kissinger commission are welcome, although belated, responses to these problems. But the depth of commitment to the approaches implied in these initiatives is called into question by the Administration's preference for saber-rattling.

The need to shift the focus of U.S. policy in Central America does not mean that we should be blind to the external forces that are exploiting the misery and repression in the area for their own ends. There is a need, as the President has said, to provide a "shield of democracy."

But, as with Vietnam, the American people will not bear the burden for such a shield if the threat to democracy is exaggerated and if alternatives to military action have not been seriously pursued.

Mr. BYRD. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The Assistant Secretary of the Senate proceeded to call the roll.

Mr. BUMPERS. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECOGNITION OF SENATOR BUMPERS

The PRESIDING OFFICER. Under the previous order, the Senator from Arkansas (Mr. BUMPERS) is recognized for not to exceed 15 minutes.

S. 1766—AMENDING THE JUDICIAL REVIEW PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

Mr. BUMPERS. Madam President, I am today introducing a bill to amend the judicial review provisions of the Administrative Procedure Act. I hope this measure, which has come to be generally known as the [redacted] will have the support of every Member of the Senate. I can make that broad assertion, Madam President, because essentially this same bill, which embodies ideas I have worked for since 1975, was passed unanimously by the Senate just last year. And I am proud to say that I am joined by Senators QUAYLE, NUNN, HEFLIN, DECONCINI SIMPSON, and GRASSLEY in offering this bill. Last year this body approved my judicial review amendments as section 5 of S. 1080. That bill, which was our major effort at regulatory reform last Congress, unfortunately never saw action in the House. The need for regulatory reform, however, has not diminished. It has, in fact, increased greatly.

Now is an especially appropriate time to consider the Bumpers amendment. I say this because of the great concern which has been expressed in both the House and the Senate over the impact of the Supreme Court's recent decision in Immigration and Naturalization Service against Chadha, holding unconstitutional the so-called legislative veto. Whatever one thinks about the merits of that decision and the legislative veto—and I admit to always having been a critic of the legislative veto—the fact is that it had become an established part of the system of checks and balances over the exercise of power by the Federal bureaucracy. Unless we substitute other controls the removal of congressional review over rulemaking by the unelected agency chiefs will only increase the potential for the abuse of executive power by countless, nameless, faceless administrators whose decisions have such a tremendous impact on the lives of all Americans.

A great variety of legislative responses to the Chadha decision has been suggested, and more will undoubtedly be forthcoming. In my judgment, however, no one thus far has offered a comprehensive answer, one which will adequately guarantee that the vast Federal bureaucracy is held accountable for its decisions. I have concluded, therefore, that this is an especially appropriate and important time to enact an amendment to the Administrative Procedure Act, that basic law which governs procedures in all Federal agencies, which will increase the degree of scrutiny which is applied to agency decisions when they are reviewed in the Federal courts.

POLICY

The rationale for this bill is readily understandable and basic. It is a basic constitutional rule that in our representative democracy, the legislative power shall be exercised by elected representatives and not by unelected bureaucrats who are not responsible to the electorate. The delegation doctrine—that constitutional doctrine which permits us in Congress to delegate to agencies the power to make rules necessary to carry out the legislative mandate—presumes that there will be methods for controlling this delegated power. Indeed, without such control the agencies would be the judges of their own actions. The fox in the henhouse. Such a result is contrary to the principle set out by Mr. Justice Reed in Social Security Board against Nierotko: "An agency may not finally determine the limits of its statutory power. That is a judicial function." 327 U.S. 358, 369 (1946).

This bill will strengthen the Administrative Procedure Act's intended protection against regulatory actions which are arbitrary and capricious, and it will do this in four important ways. [redacted] Second, the opening words of section 706 state: "The reviewing court shall independently decide all relevant questions of law." The addition of this one word, [redacted]

Third, the [redacted] That is to say, the courts will no longer be able to indulge in the presumption that, "if the agency did it, it must be within its power." Instead, the agency will have to affirmatively show that it was authorized by Congress to act in a particular case and to take the actions which it took.

The court will have to be satisfied that the particular area is one where the language of the act shows clearly that Congress intended action by the agency, or, if the language is ambiguous, then the agency action must be based on other verifiable legislative intent.

[redacted] not the agency, should be the ultimate interpreter of the law, and the Bumpers amendment makes this clear.

This last provision is intended to correct what I have long seen as an anomaly in the law. I have always thought it peculiar that the courts have so often stated that they will, on a close question, defer to an agency's expertise on questions of law. I say this is an anomaly because I take seriously Chief Justice Marshall's famous statement in Marbury against Madison that, "It is emphatically the province and duty of the judicial department to say what the law is." It seems to me that the Federal courts have abdicated this duty when they defer to an agency's interpretation of the law which the agency is charged with enforcing. It is the courts, not the agencies, which are charged under the Constitution with the duty to resolve legal questions necessary to the decision of cases before them. I do not doubt that the regulatory agencies are entitled to some degree of respect on questions of fact and policy in their respective areas of responsibility. But the present judicial doctrine of deference to administrative bureaucrats on questions of law goes a long way toward the evil of which Bishop Hoadly warned in his sermon before the King on March 13, 1717:

> Whoever hath an absolute to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.

I urge the Senate to act expeditiously to enact this important reform into law.

LEGAL ANALYSIS OF THE BUMPERS AMENDMENT

One primary mechanism for control of agency discretion is the requirement that when the legislature delegates power, it must establish an "intelligible principle" to govern the delegation, and that the judiciary will hold invalid actions which are not authorized by the statutory delegation. Indeed, a number of recent opinions by members of the Supreme Court have underscored that need by emphasizing that absent clear Congressional guidelines as to the limits of delegated power and clear Congressional guidelines as to how, once delegated, the power is to be used, the purported grant may be unconstitutional. For example, *Industrial Union Dep't., AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, , (1980) (Rehnquist, J. concurring) (concluding that § 6(b)(5) of the Occupational Safety and Health Act violates "the doctrine against uncanalized delegations of legislative power"); *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 49 U.S.L.W. 4729, , (U.S. June 16, 1981) (Rehnquist, J., dissenting). Moreover, once Congress has done its duty by establishing such principles, the courts must do their duty by holding invalid actions which are not authorized by that statutory delegation. In the words of Mr. Justice Reed, "An agency may not finally determine the limits of its statutory power. That is a judicial function" *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946).

It is appropriate for Congress to underscore this principle that the courts, and not agencies, make the final decisions as to the extent of agency jurisdiction or authority. Moreover, other experiences with judicial review during the past decade demonstrate the need for additional Congressional guidance to the courts on other aspects of the review of agency rules. In certain cases, the courts have given undue deference to agency interpretations of Congressional intent in construing statutory provisions or terms. This judicially created doctrine of deference, which in certain instances is applied as virtual presumption of correctness of all interpretations of law by an agency, imposes unfair burdens on citizens in appeals of agency rules and undermines the proper role of the courts. This amendment disapproves of this doctrine. The courts should not presume that the agencies are correct in their interpretations of the law, whether derived from the Constitution, the organic statutes and implementing regulations, procedural statutes, such as the Administrative Procedure Act, or Federal common law where it exists.

The first change made by subsection 5(b) is the insertion of the word "independently" in the introductory sentence of section 706 of title 5, United States Code ("the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action"). This modification applies to all the duties of a reviewing court set out in that sentence and is intended to reemphasize the primary role of the courts in interpreting all sources of law involved in the review of agency rules.

The addition of a new clause (F) to section 706(a)(2) provides a separate, clarified standard for review of certain factual determinations in informal rulemakings. Relying on the analysis in Recommendation 74-4 of the Administrative Conference, 1 C.F.R. § 305.74-4 (1980), clasue 2(F) requires substantial support for factual determinations in informal rulemaking when (1) the determination of fact is necessary to the rule, (that is, where the rule would fail to satisfy the "arbitrary, capricious, [or] an abuse of discretion" criterion or where the rule would be in excess of the agency's authority, absent such a finding of fact), or (2) the finding of fact is an "asserted" basis for the rule, (that is, where the agency relies on the finding as part of its rationale for the policy choice reflected in the rule).

Under clause 2(F) the "substantial support" must be found in "the rule making file, viewed as a whole." Section 706 in its present form does not specifically prescribe the standard of review for factual issues raised in review of rules promulgated under section 553 procedures. Courts have thus had to apply the "arbitrary, capricious, [or] an abuse of discretion" test to these factual issues. Many have looked for analogy to the "substantial evidence" standard now applicable to review of rulemakings "on the record" and have formulated an equivalent standard requiring a court to take a "hard look" at agency factual determination. Other courts have reviewed factual issues in a variety of ways, none easily defined.

The "substantial support" criterion is based on the precedents of judicial review provisions in recent enabling statutes that follow the logic of the "hard look" line of cases. For example, Toxic Substances Control Act, 15 U.S.C. § 2618(c)(B)(i); Federal Trade Commission Act, as amended, 15 U.S.C. § 57a(e)(3)(A). The courts, in applying this standard should essentially follow the criteria discussed by the Supreme Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 471, 487-88 (1951) and *Consolvo* v. *FMC*, 383 U.S. 607, 619-20 (1966). Later circuit cases such as *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) characterize the Court's role as making certain that the agency took a "hard look" at the salient problems and "genuinely engaged in reasoned decisions-making." Others, citing the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), have held that "the grounds upon which the agency acted must be clearly disclosed in, and substantiated by the record." *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1356 (4th Cir. 1976). See *Sierra Club* v. *Costle*, No. 79-1565 (D.C. Cir. April 29, 1981) ("If the agency's decision is not based on substantial evidence it will be held to be arbitrary and capricious." *Id.* slip op. at 32 n. 67.). The words "substantial support" are also intended to require that the data or materials in the record on which the agency based its factual determinations must be reliable and credible even though they do not necessarily satisfy the rules of evidence applied in judicial proceedings.

Earlier versions of this amendment used the words "substantial evidence" rather than "substantial support" in clause (2)(F). The change in language here is meant to negate any implication that the intent of these amendments is to require indirectly the use of trial-type procedures in informal rulemaking. Procedural requirements for informal rulemaking will be found in other provisions of the A.P.A., such as in our amendments to section 553, and in constitutional and common law considerations of fairness. It is not intended that the words "substantial support" imply that agencies must use procedures beyond those required by law elsewhere.

Finally, "substantial support" standard in new clause (2)(F) recognizes that there is a distinction between an exercise of discretion (policy choice) by the agency, which remains subject to the "arbitrary, capricious, [or] an abuse of discretion" standard of clause 2(A), and the factual foundation for such a choice.

The final change of subsection 5(b) adds a new subsection (c) to section 706 of title 5, United States Code. The first sentence of new subsection (c) of section 706 directs the courts to play a more active role in policing regulatory power by closely construing statutes which transfer regulatory authority to administrators. The Supreme Court has followed this approach in recent decisions. *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979); *NLRB* v. *Catholic Bishops of Chicago*, 440 U.S. 490 (1979). See also *Kent* v. *Dulles*, 357 U.S. 116 (1958); *National Cable Television Assn. Inc.* v. *United States*, 415 U.S. 336 (1974); Schwartz, Administrative Law Cases During 1979, 32 Ad. L. Rev. 441, 413-415 (1980).

Thus, subsection (c) emphasizes the responsibility of reviewing courts to make sure that agencies do not exceed the jurisdiction or authority conferred on them by statute. Many people, in the Congress and in the public at large, believe that when Federal regulators seek to intrude into areas not contemplated by the authorizing statute, reviewing courts are too lenient in judging whether an agency has imposed an unauthorized regulatory burden on the citizen. Courts already vigorously and carefully discharging their responsibility may not have to

alter their practice. In this respect, subsection (c) embodies a legislative solution similar to that employed by the Congress when it enacted the Administrative Procedure Act and the Taft-Hartley Act in 1946 and 1947. That story is recounted in Justice Frankfurter's opinion for the Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951). The following conclusion reached by the Court in that case is equally applicable to this subsection:

[E]nactment of these statutes does not require every Court of Appeals to alter its practice. Some—perhaps a majority—have always applied the attitude reflected in this legislation. To explore whether a particular court should or should not alter its practice would only divert attention from the application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

Under subsection (c), a court must determine that the agency's authority to act has been granted expressly in the organic statute or, in the event of ambiguity, by reference to the statute's legislative history or other contemporary materials relevant to ascertaining legislative intent. This provision is intended to underscore the duty of the courts to insure that agencies do not transcend the boundaries of the authority delegated by Congress. Indeed, for a court to allow an agency to go beyond these boundaries would be "an unwarranted judicial intrusion upon the legislative sphere wholly at odds with the democratic processes of lawmaking contemplated by the Constitution." *Lubrizol Corp.* v. *EPA,* 562 F.2d 607, 620 (D.C. Cir. 1977). See *City of Palestine* v. *United States,* 559 F.2d 408, 414 (5th Cir. 1977); *National Nutritional Foods Ass'n* v. *Mathews,* 557 F.2d 325, 326, (2d Cir. 1976).

Since by its terms, new subsection (c) of section 706 is applicable only to "determinations concerning statutory jurisdiction or authority under clause (2)(C)" of section 706(a), it does not govern review of agency action that allegedly violates other clauses of section 706(a)(2). Thus, for example, an agency's failure to comply with its own regulations might not be "in accordance with law", but would not be in excess of the agency's statutory jurisdiction or authority within the meaning of subsection (c). Likewise, review of agency action which allegedly violates the clause (B) language "contrary to constitutional right," the clause (C) language "short of statutory right," or the clause (D) language "without observance of procedure required by law" would not be subject to the requirements of subsection (c).

In the broadest sense, of course, an agency many be said to exceed its "jurisdiction or authority" whenever it acts improperly. As already noted, those words are not used in the expansive sense in this legislation. "Jurisdiction" is to be given its conventional meaning of the capacity or power to act concerning a subject matter, area of activity or class of persons or firms. E.g., *N.L.R.B.* v. *The Catholic Bishop of Chicago,* 440 U.S. 490 (1979).

The word "authority" is sometimes regarded as synonym for "jurisdiction". As used in subsection (c), however, it has a broader significance. When an agency's action is alleged to be in excess of its statutory authority, the issue will be the meaning of the statute, which is a judicial question to be decided by the court. Subsection (c) directs the court to make sure that the agency's assertion of authority is supported by the language of the statute or other evidence of ascertainable legislative intent. E.g. *F.C.C.* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978). In that case, the FCC issued regulations prohibiting common ownership of broadcast stations and daily newspapers in the same market. In the terminology of subsection (c), issuance of the regulation would be within the FCC's "jurisdiction"—over broadcast licensees, and the question for decision on review, as the Supreme Court stated at the outset of its opinion, would be "whether these regulations . . . exceed the Commission's authority under the Communications Act," id. at 779, thus triggering the provisions of subsection (c). On the other hand, if the Commission has concluded that the Communications Act did not authorize it to take into account a licensee's ownership of other media facilities, subsection (c) would not be applicable, because in such a case the consequence of the Commission's conclusion would be a lessening rather than an increase of regulation. In such a situation, those contending that the Commission was required to take into account the factor of ownership of other media would in effect be arguing that the Commission's failure to do so was, in the words of clause (C), "short of statutory right." But agency action short of statutory rights is not subject to the requirements the first sentence of subsection (c), because by its specific terms the sentence applies only to a determination concerning jurisdiction or authority. Action allegedly short of statutory right, of course, would be subject to judicial review pursuant to section 706(a)(2)(C).

The phrase, "in the event of ambiguity," reflects recognition that if a court looks only at the words of a statute, there may be ambiguity concerning the agency's jurisdiciton or authority not only because the statute may be couched in broad terms, but also because a literal interpretation of the relevant statutory provision would produce an anomalous result. In *United Housing Federation, Inc.* v. *Forman,* 421 U.S. 837 (1975), for example, the lower court held that shares of stock in a cooperative housing project were securities. The Supreme Court reversed, rejecting the "literal approach" that "the sale of shares called 'stock' must be considered a security transaction simply because the statutory definition of a security includes the words 'and . . . stock'." [Id. at 848. The Court said that it was "guided by a traditional canon of statutory construction: "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Id, at 849. Thus while courts may resort to the statute as a whole and its legislative history to ascertain the legislative will, the bill would prohibit abuses of post-hoc legislative history. *Consumer Product Safety comm'n* v. *GTE Sylvania, Inc.,* 447 U.S. 102 (1980).

The requirement that the court's decision concerning an agency's jurisdiction or authority be based on the language of the statute or other evidence of "ascertainable legislative intent," reflects the intention of the committee that an extension of an agency's jurisdiction or authority beyond that expressed in the language of the statute must be based on facts or materials in the statute's legislative history that can be discerned, identified, and discussed by the reviewing court. Subsection (c) requires more than surmise, more than a lack of evidence which would negate the extension. It requires, instead, identifiable materials which provide support for the extension.

Under subsection (c) an asserted extension of jurisdiction or authority that is unsupported by the language of the statute may not be upheld merely on the ground that the legislative history is not illuminating and the agency has made a determination that the court finds reasonable. Accordingly, under this amendment, a reviewing court could not properly uphold an extension of agency authority beyond that expressed in the statutory language on the ground that the extension "is reasonable and is not prohibited by the statute" or that the extension "is reasonable and is consistent with the statute." Subsection (c)'s requirement of affirmative evidence is not met by an absence of contradictory evidence. Reasonableness and consistency with the statutory purpose are not the equivalent of evidence of ascertainable legislative intent.

Subsection (c) directs reviewing courts to play a more active role than some courts have in the past by carefully construing statutes which transfer regulatory power to administrative agencies. In complying with the subsection, reviewing courts should take a hard look at assertions of regulatory jurisdiction or authority which an agency seeks to justify by the argument that the asserted power is granted by implication. In the exercise of its reviewing responsibility, the court will make use of all appropriate materials for ascertaining the legislative will and will be influenced as well by the nature of the asserted power. If, for example, the agency is seeking to assert a basic or significant extension of authority, the reviewing court

should not uphold the extension unless it is conscientiously convinced that the statute and relevant legal materials demonstrate that Congress addressed the issue, and that the statute does contain the authority asserted by the agency. On the other hand, if the asserted authority at issue relates to an interstitial or minor matter, the reviewing court might well conclude that although Congress had not addressed the specific issue, the matter is of such a character that sensible administration necessarily requires exercise of such an implementing authority and therefore that a fair construction of the statute and relevant legislative materials lead the reviewing court to conclude that Congress has conferred the necessary authority.

In imposing a duty on the court to ascertain the statutory basis for agency jurisdiction or authority it is not intended to impose a burden on them to act sua sponte. Those seeking review of a rule must still raise the question of jurisdiction or authority, but once raised, the burden of persuasion passes to the person asserting that agency jurisdiction exists. This is not a revolutionary change. It is consistent with the constitutional premise that delegations of legislative power to unelected officials are to be narrowly construed. It is also far easier to prove the affirmative, that an agency has jurisdiction, than to prove the negative, that it does not. This is consistent with other sections of this legislation which require an agency to include a statement of specific statutory authority under which the rule is proposed and of the congressional intent specifically sought to be achieved by the rule in the notice of proposed rulemaking, and which require an agency to include in the statement of basis and purpose a memorandum of law supporting the determinations of the agency that the final rule is within the authority delegated by Congress and is consistent with congressional intent.

The second sentence of new subsection (c) of section 706 is intended to make clear the Congress' intent that the courts perform, and perform diligently, their traditional role as the ultimate and impartial interpreters of the law. It is designed to insure that, as to questions of law, the agency and those seeking review stand on equal footing before the court without bias, preference, or deference to either and without any presumption in support of or against agency action. The only exception is for questions of jurisdiction or authority. Where such an issue is raised on review, the first sentence of subsection (c) imposes the burden on the proponent of agency jurisdiction to demonstrate that Congress has delegated to the agency the authority to act. The word "other" in the second sentence of new subsection (c) makes clear that the general rule of the second sentence is not to be read to lessen the obligations imposed by the preceding sentence on the proponent of agency jurisdiction and authority.

When a citizen challenges an agency's rule or order in the courts, the odds should not be stacked against him by judicial presumptions in favor of the agency. The judicially created doctrine of deference to agency interpretations of law, which some courts have elevated to a virtual presumption of correctness, places the bureaucratic thumb on the scales of justice, weighting them against the citizen. This amendment intends to reestablish an equal balance.

These amendments do, however, leave room for proper reliance on agency expertise where it actually exists. It is not intended to preclude judicial consideration of an agency's legal interpretation. This interpretation will be one element of the process of independent judicial examination. Nonetheless, the effect of any agency interpretation of law on the court's own interpretation should not depend on some general rule of deference of presumption of validity. Rather, in examining an agency interpretation of law, the court should evaluate "the thoroughness exhibited in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give its power to persuade, of lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). The court should also weigh any countervailing factors bearing on the validity of the agency's legal position.

Accordingly, under this amendment, a reviewing court may not proceed on the assumption that it should uphold an agency's statutory construction merely because that construction is not unreasonable or not irrational. The second sentence of paragraph (c), rejects the view expressed in *Udall* v. *Tallman*, 308 U.S. 1, 16 (1965), and other cases that a court should defer to an agency's interpretation of a statutory or regulatory term even though it is not the only reasonable interpretation or even one that a court would have reached. Instead, the courts are to regard the interpretation of law as a question which they must decide. See e.g., *Coca-Cola Co.* v. *Atchison Topeka & Santa Fe Ry.*, 608 F.2d 113 (5th Cir. 1979); *Bituminous Coal Operators Ass'n.* v. *Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977); and *Beryllium Corp.* v. *United States*, 449 F.2d 362 (Ct. Cl. 1971).

In providing that the "no presumption" criterion will apply only to questions of law, the intent is to preserve the existing "arbitrary, capricious, [or] an abuse of discretion" standard of section 706 with respect to policy determinations made within the permissible limits of agency discretion. In addition, the "no presumption criterion" does not apply to questions of fact, which are covered by the "substantial support" criterion.

Some issues will involve mixed questions of law and policy, or law and fact. But the difficulties in parsing and reviewing such issues under differing criteria now exist under section 706 in its present form. Thus this revision of section 706 does not create an obligation for the courts to wrestle with a new categorization. Despite the difficulties inherent in this task, courts can and do distinguish factual and policy from legal questions when reviewing agency action. E.g., *Sweringen Aviation Corp.* v. *NLRB*, 568 F.2d 458, 463 (5th Cir. 1978); *Getty Oil Co.* v. *DOE*, 478 F. Supp. 523, 527 (C.D. Cal. 1978). Moreover, courts generally have to distinguish legal from factual issues when hearing appeals from lower court rulings, since different standards of appellate review govern resolution of each category of issues on appeal. E.g., *Buchanan* v. *United States Postal Service*, 508 F.2d 259, 267 n. 24 (5th Cir. 1975); *Crosby* v. *United States*, 496 F.2d 1384, 1389 (5th Cir. 1974); *Rockwood & Co.* v. *Adams*, 486 F.2d 110, 112 (10th Cir. 1973). By establishing clear standards for review of the various components of agency decision, these amendments will simplify the task of the courts.

These changes to section 706 will not cause any dramatic upheaval in the process of judicial review of agency actions. These amendments to section 706 are not intended to affect any applicable rule of law which provides that in a civil or criminal action reliance on an agency rule or order is a defense. Thus, a defendant who has acted in compliance with an agency rule or order would continue to have any protection the law now provides even if the rule or order is subsequently found to be invalid.

It is expected that whenever an agency rule or order is challenged in a civil action where a private party is suing under an express or implied right of action for violation of an agency rule—arguably not a "proceeding for judicial enforcement" within the meaning of section 706—the court will apply the same standards of review as those set forth in section 706. This is not meant to imply any new standing or right of a defendant to challenge the validity of an agency rule or order. Thus, only if and to the extent that a rule can be reviewed by the court in the action would the reviewing court be expected to apply the same section 706 tests of lawfulness of agency action.

The "no presumption" criterion does not suspend the effectiveness of rules during the pendency of an appeal. This criterion affects only the judicial review of legal issues raised in appeals of agency action. Pending the outcome of that judicial review, the rule or agency action at issue would remain in effect unless, as under current law, a court issues a stay of the effectiveness of a particular agency action pending

appeal. 5 U.S.C. section 705. This requirement would not be changed by the amendment.

While this amendment applies to the judicial review of questions arising under the existing and future organic acts of Congress where the general standards for judicial review as previously articulated in section 706 have been applicable, it is not intended either to change any settled judicial interpretation existing at the date of enactment as to the boundaries of a particular agency's jurisdiction or authority determined by a Federal appellate court, or to unsettle any res judicata or collateral estoppel effects of final prior court decisions on substantive legal questions.

The ultimate objective of these amendments to section 706 is to make sure that the pace, scope, and substance of regulation conform to the timetable and map established by elected representatives, rather than by an unelected bureaucracy. Since courts do not act on their own initiative, citizens have an important role to play in assuring the attainment of that objective. In protecting their individual interests they can also help to protect the public interest.

In addition, closer judicial reading of the statutory authority of agencies, perhaps producing decisions that agencies have no authority to act in some situations, will be an incentive for the Congress to "canalize" more specifically its delegations of law making power to agencies. "Congress defaulted when it left it up to an agency to do what the 'public interest' indicated should be done." W. Douglas, "Go East Young Man" 217 (1974). See J. Skelly Wright, Book Review, 81 Yale L. J. 575 (1972) ("There is every reason to believe that, with a slight nudge from the courts, Congress would eagerly reassume its rightful role as the author of meaningful organic charters for administrative agencies." Id. at 584.).

Indeed, as one critic of agency behavior put it, likening agencies unconstrained by statutes to Plato's philosopher-king:

[O]ur whole constitutional structure has been erected upon the assumption that the king not only is capable of doing wrong, but also is more likely to do wrong than other men if he is left unrestrained. We must not today judge those in possession of governmental power more favorably than did our ancestors, with the presumption that they can do no wrong. On the contrary, if there is any presumption, it should be against the holders of power, and increasing as the power increases. In the field of administrative law, historic responsibility can never make up for the want of legal responsibility. Schwartz, "Of Administrators and Philosopher-Kings: The Republic, The Laws, And Delegations of Power," 72 Nw. U.L. Rev. 443, 450 (1977).

Madam President, I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1766

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Title 5, United States Code, Section 706 is amended to read as follows:

"§ 706. Scope of Review.

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

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

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

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

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

(D) without observance of procedure required by law;

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

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

(G) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In making determiniatrions concerning statutory jurisdiction or authority under clause (2)(C) of subsection (a) of this section, the court shall require that the action by the agency is within the scope of the agency jurisdiction or authority on the basis the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action.

Mr. GRASSLEY. Mr. President, I now rise in support of the introduction of the Bumpers amendment, named after its originator, the distinguished Senator from Arkansas.

This section amends the Administrative Procedure Act in these respects:

Reviewing courts are instructed to make independent determinations on all questions of law whether they be jurisdictional, constitutional or procedural. No presumption of validity will attach to agency regulations. The court will be the final arbiter as to whether an agency has gone beyond congressional intent in taking certain actions.

In addition, the reviewing court shall set aside agency regulations where substantial support is lacking for the necessary factual determinations which provide the basis for the rule. This will assure the promulgation of necessary regulations while preventing those which are overburdensome and unjustified.

Senator BUMPERS first introduced similar legislation in 1975. It was reintroduced in the 95th and 96th Congresses. At this point, I would like to reiterate my long-term support for this section demonstrated by my introduction of the amendment in the House in 1979 and the fact that I was fortunate enough to chair the hearings on the amendment held last Congress before the Subcommittee on Agency Administration of the Senate Judiciary Committee.

On September 7, 1979, the Senate adopted a similar proposal as a part of the Federal Courts Improvement Act. The House Judiciary Committee approved the Bumpers amendment with only one dissenting vote on September 17, 1980, as part of a comprehensive regulatory reform package. However, neither of these bills incorporating the amendment was ever finally enacted into law.

It has been demonstrated, through the extensive hearing process, that this legislation is necessary now more than ever. Testimony elicited before the Subcommittee on Agency Administration indicated that great deference has been given to various agencies in delineating their own authority. This function is clearly one for the courts, not for the agency. Examples have been given time and time again of agencies taking broad statutory language and construing it to justify certain agency action clearly going beyond congressional intent. The purpose of this legislation is not to allow courts to constantly second guess policy decisions properly made by agencies but instead to return to the courts the role of final arbiter of questions of law. It has always been the courts job to construe statutes and to determine whether an agency is operating within its statutory authority.

The other major criticism raised against this concept is that it may result in increased litigation. This fear is unfounded. What it will result in is promulgation of more responsible rules. As Mr. Neil Kennedy, former Senate Legal Counsel, indicated in his testimony, agency lawyers "are going to have to live with this provision and advise their agencies" accordingly. "This should result in no more litigation than at present and you may have fewer rules * * * and better * * * more modest and realistic rules." Mr. Kennedy continued, "* * * after the experience of the last years, I would ask, is that bad?"

I ask the same question and believe the answer is obvious. The most recent figure on the cost of regulations to America's economy is $126 billion annually. If we translate that figure into personal terms, Federal regulations cost about $575 per capita each year or $2,290 per four-member family. This is without question a contributing factor to the serious inflation problems we

are facing today. Excessive regulation is eating away at the capital investment which instead should be flowing into new production.

If we expect American industry to increase production or even remain operational it is time for serious reevaluation of our regulatory system. Adoption of the Bumpers amendment is just one aspect of this process. This, along with the passage of a comprehensive regulatory reform bill, will restore the balance of power to the three branches of Government enumerated in the Constitution and return the bureaucracy to its proper function of administering the law.

RECOGNITION OF SENATOR PROXMIRE

The PRESIDING OFFICER. Under the previous order, the Senator from Wisconsin (Mr. PROXMIRE) is recognized for not to exceed 15 minutes.

DEFICITS AND MIRACLES

Mr. PROXMIRE. Madam President, I recently ran across a study entitled "Government Deficit Spending and its Effects on Prices of Financial Assets." That has never been publicly released. The Treasury Department prepared this study in May, when the deficit reached the unprecedented sum of $161.8 billion, and that for only 8 months of the fiscal year. That is an annual rate of well over $200 billion.

The Treasury is traditionally one of the most conservative Federal departments, a home away from home for Wall Street bankers. Given this tradition and the administration's rehetoric, I expected the study to be a Philippic against deficits, concluding that those odious red numbers boosted interest rates, slowed economic growth, and possibly even signified a certain looseness of moral purpose.

Imagine my surprise when I discovered that the study came to exactly the opposite conclusions. Here are some of the eye-opening results quoted directly from the study—and I quote verbatum:

> One can only speculate on what might be the effect of continuing deficits on prices of financial assets and, more fundamentally, on economic growth.
>
> What can be deduced, therefore, is that the secular trend of deficits, if kept at a sustainable level (that is, not resulting in an explosive growth of debt-to-GNP ratio) may be more conducive to economic growth than if the corresponding amount of funds were raised by taxing the productive factors in the economy.
>
> Finally, even if one were to accept the proposition that continuing high deficit-to-GNP ratios cause high interest rates, one could not conclude that these high interest rates will unavoidably result in slow economic growth.

Put in plain English, Madam President, the Treasury is now saying that large, continuing deficits may be just what the economic doctor ordered. They may increase economic growth. They do not cause high interest rates. Even if they did, these high interest rates may not hurt the economy.

Let us pause for a moment to marvel at this conversion. Remember the story of Saul's conversion on the road to Damascus. Saul may have been a tough nut to crack. He may even have been one of the most hard-hearted sinners of his day. He was one man, alone with his wickedness, but the story of his conversion has been handed down from generation to generation for nearly 2,000 years.

Now we are witnessing the conversion of an institution. Here we see the redoubtable Treasury Department, reeking with rectitude, suddenly wriggling into a peek-a-boo blouse, dabbing on a seductive scent, and chasing after a debonair deficit. It is as though Whistler's mother stood up, threw open that prim, black dress and revealed a shocking-pink string bikini.

This study so astonished me, Madam President, that it sent me into a reverie, where I beheld other miraculous conversions: Mr. Casper Weinberger, "Cap the Knife," arising from his grindstone with a gleaming knife in hand, which he uses to slash the fat in the military budget. Mr. David Stockman coming out of the woodshed and sitting gingerly at a spinning wheel, where he begins to reweave the safety net. Mr. James Watt joining Greenpeace and being last seen in the bow of a small rubber raft, shaking his fist at a whaler. But enough; that last one snapped me out of it. Some visions are beyond that pale, even in a reverie.

Still, when the Treasury embraces large deficits, anything and everything becomes possible. Perhaps, just perhaps, the Age of Miracles is still with us.

TO STOP NUCLEAR WAR WE NEED COOPERATION AND NEGOTIATION NOT STAR WARS

Mr. PROXMIRE. Madam President, President Reagan last March proposed that this country consider pressing ahead with our advanced technology to build an impenetrable net in space that would permit us to intercept and shoot down any missile that might be fired against this country by the Soviet Union or anyone else. Since then Representative KRAMER, a Republican representative from Colorado, has introduced the Peoples' Protection Act of 1983. The Kramer bill would establish a new Federal agency to develop directed-energy systems to set up a United Space Command to deploy and operate all strategic defensive systems, and transfer military space shuttles from NASA to the Pentagon. Mr. KRAMER says he wants to make nuclear weapons obsolete.

That is a great purpose, Madam President. Almost every human being on Earth would favor such a purpose. But sadly, such an agency, like the Reagan Star Wars scenario, would be far more likely to bring a war closer rather than make it less likely. Only a few days ago, the Air Force is said to have successfully tested a laser to shoot down missiles. A successful laser against missiles or satellites would be quite a technological breakthrough in the nuclear arms race now.

This is exactly the kind of activity the Kramer bill would foster and fund. It would accelerate the development of laser, particle beam and microwave weapons that would destroy enemy missiles. I suppose we have rarely, if ever, in the last 50 years had any new weapons developed that were not, on their development, touted, pushed, advertised as necessary to bring peace, weapons to bring peace.

Our lasers presumably would shoot down incoming missiles that otherwise might blow up our cities and kill millions of Americans. What is wrong with that? What is wrong, of course, is what the Congress discovered more than 10 years ago when we ratified the Anti-Ballistic Missile Treaty with the Soviet Union. Congress ratified that treaty to stop the development of weapons by the United States and Russia that were designed for the express purpose of sparing each country the terrible consequences of an enemy attack with nuclear missiles.

We recognized that, like any other defensive weapons including lasers, the offensive provoked by the weapon would easily, quickly, and much more cheaply overpower the defensive weapons. Further, lasers could be used and would be used when fully developed to knock out satellites, the arms control eyes and ears of both countries. A laser defense, like an antiballistic missile defense, might give a temporary but false sense of security. If any principle surely prevails, especially in nuclear war, it is that the country that chooses to go on the offense can choose the time, the place, the mode, and the means of attack and, other things being roughly equal, will always have the overwhelming advantage. We no more need lasers or particle beams or any other new weapon any more than we need the MX. We need to negotiate a freeze on all, and I mean all—that is all—I will spell it, a-l-l—all nuclear weapons of all kinds.

Senator DAVID PRYOR of Arkansas put it best the other day when he made his fight against our funding a new nerve gas program. He said, "on weapon after weapon, cause after cause, this seems to be the mentality of this city, of this town, of this administration, of this Congress, all of us—let us build more, so that ultimately we can have less."

I think Senator PRYOR had it just right.

The Worldwatch Institute—a Washington think tank—has it right when they argue: "Nonweapons such as sensors, communications systems, and computers have become as important to the strategic balance as weapons improvements * * *. New information technologies are driving the strategic