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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

v. M18-304

PAN AMERICAN WORLD AIRWAYS,

Defendant

-------------------------------x

October 26, 1933
10:00 a.m.

Before:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES:

SANDY HOM,
DANIEL WILLIAMS,
Attorneys for Plaintiff,

TOWNLEY & UPDIKE,
Attorneys for Defendant,
JAMES D. MADIGAN, III, of Counsel.

THE COURT: All right Mr. Williams, you may be heard.

MR. WILLIAMS: If it please the court, Pan American is the movant in this matter.

THE COURT: I beg your pardon. I didn't realize that. I ordinarily hear the movant first. All right, Mr. Madigan.

MR. MADIGAN: Thank you. Your Honor, I don't think there is any factual dispute of any kind involved in the motion that is now before you. We have purely a legal controversy.

I think the fundamental issue presented by the motion is a simple one. Does the EEOC have lawful authority to enforce force the Age Discrimination in Employment Act against Pan Am or doesn't it? If, as Pan Am contends, the EEOC does not, then it has no standing in the subpoena enforcement action.

THE COURT: It would come as somewhat of a shock, wouldn't it, to say they didn't have authority to enforce the ADEA?

MR. MADIGAN: It would come as something of a shock to them?

THE COURT: Yes, they are in and out of the courthouse all of the time.

MR. MADIGAN: I don't think that is true at all in view of the legislative history that preceded that particular act and some of the decisions that flowed.

THE COURT: Go ahead. I will hear your argument.

MR. MADIGAN: The EEOC has conceded, I believe, for the purposes of this motion that the one-house veto provision in the Reorganization Act of 1977 is unconstitutional under the Supreme Court's decision in INS vs. Chadha.

The EEOC nevertheless insists for a variety of reasons that the response should be so what, that we should look beyond that unconstitutional provision, and that the EEOC should be allowed to continue pursuing Pan Am in this proceeding.

We are told that there are no fewer than five arguments which provide a basis for overlooking the clearly unconstitutional delegation of power.

THE COURT: Delegated from whom to whom?

MR. MADIGAN: The delegation of power was made by Congress to the president.

THE COURT: I see.

MR. MADIGAN: To in fact do the enacting of the legislation, subject to the veto of Congress.

THE COURT: What did he enact?

MR. MADIGAN: He enacted a reorganization plan, one of several, the one involved in this particular case is one of 1978 in which he transferred enforcement authority for the Age Discrimination in Employment Act as well as the Equal Pay Act to the EEOC from the Department of Labor.

Now, the EEOC --

THE COURT: So it's your contention that the Department of Labor could enforce the act in this case but that the EEOC couldn't?

MR. MADIGAN: That's correct.

THE COURT: Are you just quarreling about which bureaucrat is to pursue you? And supposing it were the conclusion of this court that you were right, wouldn't everything have to be held in abeyance until the bureaucrats could change?

MR. MADIGAN: I frankly feel --

THE COURT: You get a different face with the same issues.

MR. MADIGAN: That may well be. I think the fallout from the decision in this case and others will have to be addressed perhaps by the body that created the problem in the first place, which is Congress.

THE COURT: They are busy with other things. They have a few constituents whose Social Security payments have been stopped, and there is fighting in Grenada.

MR. MADIGAN: I am sure this is one issue that the EEOC feels is important for them to address as well.

THE COURT: It's kind of a bootless motion isn't it? If you are right it wouldn't necessarily lead to vacating any of the orders. It would just simply change the identity of the persons who can pursue your client.

MR. MADIGAN: I think that presumes that an identical approach would be taken by a different agency, and I don't think that that is a fair presumption when we are merely at the stage of investigating some charges that have been filed.

I don't think it can fairly be stated that we would be before you right now with the Department of Labor instead of the EEOC if what we are describing had not transpired.

THE COURT: I'd like to understand why it would make any difference.

MR. MADIGAN: Because we wouldn't be subjected to this investigation and the expenses associated with it.

THE COURT: Are you suggesting that the Department of Labor doesn't conduct wasteful investigations?

MR. MADIGAN: I don't know whether the Department of Labor would or would not, and that is precisely the problem. I think that is merely a speculative notion. I don't think that the EEOC can stand before you and say that the Department of Labor would be proceeding in precisely the same fashion. They haven't submitted at least anything that I have seen to indicate that such is the case other than to take the position. They haven't sought to include the Department of Labor.

THE COURT: Does the Department of Labor know that this issue is here?

MR. MADIGAN: I don't know.

THE COURT: Does the U.S. Attorney in this district know that that issue is here?

MR. MADIGAN: I do not know.

THE COURT: You brought the motion though. Don't you think that notice should be given to Mr. Giuliani's office at the very least? And perhaps to the Department of Labor?

MR. MADIGAN: I frankly feel that it is up to --

THE COURT: You want to get into a Never-never-land where the court says that it belongs to the Department of Labor and the Department of Labor says, "Oh, no, it should have stayed with the EEOC."

MR. MADIGAN: I think it's the EEOC who hopes to have the Never-never-land result achieved. They are the ones who say ignore the unconstitutionality of the Reorganization Act, that no past, present, or future litigant can raise it because they say even if you were to find an agreement with our position, that it makes the entire act unconstitutional and that they have no authority, nevertheless, you should decide that it doesn't apply to this case or any other, and therefore it goes off into space somewhere.

THE COURT: Let me hear what they say and perhaps I will hear from you further later on. It looks to me as if we don't have adequate notice here to those who might be affected by the order which is being sought.

MR. WILLIAMS: If it please the court, the Department of Justice in Washington does know that this is here.

THE COURT: How do they know it? Do they officially know?

MR. WILLIAMS: They officially know, your Honor. They know not only that this matter is here. They know that I am here arguing it today. That is known by the Deputy Assistant Attorney General for the Civil Division whose name appears along with ours on the answer.

Now, they also know that this is not the only case with this type of motion in it pending in the United States.

THE COURT: Have any of the others been decided?

MR. WILLIAMS: There is one that has been decided. That is involved in Mississippi, it's EEOC vs.

Allstate. It is referred to a number of times in our brief and --

THE COURT: Do we have a copy of it?

MR. WILLIAMS: Copy was filed with the brief, your Honor.

THE COURT: What is the status of that case, do you know?

MR. WILLIAMS: The status of that case is that notice of appeal to the United States Supreme Court on the constitutional issue --

THE COURT: Direct appeal?

MR. WILLIAMS: Direct appeal has been taken; and a statement of probable jurisdiction is in the course of being prepared and will be duly filed.

Since there is -- there may be some question as to whether or not that goes on direct appeal or on appeal through the circuit, notice of appeal to the Fifth Circuit has also been entered.

THE COURT: You say that case is indistinguishable from this one?

MR. WILLIAMS: That case involves the same identical issues as this case, your Honor.

THE COURT: Without intruding on Mr. Williams' argument, do you agree with that?

MR. MADIGAN: Most certainly, yes, your Honor.

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THE COURT: Why shouldn't this be held in abeyance until the Fifth Circuit acts, presuming the Supreme Court will leave it to the circuit since they regard themselves as overworked?

MR. WILLIAMS: If it please the court, the answer to that is this is a matter that is in investigation, there are charging parties, the statute of limitations continues to run against their individual claims. At the time that this might be held in abeyance, this is not --

THE COURT: What did the Mississippi court hold?

MR. WILLIAMS: The Mississippi court held -- they dismissed our action and a pending equal pay case holding a number of things.

They held contrary to -- No. 1, that the defendant had standing to raise the issue. We argued that they did not. The court held secondly that the unconstitutional provision of the Reorganization Act of 1977 was not separable from the rest of the act. Our arguments are to the contrary.

It held, thirdly, that the act was -- that the Chadha decision which held the one-house veto provision to be unconstitutional applied to existing acts as well as prospective acts, and that it therefore affected this act under a reorganization plan that by its very terms has expired, and therefore, can do no more damage to retroactive application of Chadha. That is basically --

THE COURT: I gather the Chadha opinion didn't hold on possible retrospective effect?

MR. WILLIAMS: It did not. The Chadha opinion, your Honor, held a number of things. It held the legislative veto provision to be unconstitutional. It also held and stated in its holding that it was not -- that separability was not a question of whether or not there was a separability clause in the act but was a question of whether or not the act would have been passed but for the legislative veto provision being in it, and on the facts of Chadha held that it would have so passed and therefore the rest of the act stood.

It did not mention the retroactive effect because it did not reach that question at all. It held the rest of the act, and the original thing that it did was to declare to be contrary to the constitution the action taken by Congress to allow certain people to be deported. Therefore, it was not reached.

If it please the court, we feel that there is a necessity, a duty conferred by statute and required to be done that somebody investigate charges. The question is who.

THE COURT: But it's very easy if there is a problem and the Supreme Court is wrestling with it, it would be simple enough to find a deputy solicitor from the Department of Labor to assign him to come over and work with EEOC jointly on these cases. I can't imagine that it would make any real difference which department investigated the case. I don't see that you can logically argue. It may be more efficient to have these cases in the hands of the EEOC, but I don't think it makes any significant long-range difference if it turns out that the Department of Labor, the Department of Commerce, or even the Internal Revenue Service were required to administer the act.

MR. WILLIAMS: If it please the court, that is the very gist of our argument as it relates to standing, that it makes no difference who does it. Somebody has to do it. It doesn't change the act. The act is still there.

THE COURT: The trouble with that, you see, is if an Internal Revenue agent came in here and said, "I want to see your personnel hiring records, or your layoff records," we would vacate the subpoena. We wouldn't hesitate a moment to vacate it. In fact, we do that regularly where some of these agents come in with demands for documents which don't pertain directly to taxes. We say, "That's none of your business, you can't have it."

Standing has never been really disputed if someone is pursuing documents and records. They have to show a right to pursue them. If the Department of the Army came in and wanted to look at these records, you wouldn't seriously argue that they could, I am sure.

MR. WILLIAMS: No, sir, but under the circumstances, if the transfer of authority to look at it had been through a reorganization plan submitted by Congress to the president -- submitted by the president to Congress, and that it had not been vetoed by Congress, even though that veto provision was in there, the legislative delegation of authority to reorganize the government was there. It has an offensive provision in it.

THE COURT: You are saying that I should disagree with the Mississippi court?

MR. WILLIAMS: Yes, sir.

THE COURT: Supposing that I either agreed or withheld decision on the theory that one case on its way to the Supreme Court is sufficient and we ought to wait and see what they do. Why is that a practical obstacle in this litigation?

MR. WILLIAMS: The practical obstacle in this litigation is, your Honor, that this is a subpoena enforcement action. We are in the process of attempting to investigate --

THE COURT: Your adversary concedes Mr. Donovan can investigate.

MR. WILLIAMS: I did not hear that, concedes that he can investigate?

THE COURT: That is my understanding. I specifically asked him who --

MR. WILLIAMS: Or that if the Secretary of Labor's name was on the subpoena, that he would comply with it?

THE COURT: That was my understanding of his position under his version of the law which the Mississippi court accepts, that you can't but Mr. Donovan can. Is that your position?

MR. MADIGAN: Yes, that's correct, your Honor.

THE COURT: Isn't there a simple practical solution to these cases rather than have a hundred different lawsuits on their way to the Supreme Court when one is already on its way?

MR. WILLIAMS: In this case, your Honor, I think that if he would submit to the subpoena by the addition of the Secretary of Labor's name to the pleadings in this matter, that we may be able to work something out.

THE COURT: I think that is what you ought to do. Understand that he takes --

MR. WILLIAMS: Do I have such an agreement?

THE COURT: The Secretary of Labor might well say this particular investigation is a waste of time and money and don't bother me with it. I think that is the underlying premise with which Mr. Madigan approaches this case.

MR. WILLIAMS: If it please the court, I would like to have an agreement with him that if the Secretary of Labor's name was added to this subpoena, that he would comply with it.

THE COURT: So stipulated?

MR. MADIGAN: Well, obviously there may be other questions about the subpoena, but as to the subject of jurisdiction --

THE COURT: The subpoena has been enforced already, hasn't it?

MR. MADIGAN: Yes, but there are some lingering issues which is part of the reason we are back before you.

THE COURT: You want the Secretary of Labor to sign it?

MR. MADIGAN: It has to be from a constitutionally authorized agency, and if the EEOC is going to agree that they are not the ones --

MR. WILLIAMS: No, sir we cannot agree to that.

THE COURT: They cannot agree to that because they don't know what will happen to the Allstate case, and as I sit here I can see that the Supreme Court might realize they opened up kind of a can of worms with the

Chadha case and the law clerks down there failed to recognize the retrospective problems, and they might clean up after themselves, which they have been known to do.

And so my understanding is that if the Secretary of Labor would sign on the investigation, that then there would be no objection to it continuing.

It seems to me that is a rational disposition of the matter. That doesn't prevent you from telling me it's a waste of time and money. I gather you believe or you wouldn't bother with this motion that the Department of Labor would not pursue this case for want of apparent merit.

MR. MADIGAN: That's correct.

THE COURT: That is your sole position.

MR. MADIGAN: That is with respect to their claim that everything comes out the same anyway. That is the position, that they cannot take the position that everything comes out the same.

THE COURT: Why can't they?

MR. MADIGAN: Because they have shown nothing to indicate that it would be the same. As you pointed out yourself, it may well be that the Department of Labor takes a look at what is involved here and Pan Am's circumstances, and says this is not one to jump into with great guns right up front.

THE COURT: And they might not.

MR. MADIGAN: That's right. It's mere speculation to say the same result would obtain if it was a different agency.

THE COURT: All right, but your position is that if the other agency signs the subpoena, that you have will comply with it?

MR. MADIGAN: That only one agency has the authority, and that we will recognize the one that we feel has the authority, and that is the Department of Labor.

THE COURT: One of them has the authority. Nobody is going to determine the authority finally until the Allstate case is decided. It's useless for me to give my views, whether they agree with or disagree with the court, which I have not read, because ultimately the Allstate case will be resolved by the higher court that made the problem in the first place.

If they would only think a little, you know, when they come down with these sweeping pronouncements and tell us that it is retrospective or it is not retrospective. For all I know I may have to give back part of my salary. All the judges got a pay raise that way. About the only way we can get it.

All right. How do you want to leave it?

MR. WILLIAMS: If it please the court, if we cannot arrive at an agreement that if the Secretary joins in this subpoena that he would produce the records, I think we are going to have to insist upon a decision.

THE COURT: I might simply decide that. I might decide it without prejudice to the ultimate resolution of the Allstate case. I don't see why that isn't a reasonable direction for this court to make. There is an ongoing investigation. The court has previously held that they were entitled to pursue it. There are persons who may be adversely affected if the investigation is stopped dead in its tracks for a period of months while the Supreme Court attends to the problem.

So I think it may be reasonable for this court simply to dispose of this motion by providing enforcement is stayed unless and until the Secretary of Labor shall co-sign the subpoenas. Once he does, then all the prior orders of this court issued in favor of the EEOC shall apply with full force to the Secretary of Labor.

If there is nothing more to be said, I think that is simply the way to dispose of this motion.

MR. MADIGAN: I have nothing further to offer in connection with that. I might suggest that if we could confer for a few moments, it might assist in a resolution.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Back on the record, yes, sir.

MR. MADIGAN: My suggestion was that perhaps if we had a few moments to confer with respect to a resolution following your suggestion --

THE COURT: Off the record

(Discussion off the the record)

(Recess)

MR. MADIGAN: Thank you, your Honor, I have an in-house legal department that likes to participate.

THE COURT: You tell them that a fellow who has a watchdog should let him do its own barking.

MR. MADIGAN: Pan Am would be prepared to comply with subpoenas issued by the Department of Labor and continue of course dealing with the Department of Labor in connection with the investigation, subject of course to any arguments based on the merits of the subpoena that is issued. I mean I can't agree now to comply with whatever they are going to send us, but as to the jurisdiction of the Department of Labor to issue the subpoena, Pan Am would raise no objection.

THE COURT: All right with him.

MR. WILLIAMS: If it please the court, I don't believe that quite meets the question. I think the question is put would they comply with the subpoena that has been issued in this case if it was also signed by the Secretary of Labor or his duly authorized representative.

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THE COURT: Yes, that's what he means.

MR. WILLIAMS: That is not what he said, your Honor.

MR. MADIGAN: I believe we'd be hard pressed to come back before the court --

THE COURT: Let me cut through it. I don't really believe Mr. Madigan intended to obfuscate in his choice of words, but this court was speaking in terms of any such subpoena being endorsed or co-signed by the Secretary of Labor or his duly authorized deputy. The court did not anticipate that the EEOC would be dismissed from the action. Rather it would be held, the issue of who could maintain the action eventually would be held in abeyance pending the resolution of the Allstate case, but the court apprehends that if the Secretary of Labor authorizes this investigation, there would be no jurisdictional exception to be taken from it.

MR. MADIGAN: That's correct, your Honor. We were not seeking to drop EEOC's name from the proceeding or from the caption, but I do want it clear for the record that any subpoena that is issued by the Department of Labor will be issued by a duly authorized representative and that is who we will be dealing with in connection with the investigation.

THE COURT: You will deal with --

MR. WILLIAMS: No, sir, your Honor.

THE COURT: The latter part I wouldn't require. You will deal with whoever the Secretary of Labor allows to deal with you, but the ruling is that the subpoena must be co-signed by the Secretary or his duly designated deputy, and if you have any problems which require authority, the authority and discretion is that of the Secretary of Labor pending resolution of this rather intricate problem by the Supreme Court?

MR. MADIGAN: That is our understanding, your Honor.

THE COURT: But you will probably still be dealing with the same people because it's assumed by the court the Secretary, if he authorizes the subpoena, will expect that this personnel which has ongoing familiarity with the case and some special expertise in this particular field, at least according to those who drafted the reorganization plan, would continue to do the day-to-day work.

All you are gaining is that you have an opportunity to require the Secretary of Labor to exercise his discretion as to whether he will or will not co-sign it, but once he co-signs it the case is in status quo.

MR. MADIGAN: I am not sure whether there is a misunderstanding or problem with this or not. It is our position that it is the Department of Labor, whoever the Department of Labor designates to carry on the investigation, the practical aspect of reviewing the records that may be subpoenaed by the Department of Labor. If they lawfully designate a representative to review those records, we will not contest the jurisdiction of that Department of Labor representative to look at the records. That is what we are agreeing to.

THE COURT: Even if he works for the EEOC?

MR. MADIGAN: If the delegation of enforcement authority is lawfully made by Department of Labor to the EEOC.

THE COURT: Now are you satisfied?

MR. WILLIAMS: If it please the court, I would like to ask one further question. In the event that the Secretary of Labor authorizes the Equal Employment Opportunity Commission and delegates full enforcement of this act as far as this case is concerned to EEOC, and there is a general right to delegate authority in the act, are we going to be back in here in the morning for another action involving the who the Secretary of Labor chooses to delegate the authority to investigate?

THE COURT: Not if the Secretary of Labor or a Deputy Secretary signs the subpoena. That is the critical thing here in my view: The subpoena would have to be signed buy the Secretary of Labor, and he cannot regard that has a purely routine ministerial act. He is exercising his own judgment and discretion when he does it. Once he does it he can require EEOC staff to continue in the pending state of confusion. If the Allstate case is affirmed, then it would be quite clear that the motion can be renewed. You just don't want to be at dead center in the meantime.

I think it would be better in the management of this case to disregard all this discussion and simply make the in the form of a ruling and then both of you can take an appeal, if you don't like the ruling, because I am afraid, although I did not detect it, I think there is a difference of language, Mr. Madigan, between what you are saying and what I am hearing on the one hand, and what Mr. Williams is apparently hearing on other. On reflection, maybe Mr. Williams is hearing it more accurately than the court is.

So I think we should start with a clean slate. There is no stipulation. The court disposes of this resolution in the following fashion:

The court finds that the pendency of an appeal in the Fifth Circuit and a direct appeal to the Supreme Court in the Allstate case makes its inexpedient for this court at this time to grant the relief requested herein to the extent that it would require this court to consider de novo a complex and difficult constitutional issue.

The court recognizes that any delay in this proceeding, if it is a meritorious proceeding, could redound to the detriment of public policy and also perhaps to the detriment of individual employees of Pan American or former employees of Pan American.

The court believes that a rational disposition of this motion is as follows, and the court now makes the following directions:

Compliance with the subpoena duces tecum issued by the petitioner, Equal Employment Opportunity Commission, EEOC, dated March 23, 1983, is from henceforward stayed in all respects unless and until that subpoena or a document substantially identical as to form shall be issued to Pan American World Airways bearing the signature of the Secretary of Labor or his duly authorized deputy for the purpose of issuing enforcement subpoenas in those statutory matters as to which the Secretary of Labor has jurisdiction to investigate and enforce compliance with such statutes.

The court does not in any way attempt to prejudge the issue of whether the Secretary of Labor will issue such a subpoena or will not do so. The court does not at this point consider whether the Secretary of Labor can associate himself in the investigation the staff members of Equal Opportunity Employment Commission, but I think it's quite obvious that if he wishes to, he may, and absent a court order staying any such subpoena when issued, it should be complied with; and the court does not have to decide what might happen tomorrow but I am giving you an indication.

The court declines to dismiss the EEOC's underlying petition herein or directing the EEOC to return to Pan Am the documents it has previously obtained because the court believes that one branch or another of the federal government will have and does have the continuing right to demand compliance with the statutes and to investigate alleged cases of noncompliance, and that if in the final analysis it be adjudged that the decision in EEOC against Allstate is affirmed, that the government could be expected to retransfer these activities to the Department of Labor, attempt to repass the Reorganization Act without violating the principles of the Chadha case, so that in this court's view, the Equal Employment Opportunity Commission can continue to hold those documents and can continue to consider them for the benefit of whatever branch of the federal government shall ultimately obtain the lawful right to administer the act and enforce compliance with the act, and that in the interim it's not contested that the Secretary of Labor has the right to investigate and subpoena documents, and compel compliance,

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and if he does so, that should be permitted, and pending such time as he shall resolve to pursue the production and inspection of additional documents, compliance with the subpoena henceforward should be and it hereby is stayed.

I trust that I have made clear my resolution of this motion, but if there is something which you gentlemen find unclear, you may call it to my attention immediately, and thereafter, I will direct that this be regarded as the disposition of this motion on the merits, and compliance therewith is directed, and the court reserves for future consideration whether the entire proceeding ought to be dismissed or not pending two things: The outcome of the Allstate litigation and the ultimate decision of the Secretary of Labor whether or not to issue the subpoena.

If the Secretary declines to issue the subpoena, we will deal with that event when it occurs.

Is there anything that I omitted to cover in the light of our somewhat lengthy discussion?

MR. WILLIAMS: No, your Honor.

MR. MADIGAN: No, that's fine. Thank you, your Honor.

THE COURT: All right. Thank you, counsel. The court will endorse the papers that it is disposed of in accordance with the oral directions and the oral directions shall be complied with.

MR. WILLIAMS: Thank you.

MR. MADIGAN: Thank you, your Honor.

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U.S. DIST. COURT S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner,	:	No. M18-304
v.	:	NOTICE OF MOTION
PAN AMERICAN WORLD AIRWAYS, Respondent.	:	

10/26

FILED
U.S. DISTRICT COURT
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S.D. OF N.Y.

PLEASE TAKE NOTICE that upon the affidavit of Kenneth J. McCulloch, sworn to on September 26, 1983, the Memorandum of Law submitted herewith, and upon all prior proceedings herein, respondent Pan American World Airways, Inc. ("Pan Am") will move this Court, before the Honorable Charles L. Brieant, United States District Judge for the Southern District of New York, at the United States Courthouse, Room 2103, Foley Square, New York, New York, on the 6th day of October, 1983, at 9:30 in the forenoon of that day or as soon thereafter as counsel may be heard, pursuant to Rule 12(h) of the Federal Rules of Court Procedure ("F.R.C.P."), or, alternatively, Rule 60(b) of the F.R.C.P., for an order (1) vacating the Order of this Court dated March 23, 1983 directing Pan Am to comply with a subpoena duces tecum issued by petitioner Equal Employment Opportunity Commission ("EEOC"), (2) dismissing the EEOC's underlying petition seeking enforcement of the subpoena, and (3) directing

Ret 10-6-83 before Judge Brieant

the EEOC to return to Pan Am any and all documents it has obtained from Pan Am in this matter, and for such other relief as the Court may deem just and proper.

Dated: September 26, 1983
New York, New York

TOWNLEY & UPDIKE

By: Kenneth McCulloch

A Member of the Firm
Attorneys for Respondent
Pan American World Airways, Inc.
405 Lexington Avenue
New York, New York 10174
(212) 682-4567

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner,	:	No. M18-304
v.	:	RESPONDENT'S MOTION TO VACATE ORDER AND DISMISS PETITION
PAN AMERICAN WORLD AIRWAYS, Respondent.	:	

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Now comes Pan American World Airways, Inc. ("Pan Am"), by its attorneys, Townley & Updike, and, pursuant to Rule 12(h) of the Federal Rules of Civil Procedure ("F.R.C.P."), or, alternatively, Rule 60(b) of the F.R.C.P., moves for an order (1) vacating the Order of this Court in this matter dated March 23, 1983; (2) dismissing the petition of the Equal Employment Opportunity Commission ("EEOC") seeking enforcement of a subpoena issued by the EEOC under the Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. § 621, et seq., and (3) directing the EEOC to return to Pan Am all information obtained from Pan Am in its investigation, because the EEOC lacks lawful authority to enforce the ADEA.

1. The EEOC alleges that it has authority to enforce the ADEA pursuant to the Reorganization Plan No. 1 of 1978 ("Reorganization Plan"), 43 F.R. 19807 (May 9, 1978), 92 Stat. 3781;

2. The Reorganization Plan was adopted pursuant to the Reorganization Act of 1977 ("Reorganization Act"), 5 U.S.C. § 901, et seq.;

3. Section 906(a) of the Reorganization Act provides for a one-house veto of all reorganization plans; and

4. Under the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, ____ U.S. ____, 51 U.S.L.W. 4907 (June 23, 1983), the one-house veto provided in Section 906(a) deprives the President of his veto power under Article I, Section 7 of the Constitution (the Presentment Clause); (b) violates Article I, Section 7's requirement of bicameralism; (c) violates the constitutional doctrine of separation of powers; and (d) constitutes an unlawful delegation of legislative authority to the Executive.

For the above-stated reasons, as more fully set forth in Pan Am's Memorandum in Support of Respondent's Motion to Vacate Order and Dismiss Petition, submitted herewith, Pan Am's motion should be granted in all respects.

Respectfully submitted,

Dated: September 26, 1983

Kenneth J. McCulloch

TOWNLEY & UPDIKE
Kenneth J. McCulloch
James D. Madigan, III
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner, v. PAN AMERICAN WORLD AIRWAYS, Respondent.	:	No. M18-304 AFFIDAVIT OF KENNETH J. McCULLOCH

-----------------------------------x

Kenneth J. McCulloch, an attorney admitted to practice in the State of New York, affirms under penalty of perjury:

1. I am a member of the firm of Townley & Updike, attorneys for Pan American World Airways, Inc. ("Pan Am"), the respondent in the above-captioned matter.

2. I make this affidavit in support of Pan Am's motion (1) to vacate the Order of this Court in this matter dated March 23, 1983, (2) to dismiss the petition filed by the Equal Employment Opportunity Commission ("EEOC") to compel enforcement of a subpoena; and (3) to direct the EEOC to return to Pan Am any and all documents it has obtained from Pan Am in this matter.

3. In an Order dated March 23, 1983, this Court directed Pan Am to permit the EEOC to make an on site examination of records located at Pan Am facilities in connection with investigation of charges of discrimination

under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq.

4. The on site examination has not been conducted. In a letter dated August 25, 1983, the EEOC requested additional information from Pan Am to be delivered by September 26, 1983. A copy of the letter is annexed to this Affidavit as Exhibit A.

5. The EEOC's purported exercise of authority in this case is based on the Reorganization Act of 1977, 5 U.S.C. § 901, et seq. ("Reorganization Act") and the Reorganization Plan No. 1 of 1978, 43 F.R. 19807 (May 9, 1978), 92 Stat. 3781 ("Reorganization Plan") under which EEOC was delegated responsibility for enforcement of the ADEA. Under the recent decision of the Supreme Court in Immigration and Naturalization Service v. Chadha, _____ U.S. ____, 51 U.S.LW. 4907 (June 23, 1983), the Reorganization Act and the Reorganization Plan have been invalidated as constitutionally defective. EEOC v. Allstate Insurance Co., Case No. 582-0186 (S.D. Miss. August 19, 1983). This deprives the EEOC of authority to proceed in this matter.

Kenneth J. McCulloch

KENNETH J. McCULLOCH

Sworn to before me this

26th day of September, 1983

Deborah D. von Mehren

DEBORAH D. VON MEHREN
Notary Public, State of New York
No. 60-4744860
Qualified in Westchester County
Cert. Filed in New York County
Commission Expires March 30, 1985

EXHIBIT A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET
NEW YORK, NEW YORK 10007
(212) 264-1961

August 25, 1983

Kenneth McCulloch, Esq.
Townley & Updike
405 Lexington Avenue
New York, New York 10174

Re: 021-82-5243 etc.
Arnell, et. al. v. Pan Am

Dear Mr. McCulloch:

In accordance with the agreement reached between the EEOC and Pan American Airways, as specified in Senior Trial Attorney, Saul Krenzel's letter to you dated April 1, 1983, the Commission is requesting additional information that is needed to continue our investigation of the above mentioned charges.

Please provide, or produce for inspection, on or before September 26, 1983, home addresses and telephone numbers for all persons identified as "retired" in the data submitted to the Commission in April of this year. For your information, a hand-written list of the individuals for whom addresses and phone numbers are requested is enclosed.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey Hartman

Jeffrey Hartman
Equal Opportunity Specialist

JH:pr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-304

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS,

Respondent.

NOTICE OF MOTION

MOTION

AFFIDAVIT OF KENNETH J. McCULLOCH

TOWNLEY & UPDIKE
CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, N. Y. 10174
(212) 682-4567

ATTORNEYS FOR Pan American World Airways, Respondent.

REFER COMMUNICATIONS TO

RECEIVED
1983 SEP 26 P 5:21
U.S. DIST COURT S.D.N.Y.

MEMO ENDORSED

U.S. DISTRICT COURT
FILED
OCT 26 1983
S. D. OF N.Y.

SEP 26 1983
LEGAL
E. E. O. C. — N. Y. D. O.

OCT 26 1983

This motion is disposed of in accordance with the oral directions of the Court made this day. See transcript. Compliance therewith is directed.

SO ORDERED

Charles L Brieant

HI[illegible]
[illegible]

FILED

[illegible]

[illegible] U.S. DIST. COURT
[illegible] DIST. OF TENN.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MULLER OPTICAL COMPANY and ROBERT E. LONG, Plaintiffs,	
VS.	CASE NO. 83-2836 H
THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	

ORDER DENYING PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

Plaintiffs Muller Optical Company and its president, Robert E. Long, seek a temporary restraining order or preliminary injunction prohibiting the defendant, Equal Employment Opportunity Commission (EEOC), from requiring Long to appear at a deposition and produce documents in compliance with a subpoena issued by the EEOC. The Court held a hearing on this matter, and, after a full review of the record and careful consideration of the issues involved, enters this Order DENYING plaintiffs' motion.

This action is the culmination of a controversy that began when plaintiffs' former employee, Vera Marie Adkins, filed

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 11/14/83.

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a charge with the EEOC contending that Muller had discharged her because of her age and her sex. After Muller resisted the EEOC's several attempts to investigate Adkins' charge, the EEOC issued a subpoena, pursuant to the Age Discrimination in Employment Act, ordering Long to appear at the EEOC's office on October 14, 1983. The subpoena required Long to bring specified records and testify before EEOC personnel. In an effort to avoid complying with this subpoena, the plaintiffs filed this action. The plaintiffs contend the EEOC lacks jurisdiction under the Age Discrimination in Employment Act (ADEA) to investigate Adkins' charge.

Plaintiffs' Contentions:

To understand plaintiffs' contention that the EEOC is without authority to investigate an age discrimination charge, it is necessary to look at the underlying legislation. Under Reorganization Plan No. 1 of 1978, the statutory responsibility for administering and enforcing the Age Discrimination in Employment Act was transferred from the Secretary of Labor to the EEOC effective July 1, 1979. This Reorganization Plan was enacted pursuant to the Reorganization Act of 1977, 5 U.S.C. 901 et seq. Through this Reorganization Act, Congress gave the President of the United States authority to restructure and reorganize the executive branch and its agencies. 5 U.S.C. §§ 901, 903. The President was empowered to prepare reorganization plans and submit such plans to both Houses of Congress. 5 U.S.C. § 903. If during the sixty days after a plan was transmitted to Congress, neither house passed "a resolution stating in substance that the House does not favor the reorganization plan," then the reorganization plan became effective. 5 U.S.C. § 906(a). Thus, the Reorganization Act included a legislative veto provision.

The plaintiffs here contend that the presence of a legislative veto provision in the Reorganization Act that authorized the transfer of responsibility for administering and enforcing the ADEA from the Secretary of Labor to the EEOC renders that transfer void. The plaintiffs base their argument on the recent United States Supreme Court decision _Immigration and Naturalization Service v. Chadha_, 103 S. Ct. 2764 (1983). In _Chadha_ the Supreme Court held unconstitutional a section of the Immigration and Nationality Act authorizing either House of Congress to invalidate the Attorney General's decision to allow a particular deportable alien to remain in the United States. _Id._ at 2788. The Court held in _Chadha_ that the House of Representative's veto of the Attorney General's decision violated the constitutional requirement that legislative acts be passed by _both_ Houses of Congress and presented to the President. Because the one House veto exercised by the House of Representatives failed to comply with these constitutional requirements of bicameralism and presentment, the Court severed the legislative veto provision of the Immigration and Nationality Act and declared the severed provision unconstitutional.

The plaintiffs contend that the presence of the legislative veto within the Reorganization Act serves to invalidate the reorganization plans implemented under the Act. In the plaintiffs' view, there has been no valid statutory grant of authority empowering the EEOC to enforce the ADEA, and therefore, the EEOC has no jurisdiction to subpoena plaintiff Long as a part of an investigation of Adkins' age discrimination charge.

DEFENDANT'S CONTENTIONS:

The EEOC agrees that the Reorganization Act, which authorized the President to transfer the administration of the ADEA from the Secretary of Labor to the EEOC via a reorganization plan, does contain a one House veto provision similar to the one found unconstitutional in Chadha. The EEOC, however, advances several arguments to support its contentions that plaintiffs have not established that they are entitled to injunctive relief, nor have they established that the EEOC lacks jurisdiction to investigate Adkins' age discrimination charge. The EEOC's arguments may be summarized as follows:

1. Plaintiffs have not demonstrated that they are entitled to injunctive relief by showing: (a) there is a substantial likelihood they will succeed on the merits; (b) they will suffer irreparable injury absent injunctive relief; (c) granting the injunction would cause no substantial harm to others; and (d) the public interest would be served by issuing injunctive relief.

2. Plaintiffs lack standing to challenge the validity of the legislative veto since plaintiffs have suffered no injury

in fact as a result of the presence of the legislative veto in the Reorganization Act.

3. The *Chadha* decision is not applicable here since the transfer from the Secretary of Labor to the EEOC did not involve any unilateral action by only one House of Congress.

4. The *Chadha* decision is not applicable since here the effect of the challenged Reorganization Plan was merely to transfer the enforcement power from one executive agency to another; the transfer determined who enforced the substantive rights created under the ADEA, but it otherwise had no effect on those rights.

5. Congress would have passed the Reorganization Act even if the legislative veto had not been included in the Act. From this, it follows that the unconstitutional one House veto provision is severable from the remainder of the Reorganization Act.

6. In subsequent legislation that does meet the requirements of bicameralism and presentment, Congress has *ratified* the transfer of the administration and enforcement of the ADEA from the Secretary of Labor to the EEOC.

7. Even if *Chadha* does dictate that the Reorganization Act be held unconstitutional and even if Congress has not subsequently ratified the transfer challenged here, the ruling of unconstitutionality should not be applied retroactively.

8. Irreparable harm has not been shown because plaintiffs failed to demonstrate that the EEOC is handling

Adkins' age discrimination charge any differently than would the Department of Labor had enforcement not been transferred.

STANDING:

The EEOC argues that the plaintiffs lack standing to challenge the EEOC's jurisdiction over age discrimination charges. Article III of the Constitution "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' Gladstone, Relators v. Village of Bellwood, 441 U.S. 91, 99 . . . (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 . . .(1976)." Valley Forge Christian College v. Americans United for Separation of Church and State, 102 S. Ct. 752, 758 (1982) (footnote omitted).

The EEOC contends that in order to challenge the legislative veto provision of the Reorganization Act the plaintiffs must demonstrate they have suffered injury in fact stemming from the one House veto provision they attack. Since neither the House of Representatives nor the Senate exercised its legislative veto under the Reorganization Act to prevent the ADEA transfer, EEOC contends that the plaintiffs have suffered no injury in fact and therefore have no standing to challenge the EEOC's authority. The Court finds that the EEOC misperceives the nature of the injury in fact sufficient to confer standing. The plaintiffs do not contend that the failure of either House of

Congress to exercise the legislative veto caused them injury. Rather, plaintiffs allege their injury arises from the EEOC's issuance of a subpoena that--in plaintiff's view--the EEOC is not constitutionally authorized to issue.

The Court finds that plaintiffs have indeed suffered injury in fact sufficient to confer standing to challenge the defendant's authority to issue the subpoena. Plaintiffs have been subpoenaed to appear with books and records in hand before the EEOC. If plaintiffs comply with the subpoena and the EEOC is without authority to issue the subpoena, then plaintiffs have been subjected to an intrusive and time consuming investigation by a governmental agency acting outside the law. On the other hand, if plaintiffs do not comply with the subpoena, then they may be subjected to court action initiated by EEOC to enforce compliance with the subpoena. 15 U.S.C. § 49. Failure to obey a court order enforcing the subpoena is punishable as contempt and may also subject these plaintiffs to a fine and/or imprisonment. 15 U.S.C. § 50. This threatened injury also qualifies as injury in fact sufficient to confer standing. If plaintiffs succeed and this action results in a decision favorable to them, their injury can be redressed by an injunction forbidding the defendant from enforcing its subpoena.

<u>APPLICABILITY OF CHADHA</u>:

Plaintiffs contend that the Supreme Court's decision in <u>Chadha</u>, <u>supra</u>, invalidates the transfer of ADEA administration and enforcement from the Secretary of Labor to the EEOC. This

Court is aware that, subsequent to the Supreme Court's ruling in Chadha, the constitutionality of provisions containing legislative vetos is being challenged on many fronts. Because of the newness of the Chadha decision, this Court is sailing in largely uncharted seas.[1] Nevertheless, after a careful reading of Chadha the Court holds that the Supreme Court's reasoning and holding in Chadha do not necessitate a ruling that the EEOC is without authority to investigate an age discrimination charge under the ADEA.

There are significant distinctions between the exercise of the legislative veto held invalid in Chadha and the presence of a legislative veto in the Reorganization Act challenged here. Chadha dealt with a situation where, through the Immigration and Nationality Act, Congress had delegated to the executive branch (specifically to the Attorney General) "the authority to allow deportable aliens to remain in this country in certain specified circumstances." 103 S. Ct. at 2786, 2770 n.1. By unilaterally vetoing the Attorney General's decision allowing Mr. Chadha to remain in the United States, the House of Representatives "took action that had the purpose and effect of altering the legal

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[1]The Court is aware of only one published post Chadha decision dealing with this issue. In EEOC v. Allstate Ins. Co., 32 Fair Empl. Prac. Cas. (BNA) 1337 (S.D. Miss. 1983), a federal district court found that the presence of a legislative veto in the Reorganization Act of 1977 invalidated the entire Act. That court then held that Reorganization Plan 1 of 1978, implemented under the Act, was ineffective to transfer the power to enforce the Equal Pay Act from the Secretary of Labor to EEOC. That decision, of course, is not binding on this Court. This Court does not concur in that decision.

rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." 103 S. Ct. at 2784. The Supreme Court stated that once Congress has delegated its authority, Congress must abide by that delegation "until that delegation is legislatively altered or revoked." 103 S. Ct. 2786. Unilateral action by only one House of Congress is constitutionally insufficient to effect such an alteration or revocation.

In contrast, the transfer from the Secretary of Labor to the EEOC of the authority to administer and enforce the ADEA did not involve the exercise of a legislative veto. Either House of Congress could have halted the transfer by vetoing it within sixty days of the President's transmittal of the Reorganization Plan to Congress. However, neither House took any veto action. Furthermore, the legislation involved in the ADEA transfer merely shifted from one administrative body to another the power to enforce legislaton that had already been approved by both Houses of Congress and the President. Unlike in Chadha, where the House's veto would have resulted in the deportation of Mr. Chadha, Reorganization Plan 1 of 1978 did not affect any substantive rights.

Although the Supreme Court did find the one House veto constitutionally deficient, Chadha is not read by this Court to hold that the mere presence of a one House veto provision in a legislative scheme will invalidate the entire legislative scheme. To the contrary, the Supreme Court, in Chadha, severed the offensive one House veto provision and left intact the remainder of the Immigration and Nationality Act. 103 S. Ct. at 2774-76, 2788. This Court then must address the issue whether the legislative veto is severable from the Reorganization Act of 1977.

SEVERABILITY:

The plaintiffs here contend that the Reorganization Act's one House veto provision is not severable, and, therefore, the entire Reorganization Act (and all reorganization plans implemented thereunder) must be invalidated. Defendant EEOC maintains that the one House legislative veto is severable from the remainder of the Reorganization Act of 1977 and that the reorganization plans implemented thereunder remain valid.

Because the Reorganization Act of 1977 does not contain a severability clause,[2] the Court must try to determmine whether Congress would have enacted other portions of the statute in the absence of the invalidated legislative veto provision. Consumer Energy Council v. Federal Energy Regulatory Commission, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd, 51 U.S.L.W. 3935 (June 28, 1983). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may

[2]As the Supreme Court stated in United States v. Jackson, 390 U.S. 570 (1968), "whatever relevance such an explicit [severability] clause might have in creating a presumption of severability, the ultimate determination of severability will rarely turn on the presence or absence of such a clause." 390 U.S. at 585 n.27 (citations omitted).

be dropped if what is left is fully operative as a law." Buckley v. Valeo, 424 U.S. 1, 109 (1976) (quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932)).

To determine whether Congress would have enacted the other provisions of the Reorganization Act of 1977 in the absence of the one House veto provision requires an examination of the Act and its legislative history, along with an unavoidable attempt at clairvoyance.

The practice of Congress' delegating to the President the authority to reorganize the executive branch via reorganization plans is not new; the first reorganization act gave this power to President Hoover in 1932. H.R. Rep. No. 95-105, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Ad. News 41, 44 [hereinafter House Report]. Since the first reorganization act, Congress has from time to time renewed or modified the reorganization act to allow the President a specific time period in which to submit reorganization plans. The scope of authority granted the President and the manner by which reorganization plans must be approved has also varied. House Report at 44-46. The initial reorganization act provided for Congressional disapproval of reorganization plans by either House of Congress, and some form of one House veto has been included in most subsequent renewals or extensions of the act.

In ascertaining whether Congress would have enacted the balance of the Reorganization Act of 1977 in the absence of the legislative veto, it is necessary to look at the reasons Congress articulated for adopting the Act. The legislative history of the Act emphasizes that in our rapidly changing society "[f]unctions change, new methods are developed, bureaucratic structures become obsolete, new laws are passed." House Report at 43-44. To adapt to such changes modification of the government's organizational structure is needed. See 5 U.S.C. § 901. Congress expected the Reorganization Act to bring about changes in the executive branch that would result in "cost reduction, improved management and better services to the public." House Report at 43.

Rather than employing the normal legislative process, Congress chose to use the legislative veto and thereby delegate the responsibility for such reorganization to the President; such delegation was chosen because it was speedier and more expeditious. House Report at 44; 5 U.S.C. § 901(a)(b). The Act's legislative history clearly shows that in choosing this route Congress was aware of the questionable constitutionality of the legislative veto. House Report at 42-43, 49-57, 63-70. Despite this awareness, Congress did not omit the legislative veto provision but, instead, took several measures to "strengthen the role of Congress and help allay, in part, those fears of unconstitutionality." House Report at 43.

First, in an effort to lessen objections to the use of the legislative veto, Congress made several modifications in the procedure by which the reorganization plans were to be handled by Congress. To assure that Congress would have an opportunity to vote on every plan, the Act provided that each time a reorganization plan was transmitted to Congress, a resolution stating that the reorganization plan was disapproved was to be introduced in both the House and Senate. 5 U.S.C. §§ 909, 910. The disapproval resolution was then to be referred to designated committees in each House; and the committees were to make their recommendations to their respective House within forty-five days. 5 U.S.C. § 910. If a committee did not report a resolution within the specified time, the committee was deemed discharged from further consideration of the resolution and the resolution was placed on the appropriate calendar of the House involved. 5 U.S.C. § 911. Thereafter, any member of the respective House could move to proceed to reconsideration of the disapproval resolution. 5 U.S.C. § 912. This plan was devised to "virtually guarantee a vote within the 60-day period in all cases and [guarantee] that Congress [would] have the opportunity to consider and act upon reorganization plans in a reasonable and expeditious manner." House Report at 48.

In addition to these procedural safeguards designed to insure a Congressional vote on each plan, Congress also included safeguards in the form of limitations on Presidential authority. Under the Reorganization Act of 1977, the President could not abolish enforcement functions or statutory programs, 5 U.S.C. § 903(a)(2), nor could he abolish independent regulatory agencies or their functions or consolidate two or more such independent regulatory agencies, 5 U.S.C. § 905(a)(1). These limitations had not been present in previous reorganization plans. House Report at 46, 47.

Having established that Congress was well aware that the presence of the legislative veto created "serious constitutional questions," House Report at 42, and that in light of such questions Congress adapted the Reorganization Act to increase Congressional involvement and lessen the authority delegated to the President, the Court is still faced with the problem of whether Congress would have enacted the Act absent the one House veto provision. Some evidence that Congress would not have done so can be found in Congressman Robert Drinan's separate views appended to the Act's legislative history. House Report at 66-70. Congressman Drinan questioned the necessity of bypassing the normal legislative process and risking that the courts would hold the Act unconstitutional. He stated that the Act "intentionally does not contain a severability clause. The one House veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization. That is a proposition to which all agree." House Report at 69. Despite Congressman Drinan's assertion, there is no evidence in the Act or in the House Report that a severability clause was considered. Instead, the House Report shows that the committee rejected a proposal that would have required the passage of a resolution by both Houses before a reorganization plan could go into effect. Whether a severability clause was even considered is not mentioned in the Committee's Report.

Based on this review of the Reorganization Act of 1977 and its legislative history, the Court cannot say that "it is evident that the legislature would not have enacted" the other provisions of the Reorganization Act independent of the legislative veto provision. Buckley, supra, at 109. Congress was keenly aware of the need for reorganization of the executive branch and adopted the most expeditious means of accomplishing such a reorganization. Several reorganization plans were implemented under the Reorganization Act of 1977, and these plans made many changes in the organizational structure of the executive branch of government. Nowhere is it evident that Congress would not have enacted the mechanism for reorganization of the executive branch absent the use of the legislative veto provision. Since, absent the one House veto provision, the remainder of the Reorganization Act "is fully operative as a law," the Court finds the invalid legislative veto provision severable and thus, the remainder of the Act valid.

Because of the admitted difficulty in attempting to divine post facto what Congress would have done, the Court is reluctant to base its holding solely on the severability of the one House veto. Consequently, the issue of Congressional ratification will also be addressed.

CONGRESSIONAL RATIFICATION:

The defendant EEOC argues that even if Reorganization Plan No. 1 of 1978 lacked the constitutionally required attributes of bicameralism and presentment, subsequent Congressional ratification of the Plan has cured these problems.

When the President, by executive order, has taken action that he may not have been authorized to take, Congress, in some situations, has the power to ratify the President's action and thus legitimize any irregularity. Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937). Such Congressional ratification may occur when both Houses of Congress either pass legislation appropriating funds to implement the executive order or make reference to the executive order in subsequently passed legislation. Id at 147-48. See also Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 118-19 (1947); Ex parte Mitsuye Endo, 323 U.S. 283, 303 n.24 (1944); Swayne & Hoyt v. United States, 300 U.S. 297, 301-302 (1937).

An examination of the Isbrandtsen-Moller decision is instructive since the situation there is analogous to the case at bar. There, by executive order, the President had abolished the Shipping Board and transferred its functions to the Secretary of Commerce. Subsequently, the Secretary of Commerce issued an order requiring the plaintiff shipping company to file certain records with the Secretary; the plaintiff shipping company then brought an action to restrain the enforcement of the Secretary's order. 300 U.S. 140-44. In challenging the Secretary's authority to issue the order, the shipping company argued that Congress had not intended that the President abolish the Shipping Board and transfer the Board's functions to the Secretary of Commerce, and, thus, the Secretary was without authority to issue the order. The United States Supreme Court held that via subsequent appropriation acts, which made appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the Shipping Act and made reference to the executive order, "Congress appear[ed] to have recognized the validity of the transfer and ratified the President's action." 300 U.S. at 147. In addition to finding Congressional ratification in the appropriations acts, the Supreme Court relied on Congressional mention in the Merchant Marine Act of 1936 that the functions formerly performed by the Shipping Board were "now vested in the Department of Commerce pursuant to . . . the President's Executive order." 300 U.S. at 148 (quoting 46 U.S.C.A. § 1114(a). The Court found that Congress had ratified the action taken by the President in his executive order.

Here the EEOC contends that by subsequent legislative action Congress has ratified the transfer of administering and enforcing the ADEA from the Secretary of Labor to the EEOC. Two recent appropriations acts clearly indicate that money appropriated to the EEOC is to be used to enforce the Age Discrimination in Employment Act, as well as to enforce Title VII. Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1874 (1982); Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183, 1192 (1981). Both of these bills were approved by both Houses of Congress and signed by the President. Additionally, Section 905 of the Civil Service Reform Act of 1978, 5 U.S.C. § 1101 notes, provides that any provision of either Reorganization Plan Numbers 1 or 2 of 1978 that is inconsistent with the Civil Service Reform

Act of 1978 is thereby superseded. The Civil Service Reform Act of 1978 did not affect Reorganization Plan 1's transfer of ADEA enforcement; therefore, the Court finds that Congress impliedly ratified the portions of the Reorganization Plan that transferred jurisdiction of the ADEA to the EEOC.

The Court is aware that in the same situation another district court did not find Congressional ratification of the Reorganization Act. See supra p.8 n.1. There is a line of cases standing for the proposition that when administrative action has raised "serious constitutional problems," specifically procedures of doubtful constitutionality affecting a person's due process rights to confrontation, the Supreme Court will look for "explicit action by lawmakers" and will not infer delegation or ratification without such explicit action. Greene v. McElroy, 360 U.S. 474, 506-08 (1959). The transfer of administrative functions from one governmental agency to another at issue here, however, does not involve such serious constitutional rights.

Under the reasoning of Isbrandtsen-Moller, the Court finds that through the appropriations acts and the Civil Service Reform Act of 1978, Congress has ratified the transfer of the administration and enforcement of the ADEA from the Secretary of Labor to the EEOC.

CONCLUSION

The Court finds, based on the severability of the one House veto provision from the remainder of the Reorganization Act and upon subsequent Congressional ratification of Reorganization

Plan No. 1 of 1978, the Reorganization Plan validly transferred responsibility for the administration and enforcement of the Age Discrimination in Employment Act from the Secretary of Labor to the Equal Employment Opportunity Commission. Because of this conclusion, it is obvious that plaintiffs are not entitled to injunctive relief. Plaintiffs' ground for relief is based on the allegation that the EEOC lacks jurisdiction to investigate age discrimination charges. Having found that the EEOC does possess such jurisdiction, the Court hereby denies plaintiffs' motion for injunctive relief. Plaintiffs have no probability of success on the merits in this case. The EEOC is therefore authorized to proceed forthwith in its investigation of the charge against Muller Optical Company.

ENTERED this 10th day of November, 1983.

ODELL HORTON, JUDGE
UNITED STATES DISTRICT COURT

ANALYSIS AND PERSPECTIVE

LEGISLATIVE PROCESS

Congress Has Post-'Chadha' Legislative Veto Options

By Stanley M. Brand

Mr. Brand, a partner at Washington, D.C.'s Brand, Lowell, Nickerson & Dole, formerly served as general counsel to the clerk of the House of Representatives. He was counsel in all three veto cases mentioned in this article.

The discussion of the regulatory environment after the Supreme Court's sweeping decision striking down legislative vetoes in *INS v. Chadha*,[1] and the summary affirmances in *Consumers Energy Council of America v. FERC*[2] and *Consumers Union of the United States v. FTC*,[3] inevitably turns to the alternative means to which Congress may look to restore meaningful review of agency action. And these alternatives become important to persons who participate in the legislative process on behalf of groups or organizations affected by the Supreme Court's decision.

The decision itself specifically sanctions one method and mentions two others that could be used constitutionally to check or limit agency action.

The first of these methods, the so-called "report and wait" device, was sanctioned on the ground that Congress may constitutionally delay the effectiveness, or "stay," agency rulemaking.[4] The purpose of the report and wait is to announce agency intentions in a particular regard, and delay effectiveness for a prescribed statutory period, to allow Congress to review the proposal, and if it deems necessary, further delay or stay effectiveness, or pass legislation barring the effectiveness of the whole or part of the regulations.

This method was effectively used and defended by Congress in delaying the leasing of wilderness areas for oil and gas exploration under §204(e) of the Federal Land Policy and Management Act of 1976.[5] In *Pacific Legal Foundation v. Watt*,[6] the House Committee on Interior and Insular Affairs invoked §204(e) and declared that an emergency existed in three wilderness areas, thereby triggering the mandatory withdrawal of public lands from oil and gas leasing by the secretary of interior. The secretary was sued by lease applicants and member organizations claiming the committee-ordered withdrawal was an unconstitutional legislative action taken without concurrence of the full House or Senate and presentation to the President.

Delay Permissible

The House and Senate, as amici curiae, urged that construed as a report-and-wait provision, the §204 withdrawal was constitutional. The court found that such a limiting construction would save the statute from infirmity and held that so long as Congress did not attempt to limit the secretary's discretion by purporting to set the scope or duration of the withdrawal, it was within congressional power to delay the effectiveness of a decision to lease wilderness areas for a "reasonable time" to permit Congress to study the report required to be filed by the secretary and pass plenary legislation.[7]

While the time for a report and wait is typically short, there is nothing to prevent Congress from using longer waits or renewing the delay consecutively until it is satisfied with the agencies' promulgation. In the Pacific Legal Foundation case, for example, the report and wait resulted in a general moratorium on wilderness leasing for a much longer period, as part of an ultimate political compromise between the secretary and Congress.[8] Thus, the report and wait can be an effective means of congressional review of agency action.

Two other methods expressly mentioned by the Court were oversight and durational limits on authorizations.[9] The Court did not mention limits on annual appropriations, or the so-called appropriations rider, but these express limits on the ability of agencies to spend money are clearly constitutional, as long as they do not offend other guarantees of rights.[10]

Oversight Insufficient

Congressional oversight is another fundamental means of legislative check on agency action. However, having represented the House and various of its committees during the recent investigation of EPA mismanagement of toxic waste cleanup under the so-called Superfund law,[11] I believe oversight cannot serve as a complete substitute for the kind of review provided by the legislative veto, particularly in view of the enormous congressional resources needed to start up and follow through on vigorous oversight.

Moreover, there are necessary but unfortunate side effects to the aggressive performance of oversight, not the least of which is the negative impact on the morale and efficacy of agency personnel while attention and energy is diverted temporarily to congressional requests for information and temporarily away from administration of the programs being reviewed. This can produce deleterious effects on the regulated community seeking decisions from an agency on myriad pending matters sometimes while it is under congressional siege.

Stimulating meaningful congressional oversight also can be difficult, given the wide range of programs and agencies under committee scrutiny. And on occasion, the executive branch has sought to block effective oversight, with claims of privilege, further delaying and impeding effective oversight efforts.[12]

And finally, the focus of oversight generally concerns not a single rule or regulation, but the administration of an entire agency or program. The ability of Congress to succeed in altering agency action through oversight is limited as well by established doctrines that require agency decisionmakers to obdurately steel themselves against undue congressional influence.[13]

As already mentioned, the appropriations rider is an available technique to limit agency discretion. These can vary from outright bans on types of rules to restrictions on particular projects. Congress frequently limits, through general administrative provisions, the amount or manner in which appropriated money may be spent. For example, a provision was included in an appropriation for the Department of Interior and related agencies for 1979 providing that none of the funds "shall be available to the Smithsonian Research Foundations,"[14] and a provision was enacted as part of the appropriation for Department of Transportation and related agencies for 1978 providing that "(n)one of the funds provided in this act shall be available for the planning or execution of programs for any construction or improvements at Flushing Airport in New York City."[15] To cite another example, a provision in the Department of Defense Appropriation Act of 1978 states that "(n)one of the funds appropriated by this Act shall be available for any research involving uninformed or nonvoluntary human beings as experimental subjects."[16]

Scores of these types of prohibitory statutory provisions may be found in other appropriations laws.[17] But new rules adopted by the House prior to *Chadha* further limit the ability of proponents of appropriations riders to offer amendments on the House floor,[18] and so additional internal procedural difficulties now stand in the way of this device as a check on agency action.

More radical approaches also are available, and some of these have been suggested to Congress. For example, consideration might be given to repeal of existing delegations and a requirement instead that the chief executive obtain individual approval, by way of joint resolution or act of Congress, for military sales above an acceptable and feasible threshold level. Former Sen. Jacob K. Javits (R-N.Y.), a principal proponent and architect of the War Powers Resolution, already has suggested amendment of that historic legislation to replace the legislative veto provision with a joint resolution to be presented to the President.[19]

Through repeal of existing delegations, in effect, Congress could impose a one-house veto, for if the President were required to obtain authorization to sell jets to Libya, for example, for more than $25 million, one House could block such a sale by inaction or failure to achieve majority approval.[20] As pointed out by one foreign policy expert, the decision augurs an era of increased difficulty for presidential actions in the normal legislative regime, for now "the administration needs to win both Houses not just one."[21]

In the wake of *Chadha*, Congress already has constricted agency discretion in the domestic area during its consideration of the Consumer Product Safety Commission authorization for fiscal year 1984.[22] More carefully defining delegations of authority is another alternative, but as pointed out in dissent, the elimination of the legislative veto presents Congress with the "hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape. . . ."[23] For those in the regulated community, this hopeless task is also risky business, for it produces uncertainty among those trying to order their affairs around anticipated government action.

And finally, the Congress might determine to withhold substantive rulemaking authority from agencies, requiring them to institute administrative adjudications against alleged violators or enter orders imposing remedial restraints against adjudicated wrongdoers.[24] For example, prior to 1974, the FTC possessed no authority to make substantive rules and enforced laws committed to its jurisdiction exclusively in this manner.[25]

Congress might determine that broad rulemaking authority, concededly a legislative power,[26] should be reserved for Congress, if not subject to review by the legislature. While the total range of congressional responses to *Chadha* cannot be anticipated, the foregoing represent at least some of the major options available to Congress.

[1] 103 S. Ct. 2764 (1983).

[2] 103 S. Ct. 3556 (1983).

[3] *Id.*

[4] INS v. Chadha, 103 S. Ct. at 2776, n.9.

[5] 43 U.S.C. §1714(e).

[6] 529 F. Supp. 982 (D. Mont. 1982), *reconsideration denied*, 529 F. Supp. 1194 (D. Mont. 1982).

[7] Pacific Legal Foundation v. Watt, 529 F. Supp. at 1005.

[8] Subsequent to the withdrawal and the entry of judgment, the secretary represented to the committee that he would refrain from leasing wilderness areas until expiration of the Congress to permit consideration of comprehensive legislation on the subject. *See* Pacific Legal Foundation v. Watt, 529 F. Supp at 1195-1196.

[9] INS v. Chadha, 103 S. Ct. 2776.

[10] 448 U.S. 297 (limits on Medicaid funds for abortion). *E.g.*, Harris v. McCrae.

[11] Pub. L. No. 95-510, 94 Stat. 2726, *codified at* 42 U.S.C. §§9601 et seq *and see* United States v. House of Representatives of the United States, 556 F. Supp. 150 (D.D.C. 1983); "Contempt of Congress," Report of the House Committee on Public Works and Transportation, Congressional Proceedings Against Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, for Withholding Subpoenaed Documents Relating to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, H.R. Rep. No. 968, 97th Cong., 2nd Sess. 58-64 (1982).

[12] *E.g.*, "The Petroleum Import Fee: Department of Energy Oversight, 18th Report by the House Committee on Government Operations," H.R. Rep. No. 1099, 96th Cong., 2nd Sess. 43, 44 (1980) (letter from Lloyd N. Cutler, counsel to the president, to Chairman Toby Moffett (D.-Conn.) claiming executive privilege).

[13] D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1248 (D.C. Cir. 1972); Koniag v. Andrus, 580 F. 2d 601 (D.C. Cir. 1978); Pillsbury v. FTC, 354 F.2d 952 (5th Cir. 1966). *But see*, Sierra Club v. Costle, 657 F.2d 298, 409-410 (D.C. Cir. 1983).

[14] Pub. L. No. 95-465, 92 Stat. 1279, 1298 (Oct. 17, 1978).

[15] Pub. L. No. 95-85, §316, 91 Stat. 402, 417 (Aug. 2, 1977).

[16] Pub. L. No. 95-111, §840, 91 Stat. 886, 906 (Sept. 21, 1977).

[17] *See, for example*, Departments of State, Justice and Commerce, the Judiciary, and Related Agency Appropriation Act, 1979, Pub. L. No. 95-431, §§103, 604, 606, 92 Stat. 1021 (Oct. 10, 1978), and Treasury, Postal, and General Government Appropriations Act, 1979, Pub. L. No. 95-429 §2, 92 Stat. 1001, 1013 (Oct. 10, 1978).

[18] H.R. Rule XXI §12(b), Constitution, Jefferson's Manual, and Rules of the House of Representatives, §834, H.R. Doc. No. 271, 97th Cong., 2nd Sess. 548 (1983).

[19] Javits, "Who Decides on War?" The N.Y. Times Magazine, Oct. 23, 1983, §6, at 107.

[20] *See*, "The U.S. Supreme Court Decision Concerning the Legislative Veto," Hearings Before the House Committee on Foreign Affairs, 98th Cong., 1st Sess. 2 (1983) (testimony of Stanley M. Brand).

[21] I.M. Destler, "Dateline Washington: Life After the Veto," Foreign Policy, 1819 (Fall 1983).

[22] *See*, 129 Cong. Rec. H4771 (daily ed., June 29, 1983) (requiring congressional approval of proposed rules).

[23] INS v. Chadha, 103 S. Ct. at 2793 (Justice Byron R. White, dissenting).

[24] *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

[25] Section 6 of the Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717, 721 (1914) authorized FTC "to make rules and regulations." The FTC used this authority to make procedural rules, but it states prior to 1962 that it could not make substantive rules. *See* National Petroleum Refiners Association v. FTC, 482 F.2d 672, 693 n. 27 (D.C. Cir. 1973).

[26] *E.g.*, Schweiker v. Gray Panthers, 453 U.S. 34, 43-44 (1981).

The Decline of the One-House Veto after *Chadha v. Immigration & Naturalization Service* and *Consumer Energy Council of America v. Federal Energy Regulatory Commission*

A longstanding method of legislative control over administrative and executive agencies has been the one-house veto.[1] This device allows one house of

1. The one-house veto first appeared in the Legislative Appropriations Act of 1932, Pub. L. No. 72-212 § 407, 47 Stat. 382, 414. This act authorized the President to transfer, consolidate, and redistribute executive agency functions in order to facilitate the elimination of overlapping and duplication of effort. In further compliance with the legislation, the President was required to transmit his reorganization order to Congress for review. If, within sixty days of continuous congressional session, either house passed a resolution of disapproval, the executive order became null and void. The act did not provide any standard by which one house could or could not disapprove, nor did it require either house to state its objections to the presidential reorganization order. *Id.*

Since 1932, use of the veto to maintain control over agencies has escalated, as attested to by the numerous statutes now in existence. *See, e.g.*, Arms Export Control Act, 22 U.S.C. § 2776(b)(1) (Supp. IV 1980) (providing for executive arms export sales to be blocked by concurrent resolution); Department of Interior and Related Agencies Appropriations Act of 1976, Pub. L. No. 94-163, tit. II, 89 Stat. 944, 944 (1975) (provides for appropriation action to be blocked by committee veto); Immigration and Nationality Act of 1952, 8 U.S.C. § 1254(c)(2) (1976) (Attorney General's suspension of deportation to be blocked by vote of a single house of Congress). *See generally* J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1086-87 (1975) (Watson attributes the increased use of the veto to increased power struggles between the executive and congressional branches of government).

In some instances less than one-house disapproval is the rule. These situations occur when a committee of one house, both houses, or a chairman of one committee are the deciding factions in determining whether to invoke the veto power. The most controversial application of the veto is by the chairman of a congressional committee. *See* The Supplemental Appropriations Act of 1953, ch. 13, Pub. L. No. 82-547, § 1413, 66 Stat. 637, 661. The use of the veto in this manner evokes particularly strong criticism because its use is susceptible to political pressures or biases. Because a chairman's position is for a limited timespan, the ability of the individual to disregard well planned, established guidelines by the use of the veto cuts deeply into the necessary continuity of established rules. Agencies working under the assumption that a particular set of guidelines will be used in determining the results of their requests could be faced with substantial changes mid-

Congress to review certain[2] proposed or existing rules and adjudicatory decisions announced by federal agencies.[3] By adoption of a veto resolution, one house may nullify an agency action.[4] Most veto provisions are narrow in scope and are either contained within the specific agency's enabling legislation[5] or are enacted subsequent to an agency's creation.[6]

While members of Congress have declared that the veto is a necessary mechanism for agency control,[7] opponents of the device have argued that the

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way through the process. *See* Watson, *supra*, at 1049 (two-level analysis of veto's impact in light of the purpose of legislative power as contained in the Constitution).

2. *See* Act of May 28, 1980, Pub. L. No. 96-252 (codified at 15 U.S.C. §§ 45-48 (Supp. IV 1980)) (extensive compilation of statutes enacted since 1933 containing veto provisions).

3. The rulemaking/adjudication dichotomy with respect to the one-house veto is discussed *infra* note 26. *See also* Note, *Rulemaking or Adjudication in Administrative Policy Formation: Rock Versus Hard Place?*, 13 DUQ. L. REV. 967, 968-70 (1975) (procedural distinctions between agencies acting as rulemakers and adjudicators when engaged in policy formation); Bell, *Administrative Law: Rulemaking And A "Hearing," A Tale of Two Cases (Three Rules) or What The Dickens*, 8 GA. L. REV. 19, 36-46 (1973) (background of APA rulemaking and adjudication distinctions).

4. Certain agency actions require some form of legislative approval before taking effect. The precise statutory requirements for submission of agency rules to the appropriate reviewing body differ. *E.g.*, Pesticide Control Act, 7 U.S.C. § 136w(a)(4) (Supp. IV 1980) (submission of agency rule to secretary of Senate and clerk of House); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1410b(c)(4) (1976) (submission of agency rules regarding occupant restraint systems to both houses of Congress as well as the House Energy & Commerce Committee and the Senate Commerce, Science & Transportation Committee).

5. *See, e.g.*, Federal Pay Comparability Act of 1970, 5 U.S.C. § 5308 (1970), which authorizes the President to determine executive salary schedules. This statute contains a veto provision which allows one house of Congress to defeat a presidential salary determination. Federal Salary Act of 1967, 2 U.S.C. § 359(1)(b) (1967) (amended 1977) which authorizes the President to determine judicial salaries. The veto provision in this Act provides that unless one house of Congress passes a resolution of disapproval, the change in judicial salaries becomes law. Both of these statutes have been challenged and upheld. 2 U.S.C. § 359(1)(b) was upheld in McCorkle v. United States, 559 F.2d 1258, 1261-63 (4th Cir. 1977) and in Atkins v. United States, 556 F.2d 1028, 1057-65 (Ct. Cl. 1977); 5 U.S.C. § 5308 was upheld in *McCorkle*, 559 F.2d at 1260-61.

6. *E.g.*, Federal Trade Commission Improvements Act of 1980, 15 U.S.C. §§ 45-58 (Supp. IV 1980). The Federal Trade Commission (FTC) was delegated very broad legislative power under the original Federal Trade Commission Act. That Act made unfair competition, unfair or deceptive acts, or practices unlawful. 15 U.S.C. § 45(a)(1) (Supp. V 1982). The Improvements Act was passed in 1980, as a result of reported congressional need to more comprehensively oversee the FTC. Act of May 28, 1980, Pub. L. No. 96-252, 1980 U.S. CODE CONG. & AD. NEWS 1073 (codified at 15 U.S.C. §§ 45-58 (Supp. IV 1980)). The Improvements Act requires the FTC to submit all final rules to each house of Congress for review. If neither house adopts a concurrent resolution of disapproval within 90 calendar days of continuous session, the submitted final rule becomes effective. If Congress adjorns prior to the end of the 90-day period and prior to completing action to disapprove the agency rule, the FTC must resubmit the rule at the next congressional session and the 90-day period reconvenes. 15 U.S.C. § 57a-1(a) (Supp. IV 1980).

7. *See, e.g.*, Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 1980 U.S. CODE CONG. & AD. NEWS 1073, 1088 (codified at 15 U.S.C. §§ 45-58 (Supp. IV 1980)). Senators Schmitt and Goldwater argued that Congress has no choice "short of passing entirely new legislation" but to empower itself with the veto. *Id.* at 1088. This provision allows Congress to maintain a "systematic procedure" to ensure agency compliance with congressional desire. *Id.*

veto is unconstitutional.[8] Since the one-house veto is not viewed by Congress as a statutory amendment to an agency's enabling act, the President's constitutional power to veto proposed law is circumvented.[9] Invocation of the rule also violates the separation of powers doctrine by removing agency action from judicial review. By reviewing an agency rule or decision and determining its validity, one house can usurp the function of the judiciary. Finally, because the veto power permits action by one house only, the fundamental principles of bicameralism are undermined.

Despite criticism of the one-house veto by Presidents,[10] Attorneys General,[11] and scholars,[12] the United States Supreme Court has refused to review the issue on its merits.[13] The Court's decision not to reach the constitutionality of the one-house veto is a result of litigants' failure to overcome justiciability barriers[14] such as political questions,[15] mootness,[16] standing,[17] and sufficient

8. Buckley v. Valeo, 424 U.S. 1 (1976) (decided on grounds other than veto provision). *But see* Justice White's concurring opinion wherein he suggests that the legislative veto may be constitutional. *Id.* at 257 (White, J., concurring). Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (per curiam), *cert. denied*, 429 U.S. 1088, *aff'd*, 431 U.S. 950 (1977) (review of constitutionality of one-house veto dismissed as unripe in view of the fact that Congress has not yet exercised the veto provision); McCorkle v. United States, 559 F.2d 1258 (4th Cir.), *cert. denied*, 434 U.S. 1011 (1977) (one-house veto provision not reviewed because of inseverability). One case, decided on the merits, upheld a one-house veto provision in the Federal Salary Act of 1967, 2 U.S.C. § 359(1)(B) (1976). Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) (per curiam), *cert. denied*, 434 U.S. 1009 (1978).

While the veto has largely escaped review in the federal system, state courts have determined the veto unconstitutional as exercised by state legislators. *See, e.g.*, State v. ALIVE Voluntary, 606 P.2d 769 (Alaska 1980); Opinion of the Justices, 431 A.2d 783 (N.H. 1981); Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); Pacific Legal Foundation v. Watt, 529 F. Supp. 982 (D. Mont. 1982).

9. The constitutional procedure for enacting law requires the approval of both houses and presentation to the President. U.S. CONST. art. I, § 7, cl. 2. If the President decides to invoke his veto power, two-thirds of Congress is then required to override the veto. The two-thirds requirement is termed a "super majority." Consumer Energy Counsel v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 464 (D.C. Cir. 1982). The framers expressed concern that without the participation of the President in lawmaking, the President "might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote." THE FEDERALIST NO. 73, at 442 (A. Hamilton) (Rossiter ed. 1961).

10. *See* J. HARRIS, *supra* note 1, at 207-38; Presidents dating back to 1920 have questioned the veto's validity. *See* Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735, 737 (1979).

11. *See, e.g.*, 41 Op. Att'y Gen. 300 (1958) (attempt by legislative branch to exercise executive authority not warranted by Constitution and therefore unconstitutional). *But see* 43 Op. Att'y Gen. 10 (1977) (veto constitutional but limited to particular statute).

12. *See generally* Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423 (1978); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

13. *See supra* note 8.

14. In order for a matter to be reviewed by a court, it must be justiciable. Under the broad term "justiciable," are the subcategories of mootness, ripeness, political question doctrine, sufficient adverseness, and standing. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 60-114 (1978). The subcategories stem from the constitutional requirement that the judicial power of

adverseness.[18] In *Chadha v. Immigration and Naturalization Service*[19] and *Consumer Energy Council of America v. Federal Energy Regulatory Commission*,[20] however, litigants have overcome these barriers to justiciability and the constitutionality of the one-house veto has been addressed on the merits in the federal circuit courts of appeals.

In *Chadha*, the Court of Appeals for the Ninth Circuit declared that the use of the one-house veto violated the separation of powers doctrine.[21] The veto provision addressed by the Ninth Circuit was invoked against the Immigration and Naturalization Service acting in its capacity as an adjudicatory body,[22] and was used to invalidate the Attorney General's suspension of an alien's deportation. Similarly, in *Consumer Energy*, the District of Columbia Court of Appeals held the use of a one-house veto unconstitutional.[23] The veto was used to negate implementation of a pricing program by the Federal Energy Regulatory Commission. The court determined that concurrence of the Senate and presentation to the President were required before the veto could become effective.[24] In contrast to *Chadha*, the veto provisions addressed in *Consumer Energy* dealt with the Federal Energy Regulatory Commission acting in its rulemaking capacity.[25] Since both courts held the veto provision un-

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the United States shall extend to "cases . . . or controversies." U.S. CONST. art. III, § 2, cl. 1.

15. *See* Baker v. Carr, 369 U.S. 186 (1962). Political questions are those issues which a court will refuse to decide because they are either textually committed to another branch of government, *id.*, at 210-11, or their determination would intrude on one of the branches of government. *Id.* at 214-17.

16. *See* L. TRIBE, *supra* note 14, at 62-64. A case is moot when one seeks judicial review of an issue which, if decided, can have no effect on the controversy and is essentially resolved. *Id.* at 62. This mootness barrier to adjudications stems from the constitutional requirement of cases or controversies. U.S. CONST. art. III, § 2, cl. 1.

17. Standing is a concept applied to cases to determine if a litigant has been sufficiently affected so that a true controversy is found to exist. L. TRIBE, *supra* note 14, at 79. While the Supreme Court has announced two particular tests to determine a litigant's standing, Congress has statutorily provided for standing when a litigant is bringing suit against an agency. *See* 5 U.S.C. § 702 (Supp. III 1979) which provides that "any person suffering legal wrong because of agency action . . . may bring suit."

18. Sufficient adverseness stems from the standing requirement which in turn stems from the "cases or controversies" requirement of Article III. *See* L. TRIBE, *supra* note 14, at 80.

19. 634 F.2d 408 (9th Cir. 1980), *prob. juris. postponed*, 454 U.S. 812 (Oct. 5, 1982).

20. 673 F.2d 425 (D.C. Cir. 1982).

21. *Chadha*, 634 F.2d at 420.

22. The United States Supreme Court on numerous occasions has determined that Congress may delegate judicial power to administrative agencies. *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Shields v. Utah Idaho Cent. R. R. Co., 305 U.S. 177 (1938); Arver v. United States, 245 U.S. 366 (1918); Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910).

Congress may not, however, delegate judicial power to administrative agencies to rule on criminal law or in situations where one has a right to a jury. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:10 at 182 (1978).

23. *Consumer Energy*, 673 F.2d at 478-79.

24. *Id.* at 470.

25. The delegation of rulemaking has been upheld as a result of the combination of enumerated powers granted Congress contained in U.S. CONST. art. I, § 8, coupled with the constitutional power "to make all laws which shall be necessary and proper for carrying into execution" the

constitutional, these cases set the framework for future litigation with respect to veto provisions affecting agencies in both their rulemaking and adjudicatory functions.[26]

This Note examines the propriety of one-house veto provisions in light of these two cases. Parts I and II present the facts and holdings of *Chadha*[27] and *Consumer Energy*[28] respectively. Part III focuses on the constitutional and practical considerations which should preclude the use of the one-house veto. Finally, this Note concludes with a comment on the impact these two cases will have if they are upheld by the Supreme Court.

I. Chadha v. Immigration and Naturalization Service

A. *Facts*

Chadha, a native of Kenya, entered the United States in 1966 as a nonimmigrant student.[29] In 1974, after expiration of Chadha's student visa, the

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enumerated powers. *Id.* The Supreme Court established the necessity of congressional delegation because of growth in the federal government. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

26. The distinction between rulemaking and adjudications arose from the Supreme Court's opinion in Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). The Court found that adjudications are those actions which determine the rights of "[a] relatively small number of persons." *Id.* at 446. Conversely, rulemaking is characterized by its ability to effect the populace as a whole, and is therefore analogous to legislation. United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973). This congruence is, however, somewhat lessened as a result of agency insulation from the political pressures which face legislators. The constitutent pressure is an accepted and somewhat successful part of our political process, whose legitimacy has judicial recognition. *See, e.g.*, Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 910-11 (1980) (an agency is not elected and therefore not politically accountable to the masses).

Regardless of the stated distinctions between rulemaking and adjudications, these differences dwindle under careful scrutiny: "[T]he line [between rulemaking and adjudication] may not always be a bright one." *Florida East Coast*, 410 U.S. at 245. Agency action in either form has an effect on individuals. Consequently, whenever agency actions affect individuals, due process should be afforded to those towards whom it is directed.

Due process in rulemaking has not been an explicit constitutional requirement. *See* Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981). However, Justice J. Skelly Wright recognized that fairness interests required rulemaking to be "openly informed, reasoned, and candid." Wright, *The Court and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 379-81 (1974).

27. 634 F.2d 408, 411, 422 (9th Cir. 1980).

28. 673 F.2d 425, 433, 478-79 (D.C. Cir. 1982).

29. *Chadha*, 634 F.2d at 411. 8 U.S.C. § 1101(a)(15)A-M (1976 & Supp. V 1981) defines a nonimmigrant student as an alien who has no intention of abandoning his residence in a foreign country, is temporarily in the United States for the sole purpose of attending an institution which has been approved for the alien's attendance by the Secretary of Education and, finally, the Attorney General of the United States had given final approval as to both the school attended and the student entering the country.

Once the nonimmigrant student has entered the country and is pursuing a particular course of study, the institution which he is attending is required to report to the Attorney General upon the student's withdrawal or termination. *Id.*

Immigration and Naturalization Service (INS) held a deportation hearing[30] at which Chadha admitted his deportable status and requested a suspension of deportation.[31] Pursuant to provisions in the INS's enabling legislation,[32] the United States Attorney General suspended Chadha's deportation.[33] The enabling legislation also mandates that such suspensions of deportation must be reviewed by either house of Congress.[34] The House of Representatives adopted the reviewing committee's recommendation and passed a resolution of disapproval which negated the Attorney General's suspension.[35] Following the House resolution, the INS issued a final order to deport Chadha.[36] After an unsuccessful appeal to the Board of Immigration Appeals,[37] Chadha petitioned

30. Deportation hearings are required under 8 U.S.C. § 1252(b) (1976). Aliens at this time are entitled to procedural due process of notice and opportunity to be heard. *Id.*

31. *Chadha*, 634 F.2d at 411. The Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1976) [hereinafter INA] empowers the United States Attorney General to control INS hearings, alien status and deportation. The Attorney General may, at his discretion, suspend the deportation of aliens and adjust their status to an alien lawfully admitted for permanent residence when certain conditions are met. *Id.* § 1254(a).

32. The INA allows the United States Attorney General to suspend an alien's deportation if three conditions are met. The conditions are, that the alien must have been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and prove that he was and is a person of good moral character, and whose deportation would result in extreme hardship. 8 U.S.C. § 1254(a)(1), (2) (1976).

33. *Chadha*, 634 F.2d at 411. Chadha was found to have met the three conditions necessary to suspend his deportation. *Id.* The first two conditions are mechanical in that the INS inquiry officer is not entitled to discretion in his findings. The third condition however, is discretionary. While there are many situations which can be equated with "undue hardship," it was found in Chadha's case that "it would be extremely difficult, if not impossible, for [him] to return to Kenya or go to Great Britain by reason of his [East Indian] racial derivation." *Id.*

34. Once an alien has fulfilled the conditions permitting the suspension of deportation, the Attorney General is required to submit to Congress the basis of his decision. 8 U.S.C. § 1254(c)(1) (1976). If either the Senate or House passes a resolution of disapproval, the Attorney General must deport the alien. *Id.* § 1254(c)(2). This one-house veto provision permits review during the entire session of Congress in which the Attorney General first reports his decision to suspend deportation. *Id.* § 1254(c)(3).

The resolution of disapproval is one of the basic objections to the legislative veto. Resolutions are not to be passed to "embody legislation." F. RIDDICK, SENATE PROCEDURE 975 (1981). House and Senate resolutions are, according to Congress, a means of expressing congressional opinion on a particular topic and are not "legislative in character." *Id.* However, when the legislative veto is used, the resolution appears to have the effect of law without the procedural protection which the creation of law requires.

35. *Chadha*, 634 F.2d at 411. The House Judiciary Committee reported that the Attorney General has suspended the deportation of 340 aliens. Six of these aliens, including Chadha, were considered by the committee not to have met the requirement of "hardship." H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,000 (1975). The House adopted the committee resolution of disapproval which required the six aliens to be deported. *Id.* The resolution read: "It was the *feeling* of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the Committee that their deportation should not be suspended." *Id.* (emphasis added).

36. *Chadha*, 634 F.2d at 411. 8 U.S.C. § 1254(c)(2) (1976) provides that once the veto has been invoked by either House, the Attorney General shall deport the alien.

37. *Chadha*, 634 F.2d at 411.

the Court of Appeals for the Ninth Circuit.[38] He asserted that the use of the one-house veto violated the bicameral procedural requirements for enactment of law and also the separation of powers doctrine with respect to the President's veto power and the judiciary's power to interpret law.[39]

B. *Justiciability: Chadha's First Hurdle*

Before the Ninth Circuit could address the constitutionality of the one-house veto, it was confronted with the assertion that the issue presented was non-justiciable.[40] Specifically, that a determination of the constitutionality of the one-house veto was a political question, that the case lacked sufficient adverseness, and that Chadha lacked standing.[41]

In order to resolve the claim that the issue presented was a political question and therefore not reviewable by the court, the Ninth Circuit relied on the standard announced by the Supreme Court in *Baker v. Carr*.[42] Since Chadha was asserting that the statutory veto provision in question was an unconstitutional violation of the separation of powers, the Ninth Circuit was satisfied that the *Baker* criteria were met and concluded that the "political question doctrine [was] not implicated."[43]

Addressing the issue of adverseness, the Ninth Circuit followed the Supreme Court's analysis in *Aetna Life Insurance Co. v. Haworth*[44] and deter-

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38. *Id.* 8 U.S.C. § 1105(a)(1) & (2) (1976) provides that judicial review of final orders of deportation shall be filed within six months of the date of the final order with the appropriate circuit court of appeals.

39. *Chadha*, 634 F.2d at 429-35.

40. *Id.* at 415.

41. *Id.* at 418-20.

42. *Id.* at 419. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court molded the contours of determining when a political question presented itself and was therefore nonjusticiable, by holding:

> Prominent on the surface of any case held to involve a political question is found a textually demonstratable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

43. *Chadha*, 634 F.2d at 419. The court further noted that the adjudication of separation of powers claims is quite common. *Id. See also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977). The court in *Chadha* pointed out that the assertion of the political question doctrine as an obstacle to judicial review of claims of separation of powers violations would leave such claims permanently unreviewable and held:

> It would stand the political question doctrine on its head to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle. It is the Judiciary's prerogative . . . to adjuciate a claimed excess by a coordinate branch of its constitutional powers.

Chadha, 634 F.2d at 419.

44. 300 U.S. 227 (1937) (failure to remit insurance premium thus disqualifying future bene-

mined that the controversy "must be a real and substantial [one] admitting of specific relief . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[45] In the instant case, the court's holding on the constitutionality of the one-house veto would determine whether Chada was to be deported.[46] The court was, therefore, in a position to provide specific relief and its decision was not an advisory opinion.[47]

The final barrier to justiciability was standing. In order for Chadha to have standing, the court had to be in a position to grant him relief.[48] Whether there was any relief to be granted turned on whether the challenged veto provision and the provision allowing suspension of deportation were severable from one another.[49] If the provisions were inseverable and the veto was struck down, the provision allowing suspension of Chadha's deportation would also fall. Thus, the original deportation order would be reinstated and Chadha would have been deported.[50] Similarly, if the veto was upheld, Chadha would also have been deported. The Ninth Circuit, however, found the veto and suspension provisions severable;[51] holding Chadha's claim justiciable and review-

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ficiary from receiving benefits presented sufficient adverseness to enable court to render a decision on the merits).

45. *Chadha*, 634 F.2d at 419 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937)).

46. *Chadha*, 634 F.2d at 419-20.

47. *Id.*, wherein the court stated: "Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold [the veto provision] the INS will execute its order and deport him." *Id.* at 419.

48. *Id.* at 415.

49. *Id.* The INA contained a severability clause, which provided that: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." 8 U.S.C. § 1101 (Supp. III 1979).

Although a severability clause is contained within a statute, the test as to severability is somewhat more stringent. In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court announced the requisites for severability. If the provisions at issue are "functionally independent" of one another and, a "total frustration" of congressional purpose would not result, the provisions are severable. *Id.* at 586, 591. The determining factor was whether Congress would have enacted one provision without the other. *Id.* In *Chadha*, the Ninth Circuit phrased the issue as whether Congress would have empowered the Attorney General to suspend deportations without the congressional veto provision. *Chadha*, 634 F.2d at 416.

50. *Chadha*, 634 F.2d at 417.

51. *Id.* at 415-16. In determining whether the veto provision was severable from the suspension provision, the Ninth Circuit relied on the standard announced by the Supreme Court: "Unless it is evident that the Legislature would not have enacted [one provision without the other] the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 415 (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam) (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

Where Congress has enacted a severability clause, a presumption of severability is created. *Chadha*, 634 F.2d at 415. "[The severability clause] reverses the presumption of inseparability [and] establish[es] the opposite presumption of divisibility. Congress has thus said that the statute is not an integrated whole. . . . On the contrary, when the validity is in question, divisibility and not integration is the guiding principle." *Id.* (quoting Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938)).

The INA contained a severability clause. *Chadha*, 634 F.2d at 415. Therefore, the burden of able on the merits.[52]

C. *Review of the Constitutional Merits*

The Ninth Circuit first addressed the issue of whether the legislative veto violated the separation of powers doctrine by examining whether use of the veto disrupted "an essential function of the judicial office or of the executive office."[53] In approaching this question, the Ninth Circuit examined three arguments advanced in support of the legislative veto:[54] First, that the veto was a "corrective device" designed to avoid judicial and executive misapplication of the statute;[55] second, that the veto served as a means for the legislature to share "the administration of the statute with the Executive;"[56] and third, that the veto was an "exercise of a residual legislative power to define substantive rights under the law."[57]

The Ninth Circuit dismissed each of these arguments.[58] As a corrective device, the court held that the veto's application served to disrupt the role of the judiciary.[59] The court was concerned that the one-house veto would in ef-

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demonstrating that Congress would not have enacted the suspension provision without the veto provision was on Congress. *Id.* at 416. The Ninth Circuit found that Congress had not met this burden and the two provisions were severable. *Id.*

52. *Id.* at 418.

53. *Id.* at 429. To determine whether a disruption among the three branches had in fact occurred, and therefore a violation of separation of powers, the Ninth Circuit formulated a test: "[W]as the assumption by one branch of an essential function of another, especially on a long-term and routine basis, if that assumption of power is both disruptive and unnecessary to the attainment of a legitimate purpose." *Id.*

54. The United States Senate filed an amicus brief pursuant to an invitation by the Ninth Circuit Court of Appeals. Amicus Brief at 1, *Chadha*. Views of both the House and Senate were solicited and consolidated in compiling the brief. *Id.* The rationale for extending this invitation may have resulted from the INS support for Chadha's view that the legislative veto was unconstitutional. *Chadha*, 634 F.2d at 411.

55. *Chadha*, 634 F.2d at 429. *See* Amicus Brief at 8, *Chadha*. By providing congressional review, Congress claimed the statute would comply with legislative intent in its enactment. *Id.*

56. *Chadha*, 634 F.2d at 429.

57. *Id.*

58. *Id.* at 429-33.

59. The framers' intent in formulating a separate judiciary empowered to determine the validity of congressional acts was to keep the legislators "within the limits assigned to their authority." THE FEDERALIST NO. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961). While the judiciary purportedly has no greater or lesser power than the remaining two branches, its duty is to interpret the Constitution. *Id.* at 446-47. A separation of powers violation with respect to the judiciary occurs when one of the two remaining branches assumes the role of intepreting law. The Ninth Circuit addressed this problem in *Chadha* and explained: "By assuming the task of correcting misapplications of the law, Congress is performing a role ordinarily a judicial or an integral administrative responsibility. The duty of the Judiciary . . . is to determine . . . whether the Executive branch has correctly applied the statute that establishes its authority." *Chadha*, 634 F.2d at 430. The court noted that the disruption which resulted from the veto occurred in both a vertical as well as horizontal fashion. The vertical disruption occurred because "[t]he nature of the federal [government] is such that [it] has a direct relation of power over and protection of the persons it governs." *Id.* at 430-31. Thus, by the use of the veto, one house severed the relationship of the people to the judiciary. *Id.* at 432. In the case at hand, Chadha was denied the benefit of logical reasoning which would have resulted from a judicial decision. *Id.* at 431. Instead, a standardless

fect render judicial interpretation of statutes "impermissible advisory opinions."[60] The Ninth Circuit also rejected the contention that the veto was a means for the legislators to share the administration of the statute; if this was the purpose of the legislation, congress was engaging in "law enforcement,"[61] thus invading the presidential power to "faithfully execute the laws."[62] Finally, in determining whether the veto was an exercise of "residual legislative power to define substantive rights,"[63] the court refused to look beyond the plain meaning of the Constitution and held that the proper procedure for defining substantive rights required the involvement of both houses and the President.[64] The court explained that the bicameralism requirement acted as a necessary restraint on legislative power, "correct[ed] its abuse[s] . . . and . . . contribute[d] to the integrity of its exercise."[65] After rejecting each argument advanced in support of the one-house veto, the Ninth Circuit determined that the veto device violated the separation of powers doctrine, and was therefore unconstitutional.[66]

While the court apparently found the violation of the separation of powers doctrine sufficient to hold the veto unconstitutional, it further buttressed its decision with a discourse on the manner by which the veto denied Chadha his right to due process.[67] The INS, in conjunction with the Attorney General, provide stringent procedural controls to ensure aliens fair and impartial hear-

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review was provided by one house, resulting in revocation of Chadha's suspension. *Id.*

The horizontal disruption occurred when the "[l]egislature interfere[d] with the central or essential function of coordinate branches. The Judiciary's duty to decide cases now becomes subject to review by the Legislature, thus undermining the integrity of the third branch." *Id.* at 431.

60. *Id.* at 430 & n.31. Article III of the United States Constitution permits the judiciary to review only cases or controversies. The legislative veto of adjudicatory decisions of administrative agency actions, in practical effect, renders prior judicial interpretations of the same matter mere advisory opinions lacking precedential value. As applied to INS proceedings, any prior suspension of deportation similar to Chadha's, condoned by a court, would have no precedential value. One house of Congress has deemed itself the final arbitrator in INS proceedings by invocation of the veto.

61. *Chadha*, 634 F.2d at 431.

62. *Id.* at 432. U.S. CONST. art. II, § 3. The President's power to administer laws was viewed by the Ninth Circuit in *Chadha*, as implementing the INA. *Chadha*, 634 F.2d at 432. The President's responsibility is thwarted by congressional involvement at will, since the veto may be invoked at any time during the ongoing process of administering the INA. *Id.*

63. *Chadha*, 634 F.2d at 429.

64. *Id.* at 434. It is significant that both houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights. U.S. CONST. art. I, § 7.

65. *Chadha*, 634 F.2d at 434 (citing 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 110 (1911) (remarks of Charles Pinckney)). *See also* Buckley v. Valeo, 424 U.S. 1, 129 (1976) (restraint on legislative power when framers denied Congress the authority to appoint ambassadors, public ministers, and judges of the Supreme Court); Watson, *supra* note 1 at 1030-32 (1975); THE FEDERALIST NO. 62 (J. Madison).

66. *Chadha*, 634 F.2d at 436.

67. The INS, in adjudicating deportations is acting in a quasi-judicial manner and as such is bound by due process constraints. *Id.* at 431 n.32. *See also* Marcello v. Bonds, 349 U.S. 302, 311 (1955) (INS hearings require notice, counsel of aliens choosing, opportunity to present evidence and cross examine witnesses); Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) (due process requirement of the Fifth Amendment requires aliens in the United States to be provided with a fair and impartial deportation hearing).

ings with respect to deporation proceedings.[68] Furthermore, the Attorney General's guidelines for suspension of deportation were clearly stated.[69] When the House exercised the veto, however, neither the alien nor the Attorney General were provided the opportunity to present their defenses.[70] Additionally, the House was not required to state a rationale for its decision.[71] This arbitrary procedure undermined the safeguards which were provided at all other stages of deportation proceedings.[72] Although Congress may set the standards for determining alien status, as well as the procedure for deporting aliens, both must be performed within the parameters of the Constitution.[73]

Having determined the one-house veto to be an unconstitutional method of overseeing INS deportation suspensions, one question which remained unanswered was whether the one-house veto could nevertheless be used to negate an administrative agency's rulemaking decisions.[74] This question was recently resolved by the District of Columbia Court of Appeals in *Consumer Energy Council of America v. Federal Energy Regulatory Commission.*[75]

II. Consumer Energy Council of America v. Federal Energy Regulatory Commission

A. *Facts*

Title II of the National Gas Policy Act of 1978 (NGPA) provides for "incremental pricing" in order to aid in the phased deregulation of natural gas.[76] Under Phase I of the NGPA, the Federal Energy Regulatory Commission (FERC)[77] is charged with the responsibility of promulgating rules applying to "boiler fuel use of natural gas by an industrial boiler fuel facility."[78] Upon completion of Phase I, Phase II of the NGPA requires FERC to pro-

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68. *Chadha*, 634 F.2d at 432 n.35. The court noted the procedural protections which have developed between the INS, the Attorney General, and the courts.

69. *See supra* notes 31-34 and accompanying text.

70. *Chadha*, 634 F.2d at 430.

71. *See supra* note 35.

72. *Chadha*, 634 F.2d at 429, 431-32.

73. *Id.* at 435.

74. The question as to the validity of the one-house veto when agency rulemaking is involved was specifically left unanswered by the Ninth Circuit:

> [W]e are not here faced with a situation in which the . . . subject matter of an agency's rule-making authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device.

Chadha, 634 F.2d at 433.

The court could not have determined the validity of the veto provision when used to negate rulemaking decisions since any decision based on hypothetical facts would be merely advisory. *Id.*

75. 673 F.2d 425 (D.C. Cir. 1982).

76. National Gas Policy Act of 1978, 15 U.S.C. § 3341 (Supp. IV 1980).

77. In 1978, Congress established the Department of Energy in the executive branch of the federal government. 42 U.S.C. §§ 7111-7112 (Supp. IV 1980). Within the Department of Energy, Congress established the Federal Energy Regulatory Commission as an independent regulatory agency. 42 U.S.C. § 7171(a) (Supp. III 1979).

78. 15 U.S.C. § 3341(b) (Supp. III 1979).

mulgate a rule to expand the program to "any industrial facility which is within a category defined by the Commission."[79] The NGPA further orders that this rule be submitted to Congress and be implemented only if neither house disapproves.[80]

On May 6, 1980, FERC issued a rule, as required under Phase II, expanding the category of industries subject to the NGPA's incremental pricing program.[81] When the House of Representatives exercised its right to veto the measure,[82] the Consumer Energy Council of America (CECA)[83] requested that FERC implement the rule despite the House veto.[84] FERC refused to implement the rule in contravention of the veto and, fearing judicial backlash, revoked it.[85] Following the rule's revocation, CECA petitioned the District of Columbia Court of Appeals for review as permitted by the NGPA.[86] The District of Columbia Circuit held that FERC's revocation of the rule was invalid; the veto provision of the NGPA was unconstitutional;[87] and recommended that

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79. *Id.* § 3342(a)(1), (b)(2).

80. 15 U.S.C. § 3342(c)(1) (Supp. IV 1980). This section provides that the effectiveness of rules promulgated by the FERC will depend on whether either house of Congress adopts a resolution of disapproval. *Id.*

81. 45 C.F.R. § 31.666 (1980).

82. H.R. J. Res. 655, Cong., 2d Sess., 126 CONG. REC. 3855 (daily ed. May 20, 1980).

83. Consumer Energy Council of America [hereinafter CECA] is a concerned citizens group based in Washington, D.C. Joined with CECA in filing a petition for review were Consumer Federal of America and Public Citizens. *See* Brief for CECA at 2-3, Consumer Energy Council v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982).

84. *Consumer Energy*, 673 F.2d at 438.

85. *Id.* After refusing to implement the rule, the FERC feared that a judicial determination holding the veto unconstitutional would require the FERC to implement the new rule. Not desirous of this result, the FERC revoked the new rule. *See* Federal Energy Regulatory Commission Order Denying Rehearing and Revoking Amendments made by Order No. 80 at 3 (August 1, 1980), *reprinted in* 45 Fed. Reg. 54,741 (August 18, 1980).

In response to CECA's second request of the FERC, to rule on the constitutionality of the one-house veto, the FERC stated: "[A]dministrative practice requires the presumption of constitutional validity of the statutes entrusted to this commission for implementation." *Id.*

86. *Consumer Energy*, 673 F.2d at 439; 15 U.S.C. § 3416 (Supp. IV 1980). Congressional Amici was the only party to contest the court's jurisdiction. Amici asserted that CECA was not seeking review of order or rule since FERC's action was merely a proposal until neither House disapproved. *Consumer Energy*, 673 F.2d at 439. This assertion was also maintained in *Chadha*. *Chadha*, 634 F.2d at 412. The courts in both cases quickly dismissed this challenge to the propriety of judicial review by viewing the veto provision as unconstitutional, thus leaving the agency's action as a final rule, and thus judicially reviewable. *Consumer Energy*, 673 F.2d at 439; *Chadha*, 634 F.2d at 412. The second challenge to the Appeals Court's ability to review was that a district court would be in a better position to create a record and monitor judicial relief. *Consumer Energy*, 673 F.2d at 439. This assertion was also summarily dismissed by the court which explained, "[n]o further compilation of record is necessary; the issues raised are purely legal . . . ." *Consumer Energy*, 673 F.2d at 440.

87. 15 U.S.C. § 3346(d)(2) (Supp. V 1981) provides:

Congressional Review

> Any rule which provides for an exemption under this subsection may take effect after the expiration of the first 30 calendar days of continuous session of Congress . . . after a copy of each rule has been submitted to each House of the Congress, unless, during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval described in . . . this title, with

the rule be implemented unless FERC amended or postponed implementation through its usual procedure.[88]

B. *Justiciability Hurdles*

In *Consumer Energy,* CECA was faced with challenges to justiciability similar to those facing Chadha. Both litigants had to overcome initial severability challenges in order to clear the standing hurdle. CECA, however, also had the additional burden of proving the issue presented was not moot.[89]

In order for CECA to bring the veto provision before the court for a determination of its constitutionality, CECA had to have standing.[90] As in *Chadha,* whether CECA had standing turned on whether the one-house veto provision and the provision mandating the promulgation of Phase II rules, both contained in the same section of the NGPA, were severable.[91] If they were inseverable and the veto provision fell, the authority of FERC to formulate a new rule would fall with it.[92] Thus, the rule in question would be as nonexistent as if the congressional veto were upheld. As in *Chadha,* if the provisions were inseverable, the new rule would be revoked. Therefore, CECA would have been without standing because the court could not have granted any relief. The legislative veto provision, however, was determined to be severable from the rule promulgation provision and the court went on to consider the issue of mootness.[93]

The challenge to mootness was based on FERC's assertion that since the rule had been revoked, CECA could no longer challenge the prior one-house veto of the same rule.[94] In response, CECA asserted the impropriety of FERC's revocation of the rule and, alternatively, argued the revocation was invalid because it did not comply with the Administrative Procedure Act's (APA) notice and comment requirements.[95] The court reasoned that the

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respect to such rule.

88. *Consumer Energy,* 673 F.2d at 479. Under the Administrative Procedure Act, 5 U.S.C. § 553(b)(c) (1976) [hereinafter APA] notice of proposed agency rulemaking must be posted in the Federal Register to allow interested parties the ability to comment.

89. *Consumer Energy,* 673 F.2d at 445-48.

90. *Id.* at 441 n.48.

91. *Id.* at 440-41.

92. *Id.* at 441.

93. *Id.* at 445. After CECA requested the FERC to implement the new pricing rule, the FERC instead revoked it. This revocation, the FERC asserts, renders CECA's arguments against the veto moot since no rule is in existence which CECA could insist be implemented. *Id.* The revocation was, however, found to be invalid. *Id.* at 446-48.

94. *See* Brief for Respondent at 14, *Consumer Energy,* 673 F.2d 425.

95. *Consumer Energy,* 673 F.2d at 445. FERC's response to the allegation of noncompliance with the notice and comment requirements of the APA, when revoking incremental pricing rules, was that the original notice and comment provided prior to enactment of the rule was sufficient to extend to the revocation. *Consumer Energy,* 673 F.2d at 446. Alternatively, FERC argued that the revocation fell within the exceptions to notice and comment requirements as contained in 5 U.S.C. § 533(b), (c). *Consumer Energy,* 673 F.2d at 446. In response to FERC's defense, the court stated that "Section 553(b)'s 'good cause' exception requires the agency to state the reasons for finding 'good cause' in its decision . . . . FERC merely asserted that further notice and opportunity to comment were unnecessary . . . later [it argued] that they were unnecessary because the regulations were defective." *Id.* at 447 (emphasis in original) (footnote omitted).

"APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule."[96] Accordingly, the issues presented as to the constitutionality of the NGPA one-house veto provision were held not to be moot and thus, the case presented a justiciable controversy, reviewable on the merits.[97]

C. *Constitutional Aspects*

The District of Columbia Court of Appeals was faced with deciding the issues of whether the one-house veto provision contained in the NGPA violated the Presentation Clause,[98] the separation of powers doctrine, and the requirements of bicameralism.[99] In support of the veto, Congressional Amici[100] argued that: The veto provision of the NGPA was analogous to other congressional action not requiring two-house approval and presentation to the President;[101] the rule promulgated by FERC was merely a proposal for action conditioned on the non-objection of both houses;[102] and the underlying rationales for bicameralism and presentation to the President were not implicated when the veto was exercised.[103]

In rejecting these contentions, the District of Columbia Circuit first noted that, while exceptions to the procedural requirements of article I, section 7 existed,[104] those exceptions were distinguishable in that they were procedural

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96. *Consumer Energy*, 673 F.2d at 446. The APA expressly includes repeal of a rule within the definition of rulemaking. 5 U.S.C. § 553(b) (1976).

97. *Consumer Energy*, 673 F.2d at 445. The petitioner argued that the correct standard to determine severability was announced in Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion). *Consumer Energy*, 673 F.2d at 441. Severability is presumed and the proponents of inseverability must prove otherwise. *Tilton*, 403 U.S. at 684 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)). Respondents, however, argued that the proper standard is found in Carter v. Carter Coal Co., 298 U.S. 238 (1936). The proponents of severability must overcome a presumption of inseverability. *Id.* at 312; *Consumer Energy*, 673 F.2d at 441-42. The court rejected both of these contentions and relied on the standard enunciated in United States v. Jackson, 390 U.S. 570, 585 n.27 (1968). *Consumer Energy*, 673 F.2d at 442.

98. U.S. CONST. art. I, § 7, cl. 2.

99. *Consumer Energy*, 673 F.2d at 448. "Every bill which shall have passed the House of Representatives *and* the Senate, shall, before it becomes a law, be presented to the President of the United States." U.S. CONST. art. I, § 7, cl. 2 (emphasis added). Furthermore, clause 3 requires the same procedure for every order, resolution, or vote. *Id.* at art. I, § 7, cl. 3. Clause 3 was added to prevent the Congress from evading the requirements of clause 2 by simply renaming "Bills" as "orders," "resolutions" or "votes." *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 301-02, 304-05 (rev. ed. 1966).

100. *See generally* Amicus Brief for Congress, *Consumer Energy*, 673 F.2d 425.

101. *Consumer Energy*, 673 F.2d at 457. Amici were referring to 15 U.S.C. § 46(d) (1976), which authorized the President, or either House of Congress to delegate investigatory powers to the Federal Trade Commission in order to investigate possible antitrust violations. This authority, via one House or the President, ended in 1933. Presently the requirement is the concurrence of both Houses of Congress. *Consumer Energy*, 673 F.2d at 457 n.132.

102. Congressional Amici interpreted the NGPA as providing the FERC with the ability to propose legislation but not enact such legislation. *Consumer Energy*, 673 F.2d at 457.

103. *Id.* at 457.

104. In Buckley v. Valeo, 424 U.S. 1, 137 (1976) (per curiam), the United States Supreme Court noted that legislative initiation of agency investigation is an exception to the procedural

and did not affect substantive law.[105] Veto of the instant rule, however, did affect substantive law in that without the rule, the old pricing structure remained in effect.[106] Second, the court interpreted the mandatory promulgation rule under Phase II as authorizing not merely proposals for legislation, but rather, new rules having the force of law.[107] Third, it was determined that the one-house veto undermined the purpose of the constitutional procedures for congressional actions.[108] Two major purposes for the lawmaking process were

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requirements of legislation. "[P]owers 'of an investigative and informative nature' can be performed by a commission constituted of legislatively appointed officers, because the powers fall 'in the same general category as those powers which Congress might delegate to one of its own committees.'" *Consumer Energy*, 673 F.2d at 457 (quoting *Buckley*, 424 U.S. at 137).

The second exception is presidential reorganization plans. *Consumer Energy*, 673 F.2d at 458. *But compare* 43 Op. Att'y Gen. 2 (1977) (the veto provision in the reorganization plan is valid but only in this limited sphere), *with* 37 Op. Att'y Gen. 56 (1933) (the veto provision "raises grave questions as to the validity of the [statute]"). *Id. See also* Dixon, *supra* note 12 at 485.

The third exception to art. I, § 7 noted by the court was presidential decisions in foreign affairs and national defense. *Consumer Energy*, 673 F.2d at 459. *See, e.g.*, War Powers Resolution, 50 U.S.C. § 1544 (1976). This statute was passed over President Nixon's veto. Nixon's objection to the Act, however, was congressional ability to require the withdrawal of troops upon passage of a joint resolution. *Consumer Energy*, 673 F.2d at 459 n. 141. The District of Columbia Circuit, however, expressed reservation in determining the validity of such exceptions since the issue was not before them. *Consumer Energy*, 673 F.2d at 459.

The final category of exceptions, that of congressional proposals for constitutional amendments, was the only one in which a previous judicial resolution had been reached. *Id.* at 460. The Supreme Court, in Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) held that although the Constitution requires the concurrence of both houses for proposals to amend the Constitution, it does not require presentation to the President. Furthermore, the process of proposing and ratifying the Constitution as described in article V excludes presidential involvement. Other exceptions to the presentation clause, while not raised by the parties, do exist. *See, e.g.*, art. I, § 2, cl. 5 (power of impeachment rests in the House alone); art. I, § 3, cl. 6 (power to concur in treaties and give advice and consent rests in the Senate).

105. "[A] resolution enacted under [a delegation for investigatory purposes] does not affect substantive law, as occurs when Congress vetoes an agency rule . . . ." *Consumer Energy*, 673 F.2d at 457. As an example of agency action which is implemented following a valid one-house resolution, the court noted the FTC's power to investigate following a one-house resolution. *Id.* at 457 n. 132. An agency investigation, however, does not affect substantive law. *Id.* at 457.

See Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) (although the Constitution does not expressly provide for congressional investigatory power, Congress is acknowledged to have such power); McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (congressional investigatory power implicit in article I, § 1 since it is "an essential and appropriate auxiliary to the legislative function.")

106. *Consumer Energy*, 673 F.2d at 457.

107. The District of Columbia Circuit examined the status of the new rule prior and subsequent to exercise of the veto. *Consumer Energy*, 673 F.2d at 465. "If neither house of Congress acts to approve a bill, the bill dies; but when neither house acts to disapprove an agency rule, the rule becomes law. Clearly the agency rule has some legal force that a proposed Bill does not." *Id.* (footnote omitted). If Congress only wanted a proposal, not having the effect of law, the NGPA would have given the FERC authorization only to propose. Therefore, the District of Columbia Circuit concluded that "an agency rule issued pursuant to . . . [a valid] delegation is binding and effective without action by either Congress or the President." *Id.* at 466.

108. *Consumer Energy*, 673 F.2d at 464-65.

to enable the executive to protect himself from intrusion by the legislature;[109] and to insure that Congress remained responsive to the people by requiring the representatives of two constituencies to come into agreement.[110] Both purposes served to restrict congressional power until agreement was reached by "three constituencies, or a super majority of two."[111] Congressional action by only one house undermined the intent of bicameralism and allowed one house to act as two.[112] Finally, the Court held that the one-house veto constituted an unauthorized invasion of the executive and judiciary functions and, therefore, violated the doctrine of separation of powers.[113]

After dismissing each of Amici's arguments in support of the veto, the District of Columbia Circuit focused on CECA's arguments in support of its initial contention that the one-house veto was an unconstitutional mechanism for controlling agency actions. CECA contended that by allowing one house to veto FERC's rule, Congress was effectively preventing the agency from performing its executive function (an intrusion into the executive branch), as well as determining the validity of FERC's ruling (an intrusion into the judicial branch).[114] In response to this charge, Congressional Amici argued that since FERC is an agency independent of the executive branch, there was no intrusion into the executive sphere.[115] In addition, the rule was not vetoed because it was *ultra vires*[116] or unconstitutional; determinations only a court could make.[117] Rather, the veto was based on a policy decision that the rule was unnecessary; the type of determination Congress is empowered to make.[118]

After reviewing the meaning of separation of powers,[119] the court con-

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109. *See, e.g.*, THE FEDERALIST No. 73 (A. Hamilton) (Presidential need for power to veto essential to the existence of that branch). *See generally* Watson, *supra* note 1, at 1043-48.

110. The District of Columbia Circuit expressed a fear that "national majorities" would be able to inflict their will on minorities and more importantly, on the state governments. *Consumer Energy*, 673 F.2d at 464.

111. *Id.*

112. *Id.* at 464-65.

113. *Id.* at 478.

114. *See* Brief for CECA at 31, *Consumer Energy*. *See also* Springer v. Philippine Islands, 277 U.S. 189, 202 (1928) wherein the Court noted "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . . ." CECA also argued that one-house vetoes violated the Incompatibility clause of the United States Constitution: "[N]o person holding any office under the United States, shall be a member of either House during his continuance in office." U.S. CONST. art. I, § 6, cl. 2. In extending this clause, CECA argued that members of Congress were attempting to both enact and implement law. Brief for CECA at 31, *Consumer Energy*. The District of Columbia Circuit did not address this argument.

115. *Consumer Energy*, 673 F.2d at 472.

116. The term *ultra vires* means that one has acted in excess of the authority granted to them. This concept historically has applied to corporations extending the powers granted in their charters. Because delegated authority has increased dramatically in government, functionally the concept is equally applicable to agencies. *See* Dixon, *supra* note 12.

117. *Consumer Energy*, 673 F.2d at 437-38.

118. *See* Brief for FERC at 6-9, *Consumer Energy*. The veto was invoked primarily on a belief that economic conditions had substantially changed the congressional desire for an incremental pricing program. *Id.* Some members of Congress, however, felt that the FERC had stepped beyond the authority granted to them in the NGPA. *Id.*

119. The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The pur-

cluded that, although FERC was not under the executive's control, rulemaking "is a function of administering and enforcing the public law . . .," both of which *are* executive functions.[120] Therefore, the separation of powers doctrine was violated since Congress is not empowered to execute the laws.[121] Although Congress had a responsibility to oversee agency action, that responsibility extended only to enactment and revision of the laws delegating rulemaking authority to the agencies.[122]

The District of Columbia Circuit further held that intrusion into the judiciary resulted when one house vetoed FERC's new rule; members of Congress were engaged in statutory interpretation, a task assigned to the judiciary.[123] Thus, FERC was denied the judicial interpretation of the rule that it was entitled to.[124] Furthermore, the House of Representatives provided no guidance to FERC with respect to its veto decision.[125] This led the District of Columbia Circuit to express concern that the standards used by the House differed from those used by a court.[126] This concern was similarly expressed in *Chadha* as a fear of rendering judicial decisions mere advisory opinions.[127]

III. Analysis

A. *Constitutional Considerations*

While the circuit courts present substantial reasoning in both *Chadha* and *Consumer Energy* to preclude congressional use of the one-house veto, the final determination as to the veto's validity rests with the Supreme Court. Both *Chadha* and *Consumer Energy* are presently pending before the Court.[128] The Court could decline to rule on the issue and assert that the cases

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> pose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Consumer Energy, 673 F.2d at 471 (quoting from Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)). A second purpose, that of promoting efficiency, was noted in *Chadha*, 634 F.2d at 423-24.

120. *Consumer Energy*, 673 F.2d at 471. The District of Columbia Circuit further noted that "executive agencies perform the same adjudicatory and rulemaking functions as do independent agencies," thus invalidating Congressional Amici's argument. *Id.* at 472 n.198.

121. *Id.*

122. *Id.* at 474.

123. *Id.* at 477-78.

124. *Id.*

125. *Id.* at 437-38.

126. *Id.* at 478. The District of Columbia Circuit expressed concern that members of Congress would review the intent of Congress at the time of review rather than at the time when the initial statute (NGPA) granting the FERC rulemaking authority was enacted. *Id.* This would permit Congress to alter law as circumstances change. *Id.* While there is no barrier to changing law, it must conform to the constitutional procedural requirements of two-house approval and presentation to the President. *Id.* at 479.

127. *Chadha*, 634 F.2d at 430.

128. Chadha v. Immigration & Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), *prob. juris. postponed*, 454 U.S. 812 (Oct. 5, 1982); Consumer Energy Council of America v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982), *petition for cert. filed sub nom.* United States Senate v. Consumer Energy Council of America, 51 U.S.L.W. 3099 (U.S. Aug. 2,

are not justiciable.[129] Such a result is unlikely, however, in light of growing public concern[130] and confusion among the lower courts.[131] The Court should find the constitutional violations espoused in *Chadha* and *Consumer Energy* sufficient and adopt the holdings set forth therein.[132] The violations of separation of powers and bicameralism, while not equally dealt with in both cases are, however, applicable to both.[133]

Separation of powers requires the three branches to perform the functions constitutionally assigned to them.[134] While this doctrine is not inflexible, a comingling of the functions to the point where one branch's intrusion prevents another branch from performing its assigned functions cannot be tolerated.[135] Where an agency has created law which is subsequently vetoed by one faction of Congress, that faction is usurping the power of the judiciary by determining the validity of the agency's action.[136] Furthermore, the agency is relegated to mere conjecture in determining what was wrong with their now defunct rule or decision, since Congress is not required to provide a rationale for the veto's invocation.[137]

The intrusion into the executive function, while not as blatant as that of the judiciary, interferes with the executive's ability to faithfully execute the laws.[138] In Chadha's situation, it was the Attorney General's discretion which determined whether an alien would suffer hardship as a result of deporta-

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1982) (No. 82-177), *petition for cert. filed sub nom.* United States House of Representatives v. Consumer Energy Council of America, 51 U.S.L.W. 3120 (U.S. Aug. 6, 1982) (No. 82-209).

129. *See supra* notes 14-18 and accompanying text. *See also Chadha*, 634 F.2d at 415-20; *Consumer Energy*, 673 F.2d at 440-48.

130. *See, e.g.*, Kaiser, *Congressional Action To Overturn Agency Rules: Alternatives To The "Legislative Veto"*, 32 AD. L. REV. 667 (1980) (controversy over legislative veto prompted needed alternatives). *See also infra* note 148.

131. *Compare Chadha*, 634 F.2d 408 *and Consumer Energy*, 673 F.2d 425 (both holding the veto an unconstitutional violation of the separation of powers doctrine), *with* Buckley v. Valeo, 424 U.S. 1 (1976) (Justice White's dissent alluding to constituitional validity of the one-house veto) *and* Atkins v. United States, 556 F.2d 1028 (1977) (one-house veto consistent with constitutional provision placing all legislative powers in Congress).

132. *Chadha*, 634 F.2d at 435-36 (holding one-house veto an intrusion into executive and judiciary, and violates bicameralism requirement); *Consumer Energy*, 673 F.2d at 478-79 (one-house veto "controvenes the constitutional procedure for making law" and is a separation of powers violation).

133. *See supra* text accompanying notes 53-73 and 99-127.

134. The principle of separation of powers pervades the United States government through the Constitution. The framers incorporated this principle as a result of its workability in England. "The most widely recognized component of eighteenth-century British constitutionalism was the doctrine of separation of powers. British institutions evolved so that governmental power was divided along functional lines (legislative, executive and judicial) with each type of power primarily assigned to different persons." A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 12-13 (1976).

135. L. TRIBE, *supra* note 14, at 15-16.

136. *See, e.g., Chadha*, 634 F.2d at 430-31; *Consumer Energy*, 673 F.2d at 477-78.

137. *See, e.g., Chadha*, 634 F.2d at 411 (no stated rationale for veto's invocation); *Consumer Energy*, 673 F.2d at 437-38 (conflicting rationales for veto's invocation).

138. In *Consumer Energy*, 673 F.2d at 474, the FERC was equated with the executive in performing the function of faithful execution of the law. *Id.* The Attorney General's role in *Chadha* was similarly equated with the executive's. *Chadha*, 634 F.2d at 432.

tion.[139] Execution of this task required a substantial familiarity by the Attorney General with alien hardship.[140] A veto of the Attorney General's decision frustrated his ability to grant suspensions and made it impossible to predict the outcome of future hardship cases. In *Consumer Energy*, FERC's responsibility to execute the requirements set forth in the NGPA was equated with the executive branch's function to carry out the laws.[141] Subsequent invocation of the veto intruded on FERC's function in that no law was in existence to be executed, yet the requirements under the NGPA were still in force. The non-necessity and frustrations of functions experienced by both the executive and judiciary when the veto is invoked are sufficient violations of separation of powers doctrine to call for its abolition.

The next violation, that of bicameralism,[142] is equally applicable in both *Chadha* and *Consumer Energy*.[143] Like the separation of powers violation, it should be sufficient to strike down the one-house veto. While the Constitution does not expressly develop the separation of powers doctrine, bicameralism, which mandates agreement of both Houses of Congress prior to the creation of law, is expressly required.[144] Theoretically, Congress is the voice of the citizenry of the United States.[145] When one House acts without agreement or approval of the other, that body is usurping power which was to be equally shared by both Houses, as well as cutting out the voice of one half of the country's representatives. Congress seeks to avoid this asserted violation of bicameralism, as witnessed in *Consumer Energy*, by arguing that agency action is merely a proposal for legislation until neither house disapproves.[146] This argument, however, is problematic in that if the intent of Congress was to delegate power to *propose* legislation only, the agencies' enabling legislation should be so restricted instead of delegating power to make binding rules.[147]

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139. *Chadha*, 634 F.2d at 432.

140. *Id.*

141. *Consumer Energy*, 673 F.2d at 472.

142. Bicameralism is a theory of divided representative government adopted by the framers from the British philosopher Jeremy Bentham. *See*, D.J. MANNING, THE MIND OF JEREMY BENTHAM (1968). James Madison wrote:

> In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

THE FEDERALIST NO. 51, at 322 (J. Madison) (Rossiter ed. 1961). The United States Constitution mandates bicameralism in the enactment of all laws. U.S. CONST. art. I.

143. *Chadha*, 634 F.2d at 433. *Consumer Energy*, 673 F.2d at 456-65.

144. U.S. CONST. art. I, § 7, cl. 2, 3.

145. U.S. CONST. art. I, § 2, cl. 1. "The House of Representatives shall be composed of members chosen . . . by the People of the several States." *Id.* "The Senate of the United States shall be composed of two Senators from each State . . . ." *Id.* § 3, cl. 1.

146. Brief for Respondent Federal Energy Regulatory Commission at 13, *Consumer Energy*, 673 F.2d 425.

147. The Federal Energy Regulatory Commission was established as an independent agency pursuant to the Department of Energy Organization Act, 42 U.S.C. § 7171(a) (Supp. III 1979). In 1978, the FERC was directed to implement a pricing program under the National Gas Policy Act, 15 U.S.C. §§ 3341-3348 (Supp. III 1979).

Furthermore, if the agency is merely proposing legislation, the final enactment of law constitutionally rests in Congress and not one House alone.[148]

B. Practical Rationale for Abolition of the Veto

While the constitutional arguments advanced in *Chadha* and *Consumer Energy* against the veto were held sufficient for its invalidation, other reasons exist which demonstrate the impropriety of such a method of congressional supervision of agencies. One study has shown that congressional control of agencies by use of the one-house veto has had a detrimental effect on the agencies' ability to function without bias amidst the forces of the political arena.[149] While it has been acknowledged that a need exists to oversee agencies;[150] the resulting constitutional problems and threatening effect of the veto

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148. In passing upon the validity of *Chadha* and *Consumer Energy* one major issue which the Supreme Court is not required to consider, but may find hard to ignore, is the pressure presently facing legislators for agency reform. *See, e.g.*, S. REP. NO. 305, 97th Cong., 1st Sess. 2 (1981) (report on the Regulatory Reform Act which "comes in response to a growing national concern about the impact of government regulation on the economy and about the ability of agencies to respond effectively and sensibly to pressing national problems.") This report also expressed a concern for the lack of agency accountability and therefore the need for expanded congressional oversight. *Id.* at 4. While neither the courts nor administrative agencies face constituent pressures, Congress does, and as a result of such pressure has consistently attempted to amend the Administrative Procedure Act. *See Regulatory Reform Legislation of 1981: Hearings on S. 344 and S. 1080 Before the Committee on Governmental Affairs, United States Senate*, 97th Cong., 1st Sess. 1 (1981) (statement of Hon. William V. Roth, Jr., Chairman of the Committee); *Administrative Rulemaking Reform Act, 1979: Hearing on H.R. 681 Before the Subcom. on Rules and Organization of the House*, 96th Cong., 2d Sess. (1979); *Administrative Procedure Act Amendments, 1978: Hearings Before the Subcom. on Administrative Practice & Procedure*, 95th Cong., 2d Sess. (1978). A currently proposed amendment seeks to provide an across the board veto provision for agency actions. *See* H.R. REP. NO. 746, 97th Cong., 2d Sess. 22-30 (1981). All major rules of agencies would require congressional review prior to their enactment. *Id.* at 27. If this amendment is passed, agency determination on majority policy would be considered proposals for legislation unless Congress disapproves.

149. *See, e.g., Impact of Congressional Review on Federal Trade Commission Decisionmaking and Rulemaking Processes* (August 17, 1982); Report to the Congress by the Comptroller General of the United States, at 5. "[I]n at least one instance, . . . [the Commissioner of the FTC] . . . decided not to support the initiation of a rulemaking because of the threat of Congressional retribution in some form." *Id.* The report, taken as a whole, holds the contrary view that the veto is one of many factors considered in the decisionmaking process of the FTC.

> [T]he report of the President's Commission of Immigration and Naturalization, Whom We Shall Welcome 213-14 (1953) expressed the view that [the veto] provision is . . . obstructive of good government and destructive of fundamental principles. In immigration matters in particular, *it frustrates proper administration* and puts a premium on extraneous considerations in the determination of legal rights.

Chadha, 634 F.2d at 426 n.23 (emphasis added). *Consumer Energy*, 673 F.2d 425 (fear of judicial review of congressional exercise of veto prompted FERC to withdraw a rule already promulgated.); G. Bell & R. Ostrow, *Congress—The Ultimate Source of Regulatory Power*, A.B.A.J., Sept. 1982, at 1088; Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 445 (1978).

150. *See generally* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 50 (1979). Congress has attempted to amend the A.P.A. to provide an across-the-board veto mechanism which would preempt existing vetoes. This proposal was first introduced in 1978 at which time it

demand an alternative means of control. Furthermore, the veto power is standardless,[151] and thus when exercised provides no guidance for future actions of the agency.[152] This aspect of the veto supports the conclusion that the courts are better equipped to resolve disputes over rulemaking and adjudicatory actions.

Congress is by no means left without alternative methods of overseeing agencies. Perhaps the strongest method of control is through appropriations which have the effect of determining an agency's very existence.[153] Other controls include investigations, standing committees, and participation in the appointment process.[154] Armed with these controls, and with the judiciary as final arbitrator,[155] Congress if fully equipped to oversee agency actions.

C. *Alternative Methods of Reviewing Agency Actions*

Chadha and *Consumer Energy* present examples of the judiciary's unwillingness to allow the Constitution to be circumvented by congressional action. One possible alternative to the one-house veto would be to require that Congress bring suit against the agency if it believes that the agency has not followed congressional wishes. While this process would be time consuming, the problems with the unconstitutionality of the veto would be alleviated. Furthermore, a judicial determination would provide the agency with a well delineated opinion as to precisely what error it had committed.

Congress itself could alleviate the veto problem by enacting clearer statutes with respect to the agencies, thus limiting the breadth of delegation. If Congress still felt compelled to negate agency actions, the vote of both houses and presentation to the President has always been an available means. While these are just a few alternative means of control, the demand for an alternative must be forthcoming from the Supreme Court.

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was met with great resistance. *See supra* note 148.

151. *See* Dixon, *supra* note 12, at 448 (The argument for validity of standardless vetoes is that the standard is "read into" the veto provisions. This, however, leads to problems of improper delegation.).

152. *E.g.*, *Chadha*, 634 F.2d at 413. The legislature's veto of Chadha's suspension of deportation was without accompanying rationale. In future circumstances the Immigration Service has no guidance as to the prerequisites of suspensions of deportation. *Id.*

153. *See* K. DAVIS, *supra* note 22, § 6.08 at 387, § 2.16 at 154.

154. *See generally* J. HARRIS, *supra* note 1. *But cf.* C. FRANKEL, HIGH ON FOGGY BOTTOM 189-90 (1969); Gellhorn, *supra* note 12. "A continuing problem in legislative investigations is drawing a clear line between policy matters (which are presumably within the scope of legislators' proper concern) and decisions in particular cases (which are pesumably to be made without external pressures or threats, explicit or implicit in congressional questioning . . .)." *Id. See generally* M. OGUL, CONGRESS OVERSEAS THE BUREAUCRACY (1976); J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE (1953) (study of the power contained in the Senate to confirm presidential appointments).

155. *E.g.*, Marbury v. Madison, 5 U.S. 137 (1 Cranch) (1803). "[The] province and duty of the judicial department [is] to say what the law is . . . ." *Id.* at 177. In this respect, the legislature cannot stand as the body to determine the validity of administrative agencies' decision or rules.

CONCLUSION

The legislative veto has been a controversial method of congressional control over administrative agency rules and adjudicatory decisions, and opponents of the veto have gained an increasing foothold in the abolition of this device. This development recently culminated in two appeals court's decisions: *Chadha* and *Consumer Energy*. After successfully overcoming longstanding justiciability barriers, the circuit courts held the veto violative of separation of powers, bicameralism, presidential veto power and was, therefore, unconstitutional.

The effect of these decisions is that invocation of the veto is precluded in agency adjudicatory or rulemaking functions. The determination of the veto's ultimate validity, however, rests upon review by the Supreme Court.* The resulting impact of a decision upholding these cases will demand a profound difference in the future methods by which Congress controls those to whom it has delegated its power.

SHIRLEY M. THOMPSON

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* On June 23, 1983, as this Article went to print the Supreme Court rendered its decision in Immigration and Naturalization Service v. Chadha, 51 U.S.L.W. 4907 (U.S. June 23, 1983). The Court, in affirming the lower court decision held that the legislative veto was an unconstitutional method of overseeing administrative agencies. *Id.* at 4917-18. The veto was deemed to be in violation of the express constitutional requirements for the enactment of legislation, specifically, the vote of both houses and presentation to the President. *Id.*

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NATIONAL WILDLIFE FEDERATION v. WATT, D.C.D.C.,1983. "

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NATIONAL WILDLIFE FEDERATION and the Wilderness Society, Plaintiffs, "
v. James G. WATT, Defendant. Civ. A. No. 83-2648. United States "
District Court, District of Columbia. Sept. 28, 1983. Memorandum with "
Respect to Preliminary Injunction Oct. 6, 1983. "

PUBLIC LANDS - COAL LEASES: Interior Secretary enjoined from issuance"
of leases to certain coal lands. "

Environmental organizations brought action against the Secretary of "
Interior to declare illegal and to enjoin planned issuance of leases to "
certain coal lands in Montana and North Dakota. Chairman of the House "
Interior and Insular Affairs Committee intervened as plantiff, and "
potential lessees intervened as defendants. The District Court, "
Oberdorfer, J., held that: (1) Chairman and environmental organizations "
had standing to sue, and (2) Secretary of Interior would be enjoined from",

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PAGE 2 OF 50"

planned issuance of leases to certain coal lands, inasmuch as plaintiffs "
were likely to prevail on merits of their claim regarding legality of the"
Secretary's refusal to withhold issuance of the leases as required by "
Federal Land Policy and Management Act of 1976 and related regulation, "
and issuance of leases would irreparably injure plaintiffs' interest in "
protection of environmental values in the land. "

So ordered. "

G. Robert Witmer, Jr., Rochester, N.Y., Jane E. Kirtley, Nixon, "
Hargrave, Devens & Doyle, Norman L. Dean, Jr., Nat. Wildlife Federation, "
Washington, D.C., for plaintiffs. "

F. Henry Habicht, II, Acting Asst. Atty. Gen., Robert D. Daniel, Sp. "
Lit. Counsel, Michael Reed, Peter R. Steenland, Jr., Land & Natural "
Resources Div., Washington, D.C., for defendant. "

John A. Macleod, Timothy M. Biddle, David B. Siegel, Crowell & Moring,"
Washington, D.C., for defendants-intervenors North American Coal Corp., "
Falkirk Mining Co., Missouri Valley Properties Co., and Baukol-Noonan, "
Inc. "

Stanley M. Brand, Gen. Counsel to the Clerk, Steven R. Ross, Deputy "
Counsel to the Clerk, Michael L. Murray, Asst. Counsel to the Clerk, U.S.",

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PAGE 3 OF 50"

House of Representatives, Washington, D.C., for plaintiff-intervenor "
Morris K. Udall. "

PRELIMINARY INJUNCTION"

to sue to vindicate his interest as congressman and as Committee Chairman"
in seeking to compel Interior Secretary to honor resolution adopted by "
the Committee pursuant to section of Federal Land Policy and Management "
Act of 1976, requiring the Secretary temporarily to withhold public lands"
from sale or lease when requested to do so by the House Committee. "
Federal Land Policy and Management Act of 1976, § 204(e), 43 U.S.C.A. § "
1714(e). "
2. Federal Civil Procedure 103"
Standing of the Chairman of the House Interior and Insular Affairs "
Committee to sue to compel Interior Secretary to honor resolution adopted"
by the Committee pursuant to the Federal Land Policy and Management Act "
of 1976, requiring the Secretary temporarily to withhold public lands "
from sale or lease when requested to do so by the Committee, was "?
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" "

sufficient, when coupled with environmental organizations' interest in "
preservation of land sought to be leased, to give those organizations "
standing as well. Federal Land Policy and Management Act of 1976, § 204("
e), 43 U.S.C.A. § 1714(e); 28 U.S.C.A. § 512. "
3. Mines and Minerals 5.1(3)"
Secretary of Interior was obligated to apply his own regulation "
requiring him temporarily to withhold public lands from sale or lease "
when requested to do so by the House Interior and Insular Affairs "
Committee, unless and until regulation was rescinded after affording "
notice and opportunity to comment. Federal Land Policy and Management "
Act of 1976, § 204(e), 43 U.S.C.A. § 1714(e). "
4. United States 58(3)"
Congress not only has legislative power over public domain, it also "
exercises powers of proprietor therein; like any other owner, it may "
provide when, how, and to whom its lands are to be sold. U.S.C.A. "
Const. Art. 4, §§ 1 et seq., 3; Federal Land Policy and Management Act "
of 1976, § 204(e), 43 U.S.C.A. § 1714(e). "
5. Mines and Minerals 5.1(9)"
Secretary of Interior would be enjoined from planned issuance of "?
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" "

leases to certain coal lands in Montana and North Dakota, inasmuch as "
plaintiffs, namely, Chairman of the House Interior and Insular Affairs "
Committee and environmental organizations with interest in preservation "
of land sought to be leased, were likely to prevail on merits of claim "
regarding legality of the Secretary's refusal to withhold issuance of the"
leases as required by Federal Land Policy and Management Act of 1976 and "
regulation, and issuance of the leases would irreparably injure "
plaintiffs' interests in protection of environmental values in the land. "
U.S.C.A. Const. Art. 4, §§ 1 et seq., 3; Federal Land Policy and "
Management Act of 1976, § 204(e), 43 U.S.C.A. § 1714(e). "
Preliminary Injunction Memorandum"
6. Federal Civil Procedure 103"
Member of Congress has standing to protect the "effectiveness of his "
vote" in enacting a statute. "
7. Federal Civil Procedure 103"
Injury to aesthetic or environmental interests constitutes injury in "
fact for purposes of standing. "
8. Injunction 137(4)"

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PAGE 6 OF 50"

Interior from planned issuance of certain coal leases, contention that "
emergency withdrawal resolution of House Committee, purporting to require"
Secretary to postpone issuance, was not an improper attempt to "
legislatively veto Secretary's action, but, rather, merely an emergency "
procedure to temporarily withdraw lands from leasing pending "
congressional study, was not likely to succeed on the merits, inasmuch as"
effect of resolution was to alter Secretary's rights and duties, without "
benefit of bicameral passage and presidential presentment. U.S.C.A. "
Const. Art. 1, § 8; Art. 4, § 3; Federal Land Policy and Management Act"
of 1976, § 204(e), 43 U.S.C.A. § 1714(e). "
9. Administrative Law and Procedure 421"
Mines and Minerals 92.6"
Reliance by the Secretary of Interior on informal, ex parte, "
unpublished legal opinions, without minimal testing by other interested "
persons, that section of the Federal Land Policy and Management Act was "
unconstitutional and void, and that, therefore, implementing regulation "
was void as well, excusing compliance by the Secretary therewith, did not"
satisfy administrative procedural notice and comment requirements for "
rescission of regulation. Federal Land Policy and Management Act of ",
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SET/1 DOCUMENT 1"

PAGE 7 OF 50"

1976, § 204(e), 43 U.S.C.A. § 1714(e). "
10. Administrative Law and Procedure 421"
Administrative procedural requirement of notice and comment before "
regulation is rescinded or disregarded permits interested parties to "
criticize proposed agency action and allows agency to benefit from "
outside suggestions. "
11. Mines and Minerals 92.6"
Statutory requirement that Secretary of Interior submit report to "
congressional committee with respect to proposed use of subject public "
lands and impact of such use was not satisfied by letter sent by the "
Secretary to House Interior and Insular Affairs Committee, stating merely"
that reasons given by the Committee for its conclusion that emergency "
existed justifying invocation of Committee's authority to require "
withholding issuance of certain coal leases did not, in fact, support "
finding of emergency. Federal Land Policy and Management Act of 1976, § "
204(c)(2), (e), 43 U.S.C.A. § 1714(c)(2), (e). "
"
OBERDORFER, District Judge. "
This is an action by plaintiffs against the Secretary of Interior to ",
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PAGE 8 OF 50"

declare illegal and to enjoin his planned issuance of leases to certain "
coal lands in Montana and North Dakota. The Honorable Morris Udall, "
Chairman of the House Interior and Insular Affairs Committee, has "
intervened as a plaintiff. Potential lessees have intervened as "
defendants. "
At issue is the legality of the Secretary's refusal to withhold "

Department of Interior regulation. 43 C.F.R. § 2310.5. Both section "
204(e) and the regulation require the Secretary temporarily to withhold "
public lands from sale or lease when requested to do so by the House "
Committee. Although defendant has not rescinded the regulation, nor "
conducted notice and comment with respect to recission of it, he "
justified his refusal to abide by it on the ground that he had been "
advised by his general counsel and by the Office of Legal Counsel of the "
Department of Justice /1/ that the Supreme Court's recent decision in INS"
v. "Chadha," --- U.S. ----, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), "
invalidated both the statute and the regulation. See letter from "
Secretary Watt to Chairman Udall (Sept. 9, 1983) (Attachment A to ",
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Defendant's Memorandum Opposing Motion for Preliminary Injunction). "

After consideration of briefs of the parties, and an excellent oral "
argument, and for reasons more fully stated in a Memorandum to be filed, "
the Court concludes that: "

(1, 2) 1. Chairman Udall has standing to sue to vindicate his interest"
as a Congressman and as a Committee Chairman in seeking to compel the "
defendant to honor a resolution adopted by his Committee pursuant to "
section 204(e). See American Federation of Government Employees v. "
Pierce, 697 F.2d 303, 305 (D.C.Cir.1982). This standing, coupled with "
the plaintiff organizations' interest in preservation of the land sought "
to be leased, give the organizations standing also. See Watt v. Energy "
Action Educational Foundation, 454 U.S. 151, 102 S.Ct. 205, 212, 70 L.Ed."
2d 309 (1981). "

(3) 2. Plaintiffs are likely to prevail on the merits because "
defendant is obligated to apply his own regulation, unless and until it "
is rescinded after he affords notice and an opportunity to comment. "
Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957). "

(4) It is not at all clear that section 204(e) and the regulation are "
void. Indeed, they may well be authorized by Article IV, Section 3, of ",
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the Constitution, independently of Article I, the subject of the "Chadha" "
decision. "

As the Supreme Court has stated: "

> Congress not only has a legislative power over the public "
> domain, but it also exercises the powers of a proprietor "
> therein.... Like any other owner it may provide when, how, and to "
> whom its land can be sold. "

United States v. Midwest Oil Co., 236 U.S. 459, 474, 35 S.Ct. 309, 313, "
59 L.Ed. 673 (1915); see also Kleppe v. New Mexico, 426 U.S. 529, "
536-43, 96 S.Ct. 2285, 2290-93, 49 L.Ed.2d 34 (1976). It may well be "
held that the statute requiring the Secretary temporarily to withdraw "
lands at the request of a designated congressional committee in order "
that Congress may reexamine the leasing process after an impending recess"
is an appropriate exercise of the proprietary power, as distinguished "
from legislative power, created in Congress by Article IV, Section 3. "

Dictum in United States v. California, 332 U.S. 19, 28, 67 S.Ct. "
1658, 1663, 91 L.Ed. 1889 (1947), relied upon by defendant, is not "
controlling here. That original action involved the question of whether "
California or the United States "owns or has paramount rights in and ",
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power over several thousand square miles of land under the ocean off the " coast of California." Id. at 24-25, 67 S.Ct. at 1661. In deciding that " the Congress had not precluded the Attorney General from prosecuting that" original action, the Court recognized that only a formal Act of Congress " pursuant to Article IV could divest the Attorney General of his authority" to sue. But the California opinion went on to note with respect to " Congress' Article IV power: "

> We have said that the constitutional power of Congress in this " respect is without limitation .... Thus neither the courts nor the " executive agencies, could proceed contrary to an Act of Congress in" this congressional area of national power. "

Id. at 27, 67 S.Ct. at 1663. Congress enacted section 204(e) and a " President signed it. It is an Act of Congress "in this congressional " area of national power." One provision requires the Secretary to withhold" leasing temporarily at the request of the House Committee. The " California opinion may well presage a decision that neither the defendant" nor the courts may "proceed contrary" to that statute. "

Moreover, even if portions of section 204(e) are unconstitutional, the" independent discretion given to the Secretary by section 204(e) to ",
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withdraw the land probably preserved the regulation, unless and until the" Secretary rescinded it after notice and comment. In these circumstances," his failure to honor the regulation probably violated the Administrative " Procedure Act, 5 U.S.C. § 553. See Motor Vehicle Manufacturers " Association v. State Farm Mutual Automobile Insurance Co., --- U.S. ----," 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). /2/"

(5) 3. Issuance of the leases, or any other change in the status quo, " would irreparably injure plaintiff Udall's interest in vindication of his" prerogatives as a Committee Chairman and as a Member of the House, and " would leave the other plaintiffs at risk of irreparable injury to their " interests in protection of environmental values in the land. "

4. Defendants' interests in issuance of the leases during fiscal 1983 " where pending legislation might preclude or delay their issuance in " fiscal 1984 are outweighed by the interests of the plaintiffs and by the " public interest. That interest is authoritatively expressed by the 1976 " Act, the Committee Resolution, a recent Act of Congress requiring a " Commission to study coal leasing procedure (Pub.L. No. 98-63, July 30, " 1983), and similar bills passed by both Houses of Congress (see 129 Cong." Rec. S 12486-95, Sept. 20, 1983) and now reportedly under consideration ",
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by a Conference Committee which, if enacted, would declare a moratorium " on such leases during fiscal 1984. "

Accordingly, it is this 28th day of September, 1983, hereby"

ORDERED: that pending a decision on the motions for summary judgment," unless this order is sooner dissolved, and without plaintiffs being " required to give security therefor, the defendants, their agents, " servants, employees, attorneys, and representatives shall be stayed, " enjoined, and restrained from issuing to, entering into, or otherwise "

ORDERED: that defendant's protective motion for a stay pending appeal" is DENIED."

MEMORANDUM WITH RESPECT TO PRELIMINARY INJUNCTION /1/"

I"

Plaintiffs National Wildlife Federation and The Wilderness Society " brought this suit on September 8, 1983, against defendant Secretary of " the Department of the Interior. Plaintiffs seek a declaratory judgment " holding illegal the Secretary's plan to lease for coal mining certain " tracts of federal lands in the Fort Union Federal Coal Production Region ";
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in eastern Montana and western North Dakota. Plaintiffs also seek " appropriate injunctive relief. They filed the suit after defendant gave " notice of his intention to receive and accept bids for the sale of coal " leases in the region despite a Resolution adopted by the Interior and " Insular Affairs Committee of the House of Representatives on August 3, " 1983, pursuant to section 204(e) of the Federal Land Policy and " Management Act of 1976, 43 U.S.C. # 1714(e). That Resolution directed " the Secretary to withdraw the Fort Union lands from coal leasing " temporarily. The Honorable Morris K. Udall, Chairman of the House " Committee on Interior and Insular Affairs, has intervened as a plaintiff " pursuant to Rule 24 of the Federal Rules of Civil Procedure. Four coal " companies that successfully bid for the Fort Union tracts have intervened" as party defendants. /2/"

The complaint alleges that the issuance of the leases disregards and " violates the Resolution, and is therefore arbitrary and capricious, an " abuse of discretion, and otherwise not in accordance with law. " Plaintiff-intervenor Udall claims that the defendant's refusal to honor " the Resolution and his decision that section 204(e) is void injures " Udall's interest as Committee Chairman and as a Congressman in the ";
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exercise of specific authority vested in him by law. The plaintiff " organizations claim that their members will be adversely affected in " their recreational, aesthetic, hunting, and fishing use of the Fort Union" region. All plaintiffs claim that opening of the region to coal leasing " will result in air pollution, the loss of wildlife habitat, and the " deterioration of the aesthetic and recreational values of the region and " surrounding areas. "

The complaint was accompanied by an application for a temporary " restraining order and a motion for a preliminary injunction. These " motions alleged that defendant intended to offer leases for bid on " September 14. On September 9 the Court denied the application for a " temporary restraining order on the understanding that no leases would be " issued to successful bidders until 45 to 60 days after the September 14 " bidding and that the parties had worked out a schedule for briefing and " hearing dispositive motions toward the end of October. See Order (Sept. " 14, 1983); see also Transcript at 11-15 (Sept. 9, 1983). In a letter " dated September 15, however, defendant's counsel advised that defendant " had accepted some bids and that he would issue leases to the successful " bidders by September 30. Accordingly, the Court restrained the issuance ";
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of leases while the parties briefed and argued an expedited motion for a " preliminary injunction. See Transcript (Sept. 16, 1983); Stipulation " of Schedule and Temporary Restraining Order (Sept. 19, 1983). "

Plaintiffs' motion for a preliminary injunction was supported by a " factual affidavit and documentary evidence. Hastily prepared briefs were" filed by plaintiffs, defendant, and plaintiff-intervenor. In addition, " the Court was aided by excellent oral arguments by all counsel on " September 27. Upon consideration of all submissions, the Court was " persuaded that there was substantial likelihood that plaintiffs would " succeed on the merits, that without temporary relief plaintiffs would " suffer irreparable injury, that defendant and defendant-intervenors would" not suffer substantial harm from temporary relief and, finally, that such" relief would be in the public interest. Accordingly, on September 28 the" Court entered an order restraining defendant from issuing the leases in " question pending a final decision on the motions for summary judgment. "

II"

A. "

Article IV, Section 3, of the Constitution provides: "

> The Congress shall have Power to dispose of and make all needful",

> Rules and Regulations respecting the Territory or other Property " belonging to the United States ...."

The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 " et seq. ("1976 Act"), declared it the policy of the United States that, " among other things: "

> (1) the public lands be retained in Federal ownership, unless as" a result of the land use planning procedure provided for in this " Act, it is determined that disposal of a particular parcel will " serve the national interest; "
>
> . . . . "
>
> (4) the Congress exercise its constitutional authority to " withdraw or otherwise designate or dedicate Federal lands for " specified purposes and that Congress delineate the extent to which " the Executive may withdraw lands without legislative action; "
>
> (5) in administering public land statutes and exercising " discretionary authority granted by them, the Secretary be required " to establish comprehensive rules and regulations after considering " the views of the general public ..."
>
> (6) judicial review of public land adjudication decisions be ",

> provided by law; "
>
> . . . . "
>
> (8) the public lands be managed in a manner that will protect " the quality of scientific, scenic, historical, ecological, " environmental, air and atmospheric, water resource, and " archeological values; that, where appropriate, will preserve and " protect certain public lands in their natural condition; that will" provide food and habitat for fish and wildlife and domestic " animals; and that will provide for outdoor recreation and human " occupancy and use; "

by statute; "

* * * * * * * "

(12) the public lands be managed in a manner which recognizes " the Nation's need for domestic sources of minerals, food, timber, " and fiber from the public lands including implementation of the " Mining and Minerals Policy Act of 1970 ... as it pertains to the " public lands.... ",

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Section 103(J) of the Act defines "withdrawal" as withholding an area " of Federal land from settlement, sale, location, or entry, under some or " all of the general land laws, for the purpose of limiting activities " under those laws in order to maintain other public values in the area or " reserving the area for a particular public purpose or program. Section " 204 governs withdrawals. Section 204(a) authorizes the Secretary"

to make, modify, extend, or revoke withdrawals but only in " accordance with the provisions and limitations of this section. "

Section 204(e), at issue here, provides in relevant part that"

When the Secretary determines, or when the Committee on Interior" and Insular Affairs of either the House of Representatives or the " Senate notifies the Secretary, that an emergency situation exists " and that extraordinary measures must be taken to preserve values " that would otherwise be lost, the Secretary ... shall immediately " make a withdrawal .... Such emergency withdrawal shall be effective" when made but shall last only for a period not to exceed three " years ...."

Section 310 of the Act gives the Secretary broad authority to " promulgate regulations, in the manner prescribed by the Administrative ",

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Procedure Act: "

The Secretary, with respect to the public lands, shall " promulgate rules and regulations to carry out the purposes of this " Act .... The promulgation of such rules and regulations shall be " governed by the provisions of chapter 5 of Title 5, without regard " to section 553(a)(2). /(/ /3/ /)/"

Pursuant to this rule-making authority, the Secretary promulgated a " regulation governing his response to a notice from committees in the " House or Senate of an emergency requiring a temporary withdrawal of land " from leasing. That regulation provides in relevant part: "

(a) When the Secretary determines, or when either one of the two" Committees of the Congress that are specified in section 204(e) of " the act (43 U.S.C. 1714(e)) notifies the Secretary, that an " emergency exists and that extraordinary measures need to be taken " to protect natural resources or resource values that otherwise " would be lost, the Secretary shall immediately make a withdrawal " which shall be limited in its scope and duration to the " emergency...."

(b) When an emergency withdrawal is signed, the Secretary shall ",

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on the same day, send a notice of the withdrawal to the two "
Committees of the Congress that are specified for that purpose ...."
(c) The Secretary shall forward a report to each of the "
aforementioned committees within 90 days after filing with them the"
notice of emergency withdrawal. Reports for all such withdrawals, "
regardless of the amount of acreage withdrawn, shall contain the "
information specified in section 204(c)(2) of the act (43 U.S.C. "
1714(c)(2)). "

43 C.F.R. § 2310.5. That regulation has not been rescinded by the "
Secretary through notice, comment, and reasoned decision. "

B. "

The Secretary's decision to bid and lease the Fort Union land for coal" mining was preceded by an elaborate administrative process beginning in " the late 1970's with the Federal Coal Management Program. The Program " proceeded through several stages, including an environmental impact " statement. In a report prepared in 1979, a Fort Union lease sale was " called for in April 1982. See Federal Coal Management Report for Fiscal " Year 1979. On November 6, 1980, in 45 Fed.Reg. 73,801, the then " Secretary published a notice calling for expressions of leasing interest ",
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in the region, pursuant to his authority under the Mineral Lands Leasing " Act of 1920, 30 U.S.C. § 201. "

Identification of the particular tracts to be leased in the Fort Union" Region was conducted under the guidance of a Regional Coal Team (RCT). " /4/ In 1982, the RCT published an environmental impact statement specific" to the Fort Union Region and subjected the statement to public comment. " /5/ On February 14, 1983, the final environmental impact statement was " published. After balancing the environmental considerations, the RCT " recommended and the defendant approved an offer of 790.2 million tons of " coal for both production tracts and maintenance tracts. "

In the year before the sale at issue, the Secretary auctioned leases " for 1.5 billion tons of coal on approximately 32,000 acres in Montana and" Wyoming. In May 1983, the General Accounting Office (GAO) reported that " the Interior Department had issued those leases for $100 million less " than the GAO's estimates of fair market value. See Comptroller General, " Report to the Congress: Analysis of the Powder River Basin Federal Coal " Lease Sale: Economic Valuation Improvements and Legislative Changes " Needed (May 11, 1983). On July 30, 1983, Congress passed, and the " President signed, an Act that ordered the Secretary to appoint a ",
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commission to review coal leasing procedures. The Commission was " obligated to report to the Congress by January 1984 on methods to insure " that fair market value is received for leases. Act of July 30, 1983, " Pub.L. No. 98-63, 97 Stat. 328. During this same time, the House passed," but the Senate rejected, a provision in a supplemental appropriations " bill that would have imposed a moratorium on coal leasing by the " Department of the Interior. More recently the Senate has approved a " counterpart to the coal leasing moratorium previously passed by the House" as an element of the 1984 appropriations legislation. 129 Cong.Rec. S " 12,486-95 (Sept. 20, 1983). The House and Senate versions are now before" a Conference Committee. "

The immediate actions leading up the current litigation began with an " postpone the sale of Fort Union leases previously scheduled for September 14. /6/ The Chairman replied with a request for postponement pending committee review. /7/ The Secretary then stated that any Committee resolution passed pursuant to section 204(e) would be treated as a request, not a directive. /8/ On August 3, the Committee adopted a

Resolution pursuant to which the Chairman notified the Secretary that an emergency situation existed and that the Fort Union tracts "are to be immediately withdrawn" from coal leasing. /9/ Nevertheless, in two subsequent notices in the Federal Register, the Secretary continued preparations for the September 14 sale. /10/

On September 9, 1983, the Secretary acknowledged by letter to Chairman Udall that he had received "the August 3, 1983 Resolution voted out of your Committee by a partisan vote." /11/ The Secretary stated that he was respectfully declining to comply with the Committee's directive because section 204(e) and the Committee Resolution were unconstitutional under Immigration and Naturalization Service v. "Chadha," --- U.S. ----, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983). In making that decision, the Secretary stated that he relied on opinions of the Attorney General and his own counsel. /12/ Neither of these opinions referred to in the September 9 letter was apparently published or furnished to the House Committee. They have not has been furnished to the Court. Moreover, the September 9 letter made no reference to the Department of Interior Regulation on emergency withdrawal. 43 C.F.R. # 2310.5. Nor is there reference to Congress' power to dispose of public lands under Article IV, Section 3,

of the Constitution, as distinguished from Article I.

The September 9 letter further related that, out of respect for the Committee, the Secretary had requested the Bureau of Land Management to review the reasons stated by the Committee for its conclusion that an emergency existed justifying invocation of the authority vested in the Committee by section 204(e). Based on that review the Secretary concluded that "those reasons simply do not support the finding of an emergency which would justify withholding" the Fort Union lands from leasing. Letter at 1. There followed a detailed response to each of the reasons advanced by the Committee.

III

(6) Before discussing the plaintiffs' chances of prevailing on the merits, it is necessary to address defendant's challenge to plaintiffs' standing to sue. This challenge was originally directed toward plaintiff organizations. The complexion of the standing issue changed significantly when Chairman Udall intervened. It is clear under the case law of this Circuit that a member of Congress has standing to protect the "effectiveness of his vote" in enacting a statute. American Federation of Government Employees v. Pierce, 697 F.2d 303, 305 (D.C.Cir.1982). In

the approval of his committee. He was held to have standing. The same "
principle applies here. "
(7) Once the standing of Chairman Udall is recognized, it is axiomatic"
that the other plaintiffs have standing. See Watt v. Energy Action "
Educational Foundation, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d"
309 (1981). Moreover, the defendant's claim that plaintiff organizations"
lacked standing overlooked the preamble, text, and context of the 1976 "
Act, which forms the basis of this action. That statute stated Congress'"
purpose to be to protect the very values of scenery, wildlife and outdoor"
recreation that plaintiffs and their members now enjoy and claim that "
defendant threatens. In addition, the Resolution cited environmental as "
well as economic concerns as the basis for the request for withdrawal. "
See infra note 9. Given this expression of priorities by Congress and "
the Committee, plaintiff organizations could legitimately expect that a "
suit to enforce withdrawal would, if successful, advance their "
environmental goals. Injury to aesthetic or environmental interests "
constitutes injury in fact for purposes of standing. See Duke Power Co. ",
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v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, "
57 L.Ed.2d 595 (1978); United States v. Students Challenging Regulatory "
Agency Procedures, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). "
The causal connection between the threatened injuries which plaintiff "
organizations assert and the relief they request is sufficient to meet "
the standard set forth in those cases. Finally, it is noteworthy that "
the 1976 Act expressed Congress' desire that there be judicial review of "
defendant's actions affecting such values. See supra p. ----. "

IV"

On the merits, plaintiffs contend that issuance of the leases in the "
face of the House Committee's emergency withdrawal resolution violates "
section 204(e) of the 1976 Act and a parallel regulation, 43 C.F.R. § "
2310.5, issued by the Department of Interior. Defendant counters that "
plaintiffs fail to state a claim upon which relief can be granted because"
section 204(e) and the regulation are "patently unconstitutional and "
unenforceable," citing INS v. "Chadha," supra. Defendant's Statement in "
Opposition to Motion for Preliminary Injunction at 16. "
Plaintiffs respond that the Committee Resolution is not a legislative "
veto, "but rather is an emergency legislative procedure" to withdraw the ",
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lands for leasing temporarily in order to enable Congress to study and, "
if necessary, change the defendant's coal leasing procedures. "
Plaintiffs' Memorandum in Support of Preliminary Injunction at 10. "
Plaintiffs rely upon Judge Jameson's recent decision in Pacific Legal "
Foundation v. Watt, 529 F.Supp. 982 (D.Mont.1982), sustaining another "
temporary withdrawal so long as the Secretary of Interior had the last "
word as to the duration of the withdrawal, and upon a footnote in "Chadha" "
that recognized the constitutionality of "report and wait" statutes. INS"
v. "Chadha," 103 S.Ct. at 2776 n. 9. Plaintiffs supplement their claim "
with the contention that a resolution passed pursuant to section 204(e) "
is not an exercise of legislative power subject to the restrictions of"
"Chadha," but, instead, is an exercise of Congress' proprietary power over"
public lands. The latter power, they claim, is granted by Article IV and"
is not subject to the Article I requirements of bicameral passage and "
presentment. "

§ 2310.5, by its terms, requires deference to the Resolution. Plaintiffs"
assert that the regulation is binding (even if the Resolution is not "
itself enforceable by direct operation of the statute) until defendant ",
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has amended or rescinded the regulation in the manner prescribed by the "
Administrative Procedure Act, 5 U.S.C. § 553. See United States v. "
Nixon, 418 U.S. 683, 694-96, 94 S.Ct. 3090, 3100-3102, 41 L.Ed.2d 1039 "
(1974); Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1165, 1 L."
Ed.2d 1403 (1957). Plaintiffs urge that the Secretary's failure to "
rescind the regulation through notice and comment establishes the "
illegality of defendant's lease plan and makes consideration of his "
constitutional claim unnecessary. "
Defendant has a number of responses. Defendant presses his "
constitutional claim based on the requirements in "Chadha" of bicameral "
passage and presidential presentment. He points to the standard "
announced by the Supreme Court for identifying an impermissible exercise "
of legislative power in these circumstances: whether the action altered "
the "legal rights, duties and relations of persons ... outside the "
legislative branch." INS v. "Chadha," 103 S.Ct. at 2784. In "Chadha," "
defendant points out, the House of Representatives overturned the "
Attorney General's decision not to deport "Chadha. " Here, defendant "
contends, the House Committee attempts to overturn defendant's decision "
to lease the coal lands at the time he had selected. It is defendant's ",
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position that the District Court's attempt in Pacific Legal Foundation to"
recast section 204(e) into something different from a legislative veto "
did not survive "Chadha. " Even granting Pacific 's validity, arguendo, "
defendant contends that he complied with Judge Jameson's formula /13/ and"
made an independent decision, contrary to the opinion stated by the House"
Committee, that there was no emergency and that therefore the withdrawal,"
if any, was ended. "
Defendant also disputes plaintiffs' contention that Congress' Article "
IV power to dispose of public land is a plenary grant not subject to "
Article I restrictions. He cites United States v. California, 332 U.S. "
19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947), for the contrary position. See "
defendant's Supplemental Statement. Finally, defendant claims to be free"
of any obligation to follow his own regulation because it "is just as "
unconstitutional as FLPMA § 204(e)," citing Texas Oil and Gas Corp. v. "
Watt, 683 F.2d 427 (D.C.Cir.1982). Defendant's Statement in Opposition "
to Preliminary Injunction at 24. "
V"
A. "
(8) On the basis of the limited briefing and research which the ",
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schedule has afforded counsel and the Court, it appears to be unlikely "
that plaintiffs' original, nonconstitutional theory for distinguishing"

[illegible] from Article I of the Constitution. If the
"Chadha" rationale applies to Article IV, Section 3, the Committee "
resolution will probably be held to be impermissible legislative "
activity. Plaintiffs' attempt to distinguish a section 204(e) withdrawal"
from a legislative veto on the grounds that the withdrawal is only "
temporary is unconvincing. A forced withdrawal, whether temporary or "
permanent, alters the legal rights and duties of the Secretary of the "
Interior, and this cannot be done, according to "Chadha," without bicameral"
passage and presidential presentment. The holding in Pacific Legal "
Foundation, /14/ which plaintiffs cite as support, seems susceptible to "
similar criticism. If section 204(e) is read to give the Secretary total"
discretion over the duration of the withdrawal, then the section would "
lose all force. Yet once the section is interpreted to mandate "
withdrawal for any length of time, it alters the Secretary's legal rights"
and duties. /15/"
  Finally, section 204(e) does not seem analogous, as plaintiffs claim, ",
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to the "report and wait" provisions that passed constitutional muster in"
"Chadha" and Sibbach v. Wilson & Co., 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. "
479 (1941). The statute at issue in Sibbach provided that newly "
promulgated Federal Rules of Civil Procedure would not take effect for a "
certain period of time after presentment to Congress. This grace period,"
uniformly applied to every new rule, allows Congress time to amend or "
reject the rule if it desires. There is no similar rule of postponement "
universally applied to coal leases so that each lease can be reviewed by "
Congress as a whole. Rather, the House Committee may pick and choose to "
delay leases that may or may not become the subject of action by "
Congress. "Chadha" will probably be interpreted as holding that this sort "
of selective review of executive action by less than the full Congress is"
not a permissible exercise of its legislative power under Article I. "
B. "
  (9) Defendant's failure to follow his own regulation, or to rescind it"
after notice, comment, and reasoned determination, raises a more serious "
question. On the day after the Supreme Court decided "Chadha," it "
announced its decision in Motor Vehicle Manufacturers Association v. "
State Farm Mutual Automobile Insurance Company, --- U.S. ----, 103 S.Ct. ",
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2856, 77 L.Ed.2d 443 (1983). That decision reiterated the high standard "
set by Congress in the Administrative Procedure Act for Executive "
Department decisions which withdraw regulations, a standard not satisfied"
in that case even though there had been full compliance with APA notice "
and comment rules. /16/ A fortiori, it will probably be held that "
defendant's decision not to follow his regulation, on the basis of "
informal, ex parte, unpublished legal opinions that the parallel "
provision of section 204(e) was void, violated those notice requirements."
Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1165, 1 L.Ed.2d 1403"
(1957); see also United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, "
41 L.Ed.2d 1039 (1974). /17/ Reliance on such ex parte opinions without "
minimal testing by other interested persons does not satisfy the notice "
and comment requirements of APA. See, e.g., Environmental Defense Fund, "
Inc. v. Environmental Protection Agency, --- F.2d ---- at ---- No. "
82-1346, slip op. at 10 (D.C.Cir. Aug. 30, 1983); National Association "
of Home Health Agencies v. Schweiker, 690 F.2d 932, 948-50 (D.C.Cir."

April 29, 1983). ",
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Neither the material furnished by the parties nor that otherwise " available to the Court in this brief time establishes with the certainty " perceived by the defendant's legal advisers that section 204(e) of the " 1976 Act, the Committee resolution, and the regulation are, as defendant " asserts, "patently unconstitutional." At issue in "Chadha" was the " congressional power "(t)o establish a uniform Rule of Naturalization" " under Article I, Section 8, of the U.S. Constitution. Article IV, " Section 3, by contrast, provides that: "

> The Congress shall have Power to dispose of and make all needful" Rules and Regulations respecting the Territories or other Property " belonging to the United States .... (Emphasis added.)"

In interpreting Article IV, the Supreme Court has stated that: "

> Congress not only has a legislative power over the public " domain, but it also exercises the powers of the proprietor " therein.... Like any other owner it may provide when, how and to " whom its land can be sold. "

United States v. Midwest Oil Co., 236 U.S. 459, 474, 35 S.Ct. 309, 313, " 59 L.Ed. 673 (1915); see also Kleppe v. New Mexico, 426 U.S. 529, " 536-43, 96 S.Ct. 2285, 2290-2293, 49 L.Ed.2d 34 (1976). ",
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It may well be that when this Court, the Court of Appeals, or the " Supreme Court has had comprehensive briefs and an adequate opportunity to" consider all the relevant historical evidence /18/ about the drafting and" context of Article IV, Section 3, as well as its application over the " years, they will reach a conclusion contrary to the opinions relied upon " by the defendant here. The Supreme Court has stated that Congress' " proprietary interest in public lands gives it constitutional prerogatives" which transcend those which it enjoys in its purely legislative role in " respect of immigration. See, e.g., United States v. California, 332 U.S." 19, 27, 67 S.Ct. 1658, 1662, 91 L.Ed. 1889 (1947). Moreover, it is " common historical knowledge that in the years before the Constitution was" adopted (and for many years thereafter) Congress was in session for only " brief periods and in recess for many months at a time. Public lands were" matters of even greater public and political interest than they are now. " It is not inconceivable that courts will decide from the text and context" of Article IV, Section 3, that its Framers contemplated that Congress' " proprietary power to "dispose of" public lands included the power to " delegate power to dispose of public land to the Executive as a trustee. " The Framers may well have contemplated that such an Article IV delegation",
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might be subject to an express and narrow condition that a specified " Committee of Congress could, during or in anticipation of a congressional" recess, temporarily suspend that delegation in the manner now provided " for in section 204(e) of the 1976 Act. Such a condition would be "

Dictum in United States v. California, 332 U.S. 19, 28, 67 S.Ct. "
1658, 1663, 91 L.Ed. 1889 (1947), relied upon by defendant, does not hold"
to the contrary, and other statements in that opinion may prove fatal to "
his defense. That original action involved the question of whether "
California or the United States "owns, or has paramount rights in and "
power over several thousand square miles of land under the ocean off the "
coast of California." Id. at 24-25, 67 S.Ct. at 1661. Defendant relied "
upon the element of the California decision that honored the authority of"
the Attorney General to file that original action in the Supreme Court "
despite a resolution by both Houses of Congress which, if signed by the "
President, would have ceded the tidelands in question to California. The"
Court decided that since the President had vetoed the cession, it had not"
precluded the Attorney General from prosecuting that original action. ",
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The Court indicated thereby that only a formal legislative Act of "
Congress pursuant to Article IV could divest the Attorney General of his "
authority to sue. But another nearby statement in the California opinion"
/19/ went on note with respect to Congress' Article IV power: "

We have said that the constitutional power of Congress in this "
respect is without limitation .... Thus neither the courts nor the "
executive agencies could proceed contrary to an Act of Congress in "
this congressional area of national power. "

Id. at 27, 67 S.Ct. at 1663. "
Applying that statement to the present case, it is noteworthy that "
Congress enacted section 204(e) and a President signed it. It is an Act "
of Congress "in this congressional area of national power." One provision"
requires the Secretary to withhold leasing temporarily at the request of "
the House Committee. The California opinion may well presage a decision "
that neither the defendant nor the courts may "proceed contrary" to that "
statute. "
(10) All of these considerations give substance to what may at first "
blush appear to be a hypertechnical claim by plaintiffs: that defendant "
violated the APA when he treated as void a Department regulation in ",
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reliance on informal ex parte legal opinions, without notice and comment."
Notice and comment would have afforded scholars and interested parties, "
including possibly counsel for the House of Representatives, the courtesy"
and the opportunity to do some of the research and analysis requisite to "
a reasoned decision about an original constitutional question and test "
the opinions of defendant's advisors. As our Court of Appeals has "
recently stated in a related context with respect to the APA requirement "
of notice and comment before a regulation is rescinded or disregarded: "

This requirement permits interested parties to criticize the "
proposed agency action, and allows the agency to benefit from "
outside suggestions. See National Tour Brokers Association v. "
United States, 591 F.2d 896, 902 (D.C.Cir.1978). "

Environmental Defense Fund, Inc. v. Environmental Protection Agency, --- "
F.2d ---- at ---- No. 82-1346, slip op. at 10 (D.C.Cir. Aug. 30, 1983). "
All of the reasons why a department head's rule-making decisions must be "
the product of "reasoned decision making" after notice and comment should"
apply as much to a delicate and original question of constitutional law "
as to matters of fact and policy. See Motor Vehicle Mfrs. Ass'n v. State"

C. "

This is not a case where Congress repealed a statute leaving an " implementing regulation high and dry. See Texas Oil and Gas Corp. v. " Watt, 683 F.2d 427 (D.C.Cir.1982). Obviously, notice and comment would " not enhance the simple process of discerning that Congress has repealed a" statute. But, by contrast, the original constitutional question of " whether "Chadha" applies to conditions attached by Congress to a delegation" of its power to dispose of or withhold public land pursuant to Article " IV, Section 3, is complex and delicate. Defendant's reliance on Texas " Oil to justify his disregard of his own regulation is misplaced. "

D. "

(11) Finally, it is probable that other language in section 204, the " constitutionality of which is unchallenged, will provide an independent " basis for the regulation's vitality. That statutory language gives the " Secretary discretionary authority on his own to declare an emergency and " withdraw land from leasing. The challenged regulation could be viewed as" a binding commitment by the Secretary to exercise this discretionary " authority to declare such an emergency and to effect such a temporary " withholding in deference to the formally expressed concerns of a ",
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previously designated Committee of Congress. Thus, the APA obligated the" Secretary to follow his own regulation until he had published notice of " his intention to rescind it, invited comment, put that comment (including" the constitutional law opinion of the Department of Justice) on the " public record, and published a reasoned and reviewable explanation of his" decision to rescind. "

Defendant claims that even if section 204(e) and the regulation remain" valid, the September 9 letter is the functional equivalent of the report " required of him by section 204(e), as more fully described in section " 204(c)(2). However, the Court has compared the September 9, 1983, letter" with an Interior Department report /20/ on an emergency withdrawal of " land forwarded to the House Committee on September 10, 1981, with respect" to what appears to be proposed leasing of other Montana lands at issue in" Pacific Legal Foundation v. Watt, 529 F.Supp. 982 (D.Mont.1982). The " comparison dramatizes the apparent failure of the September 9 letter to " comply with the requirements of section 204(c)(2). "

E. "

On the basis of the foregoing, the Court is persuaded that plaintiffs " will probably prevail on the merits of their claim that defendant ",
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violated the Department of Interior regulation which required the " defendant to withhold land when the House Committee served notice of an " emergency. A court will probably conclude that, until legally revoked, " the regulation is effective irrespective of the validity of section 204(" e). Even if 204(e) were found unconstitutional, notice and comment would" provide the Secretary with the opportunity to evaluate the regulation in "

VI"

Finally, it is necessary to address the related questions of whether " plaintiffs are threatened with irreparable injury, whether granting of " relief will seriously harm defendant, and, finally, what would best serve" the public interest. Considering these factors in reverse order, the " evidence about the public interest demonstrates that it would be best " served by maintaining the status quo, at least until there can be " adequate consideration of the serious constitutional problem underlying " this controversy. The Congress' view of the public interest has been " expressed not only by the Act and the House Committee Resolution, but " also by the passage by each House of a bill declaring a moratorium on ",

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these and other coal leases and by a law, passed by Congress and signed " by the President, for the appointment of a Commission to re-examine the " defendant's coal leasing procedures. See supra p. ----. There is also a" public interest in diplomatic resolution of constitutional impasses " between the Congress and the Executive. Yet if unrestrained, defendant " could alter rights or permit damage to the land in a way that confronted " the courts with a fait accompli before they could resolve the impasse. "

Plaintiff Udall's claim of irreparable injury is obvious. Because of " the Secretary's disregard of the withdrawal mechanism of section 204(e), " unless he is restrained, Congress would not be able to act under the same" circumstances as when the House Committee passed its resolution, and in " fact might not have an opportunity to act at all. See American " Federation of Government Employees v. Pierce, 697 F.2d at 305. The other" plaintiffs have a similar interest which would also suffer irreparable " injury. "

Defendant may also be harmed by the issuance of a preliminary " injunction. Legislation has passed both Houses of Congress that would " bar the sale of coal leases in the fiscal year 1984. Therefore, if the " leases in question are not issued by September 30, 1983, they may not be ",

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issued at all. The Court must balance this concern against the others. " Considerations about the public interest and threatened harm to " plaintiffs outweigh any harm which defendant is likely to suffer from " maintenance of the status quo pending a decision. All things considered," plaintiffs' motion for a preliminary injunction should be and has been " granted. "

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ALL FOOTNOTES FOLLOW "

1. Compare 28 U.S.C. § 512 authorizing the head of an executive " department to "require the opinion of the Attorney General on questions " of law arising in the administration of his department.""

2. Defendant also claims that even if section 204(e) and the " regulation are valid, the September 9 letter is the functional equivalent" of the report required of him by section 204(e), as more fully described " in section 204(c)(2). The Court has compared the September 9, 1983, " letter with an Interior Department report on an emergency withdrawal of " land forwarded to the House Committee on September 10, 1981, with respect" to what appears to be proposed leasing of other Montana lands at issue in" Pacific Legal Foundation v. Watt, 529 F.Supp. 982 (D.Mont.1982). The ",

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comparison demonstrates the apparent failure of the September 9 letter to" comply with the requirements of section 204(c)(2). "

1. An Order filed Sept. 28, 1983, preliminarily enjoining defendant " from issuing certain coal leases referred to a Memorandum to be filed. " See Order at ---- (Sept. 28, 1983). This is that Memorandum. Oral " argument was heard on Sept. 27, 1983; the injunction was issued as " quickly as possible, without full explanation, in order to afford the " losing party an opportunity to seek emergency appellate relief before the" end of the fiscal year, Sept. 30, 1983. "

2. Defendant-intervenors are the North American Coal Corp., which bid " on the North Beulah tract (coal lease no. M59115); the Falkirk Mining " Co., which bid on the Underwood tract (coal lease no. M59119); the " Missouri Valley Properties Co., which bid on the Renner tract (coal lease" no. M59118); and Baukol-Noonan, Inc., which bid on the Center tract " (coal lease no. M59116). "

3. But for this proviso, 5 U.S.C. § 553(a)(2) might exempt withdrawals" from APA scrutiny. "

4. The Fort Union RCT is composed of the Governors of North Dakota and" Montana, or their designated representatives, and the Bureau of Land ",

Management state directors for those two states. "

5. The Fort Union Coal Tract Summaries ("FUCTS") and the Final " Environment Impact Statement for the Fort Union Coal Region ("FEIS"), " both issued by the Bureau of Land Management of the Department of the " Interior ... show the following for the five tracts on which bids were " received: "

a) Coal leasing and development in the maintenance tracts will have a " significant impact on the local agriculture economics, potentially " adversely affecting 70 agricultural operators (FUCTS pp. 114, 120, 126, " 132, 182); "

b) Coal leasing and development in the maintenance tracts will result " in the probable violation of state and federal 24-hour maximum ambient " air standards for Total Suspended Particulates ("TSP") and exceedance of " the Class I 24-hour maximum Prevention of Significant Deterioration " ("PSD") interval for sulfur dioxide and the Class II 24-hour maximum PSD " interval for particulates in each tract (FUCTS pp. 113, 119, 125, 131, " 181 and FEIS, p. S-43); "

c) Coal leasing will cause the elimination of unique unfarmed wildlife" habitat, high density wetlands, native woodlands and remnant native ",

prairie (FUCTS p. 109 and FEIS p. 123-24); "

d) The elimination of wildlife habitat, wetlands, woodlands and " prairie due to the proposed coal leasing will significantly affect the " wildlife in the area and the enjoyment thereof (FUCTS pp. 113, 119, 125, " 131, 181 and FEIS p. 123-24); "

e) Between 45 and 162 local wells will be significantly impacted by " the expanding mining in the five maintenance tracts (FEIS p. 64). "

The TSP concentration caused by the proposed coal leasing and "

Affidavit of G. Robert Witmer, Jr., in Support of Motion for "
Preliminary Injunction (para. nos. omitted). "

6. Letter from Interior Department Secretary Watt to House Committee " on Interior and Insular Affairs Chairman Udall (Aug. 2, 1983) (Exhibit D " to Plaintiffs' motion for preliminary injunction). "

7. Letter from Chairman Udall to Secretary Watt (Aug. 2, 1983) " (Plaintiffs' exhibit E). "

8. Letters from Secretary Watt to Chairman Udall (n.d.) (Plaintiffs' " exhibit F). ";
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9. Resolution of the Committee on Internal and Insular Affairs of the " House of Representatives (Aug. 3, 1983). The Committee cited the " following reasons, among others, for its finding of an emergency " situation: the impact of rapid population expansion, increased air and " water pollution, effect on agriculture, vegetation, and wildlife, " jeopardization of cultural and archaeological sites, the current excess " supply of coal for national needs, and the question of whether fair value" would be received for the leases. In particular, the Committee pointed " out that withdrawal would allow time for Congress to review the " Department leasing procedure and to receive the Commission report on fair" value in leasing. "

10. 48 Fed.Reg. 36,006 (Aug. 8, 1983) (notice of decision by Secretary" to conduct on Sept. 14, 1983, a lease sale of 13 tracts in Fort Union " region); 48 Fed.Reg. 37,529 (Aug. 18, 1983) (notice by Secretary that " coal lease sale would be limited to 8 tracts representing 542.7 million " tons of coal). "

11. Letter from Secretary Watt to Chairman Udall at 1 (Sept. 9, 1983) " (Attachment A to Defendant's Statement in Opposition to Motion for " Preliminary Injunction). ";
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12. At the Sept. 27 hearing, defendant's counsel stated the opinion " attributed to the Attorney General in the Sept. 9 letter was actually the" informal opinion of the Office of Legal Counsel of the Department of " Justice and not a formal opinion of the Attorney General, as provided for" by 28 U.S.C. § 512. "

13. Judge Jameson indicated that the House Committee's power to " withdraw, or to require the Secretary to withdraw, lands did not include " the power to fix the minimum duration of the emergency and the " withdrawal. Pacific Legal Foundation v. Watt, 529 F.Supp. at 1002. "

14. Pacific Legal Foundation was decided after the Ninth Circuit had " held the legislative veto unconstitutional in "Chadha" but before the " Supreme Court rendered its decision. Although the Ninth Circuit and the " Supreme Court reached the same conclusion, it is not clear that Judge " Jameson's theory would hold up under the Supreme Court's reasoning. "

15. Plaintiffs claim that section 204(e) must be read, at a minimum, " to mandate withdrawal of land from leasing until the Secretary has filed " a report as mandated by section 204(c)(2) detailing the withdrawal and " current and proposed uses of the land, so that Congress can take informed" action. Plaintiff is probably correct in asserting that the Secretary's ";
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letter of Sept. 9, 1983, describing his reasons for concluding that no " emergency exists in the Fort Union region, does not provide the " information required by section 204(c)(2). See infra pp. ---- - ----. " Yet to require delay until a (c)(2) report is prepared would again be to " alter the Secretary's legal rights, if any. "

16. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 " S.Ct. at 2864. "

17. There is no evidence that the opinions relied upon by defendant " even address the constitutionality of the regulation. "

18. The Supreme Court frequently gives great weight to historical " evidence when it is called upon to decide original questions of " constitutional law. See, e.g., Marsh v. Chambers, --- U.S. ----, 103 S." Ct. 3330, 3332-34, 77 L.Ed.2d 1019 (1983) (chaplains for legislatures); " Solem v. Helm, --- U.S. ----, 103 S.Ct. 3001, 3006-07, 77 L.Ed.2d 637 " (1983) (proportionality of punishment); INS v. "Chadha," 103 S.Ct. at " 2781-84 (legislative veto); Powell v. McCormack, 395 U.S. 486, 522-48, " 89 S.Ct. 1944, 1964-78, 23 L.Ed.2d 491 (1969) (exclusion of member-elect " from House). "

19. Compare Defendant's Supplemental Statement at 3 (quoting from U.S.",
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v. California). "

20. See U.S. Dept. of Interior, Report on the Emergency Withdrawal of " Land in the Bob Marshall, Scapegoat, and Great Bear Wilderness Areas, " Montana (Sept. 14, 1981). "