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THE WHITE HOUSE

WASHINGTON

July 13, 1983

MEMORANDUM FOR EDWIN L. HARPER
ASSISTANT TO THE PRESIDENT
FOR POLICY DEVELOPMENT

FROM: RICHARD A. HAUSER /S/
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Legislative Veto Provisions

This will respond to the question noted on Wendell Gunn's June 23 memorandum for you about the impact of the Supreme Court's decision in INS. v. Chadha on the legislative veto provision of section 203 of the Trade Act of 1974, 19 U.S.C. § 2253, with specific reference to the recent specialty steel case.

Prior to the President's decision in that case, we were advised by the Office of Legal Counsel at the Department of Justice that it had reviewed this issue, and believed that the Chadha decision invalidated this legislative veto provision. OLC was also of the view, however, that the President retained his statutory authority to review United States International Trade Commission recommendations, and that he should continue to report to the Congress his decisions with respect to such recommendations. Our office reiterated this OLC advice in our comment memorandum on the specialty steel case.

Our office was copied on your more general memorandum to Assistant Directors of the Office of Policy Development, asking them to compile lists of statutes with legislative veto provisions involving their respective areas of substantive responsibility. As you know, the Cabinet Council on Legal Policy and the Department of Justice "Working Group" are conducting an overall survey of legislative veto provisions that may have been affected by the Supreme Court's decision. Accordingly, the results of the OPD survey should probably be forwarded to the Justice Working Group, which we can handle if you wish.

Let me know if you have any questions; thank you.

RAH:PJR:ph 7/13/83

cc: Wendell W. Gunn

cc: FFFielding
RAHauser
PJRusthoven
JGRoberts
Subject
Chron.

Volume 113 · Number [illegible]

THE DAILY WASHINGTON

Law Reporter

Established 1874

U.S. Court of Appeals for the D.C. Circuit

CONSTITUTIONAL LAW

LEGISLATIVE VETO

Unconstitutional legislative veto in Airline Deregulation Act is held to be severable from remainder of statute.

ALASKA AIRLINES, INC., ET AL. v. DONOVAN, ET AL., U.S.App.D.C. Nos. 84-5442, 84-5467, 84-5468 and 84-5470, July 16, 1985. *Reversed and remanded* per Starr, J. Clamm, J. concurs; Ginsburg, J. concurs in judgment. *Douglas Letter* with *Richard K. Willard*, *Joseph E. diGenova* and *Anthony J. Steinmeyer* for appellant Secretary of Labor in No. 84-5470. *William J. Birney* with *William G. Mahoney*, *John O'B. Clarke, Jr.* and *Clinton J. Miller, III* for appellants Brotherhood of Railway and Airline Clerks, et al. in No. 84-5442. *Eugene B. Granof* with *Gary Green* for appellant Air Line Pilots Association in No. 84-5468. *Mathew Finucane* for appellant Association of Flight Attendants in No. 84-5467. *William T. Coleman, Jr.* with *Richard C. Warmer*, *Donald T. Bliss* and *John H. Beisner* for appellees Alaska Airlines, Inc., et al. in Nos. 84-5442, 84-5467, 84-5468 and 84-5470. Trial Court—Gesell, J.

STARR, J.: This case raises a question left in the wake of *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), invalidating as violative of separation of powers principles the device of the legislative veto of administrative regulations. The context is Congress' pre-*Chadha* deregulation of the airline industry. The specific issue is whether an unconstitutional legislative veto provision contained in section 43(f) of the Airline Deregulation Act of 1978, Pub.L. No. 95-504, §43(f), 92 Stat. 1705, 1750 (1978), is severable from the remainder of the airline employee protection provisions of that statute. We conclude that the veto provision should be severed; we therefore reverse the judgment of the District Court, which held the veto provision inseverable. Inasmuch as the District Court did not have occasion to address the other issues raised by the airlines, we remand the case for further consideration.

I

The Airline Deregulation Act of 1978 contains an employee protection program for the benefit of employees displaced through the impact of deregulation on the shifting fortunes of individual air carriers. *See id.* §43 at 92 Stat. 1750, *codified at* 49 U.S.C. app. §1552 (1982). As originally drafted, the program contained two prongs. The first provided monetary support and assistance in relocation to individuals who had lost their employment or suffered a diminution in compensation as a result of a qualifying industry dislocation. *See* 49 U.S.C. app. §1552(a). While that provision is still on the books, Congress has never funded its implementation, inasmuch as that provision's operation was expressly made subject to Congress' ap-

(Cont'd. on p. 1906) · Veto

U.S. District Court

CIVIL PROCEDURE

JURISDICTION

Motion to dismiss suit against nonresident based on lack of jurisdiction under long arm statute is denied where there are disputed factual issues.

REIMAN v. FIRST UNION REAL ESTATE EQUITY AND MORTGAGE INVESTMENTS, ETC., Dist.Ct., D.C., C.A. No. 84-2574, July 17, 1985. *Opinion* per Jackson, J. *David S. Greene* for plaintiff. *Stephen D. Walters* for defendant.

JACKSON, J.: This matter is before the Court on defendant's motion to quash service of process and to dismiss the complaint against it in this diversity case for breach of contract on the ground that the Court lacks personal jurisdiction over it. In the alternative, defendant moves that the case be dismissed under the doctrine of *forum non conveniens* because its home state of Ohio is a more appropriate forum for the case to be heard. Both sides having presented affidavits and other materials outside the pleadings, the Court must treat the motion as one for summary judgment of dismissal pursuant to Fed.R.Civ.P. 12(b). For the reasons set forth below, the motion will be denied.

Plaintiff is a District of Columbia real estate broker who sues defendant First Union Real Estate Equity and Mortgage Investments ("First Union"), an Ohio business trust, for a commission to which he claims he is entitled. The suit arises out of an alleged contract between plaintiff and defendant by which, according to plaintiff, he would receive a two percent cash commission at closing if he were able to secure a buyer for certain Tennessee real property owned by defendant (the "Two Rivers" property). Plaintiff asserts that he did, in fact, secure two ready, willing and able buyers for the property, but that defendant refused to consummate a sale with either.

Defendant contends that this Court is without personal jurisdiction over it because First Union did not "transact business" in the District of Columbia within the meaning of the applicable portion of the D.C. long-arm statute, D.C. Code §13-423(a)(1), and that service of process upon it in Ohio must, therefore, be quashed. D.C. Code §13-424. First Union represents that it is an Ohio business trust with its only place of business in Ohio, and that it has never owned property in D.C., nor derived any revenue from the District. Defendant further maintains that it did not initiate contact with plaintiff with respect to the Two Rivers property, nor did any of its employees or agents ever visit the District in connection with that transaction, or any other.

Ordinarily an inquiry into the basis for a court's exercise of personal jurisdiction over a non-resident defendant begins with consideration of whether service of process is authorized by statute; if so, it proceeds to whether the defendant has the requisite "minimum contacts" with the forum to satisfy the Due Process Clause. *International Shoe Co. v. Washington*,

(Cont'd. on p. 1902) · Jurisdiction

D.C. Court of Appeals

CRIMINAL LAW & PROCEDURE

RESISTING ARREST

One may not lawfully resist arrest where made by person believed to be law enforcement officer whether or not arrest was lawful.

McDONALD v. UNITED STATES, D.C.App. No. 83-782, August 7, 1985. *Affirmed* per Rogers, J. (Newman, J. and Reilly, C.J. (Ret.) concur). *Jack Koppeiman*, appointed by this court, for appellant. *Tamra Phipps* with *Joseph E. diGenova*, *Michael W. Farrell*, *Judith Hetherton* and *Debra L. Long* for appellee. Trial Court—Revercomb, J.

ROGERS, J.: Appellant appeals his conviction by a jury of three counts of simple assault, D.C. Code §22-504 (1981), on the grounds that he was illegally arrested by METRO Transit Police who lacked jurisdiction to execute an arrest warrant for impersonating a Metropolitan Police Officer, and the trial court erred in failing to instruct the jury that he had a common law right to resist the arrest when charged with simple assault. We need not decide whether appellant was illegally arrested because the right to resist an unlawful arrest by a person reasonably believed to be a law enforcement officer has been abolished in the District of Columbia; accordingly, we affirm.

I

A METRO Transit Police detective and three uniformed METRO officers went to appellant's residence at 46 S Street, N.W., on February 24, 1983 around 6 a.m., to arrest Joey Embry on an arrest warrant for impersonating a Metropolitan Police Department officer in violation of D.C. Code §22-1306 (1981). The alleged impersonation had occurred on February 2, 1983 when two Transit Officers had followed a car from the Rhode Island Avenue, Northeast, METRO Station after a traffic offense had occurred inside the METRO Station. While the Transit Police were admonishing the driver, a 197[illegible] maroon Monte Carlo car pulled up behind the Transit Police car. A man got out, questioned the Transit officers about their right to stop the vehicle, and showed Metropolitan Police Department credentials. When the Transit Police finished speaking to the first driver and walked toward the Monte Carlo, the driver jumped in the car and sped away. In checking the license tag number of the Monte Carlo, the Transit Police learned that the car was registered to Andre McDonald, the

(Cont'd. on p. 1901) · Arrest

TABLE OF CASES

dismissal of this action on *forum non conveniens* grounds for its convenience alone, nor does it appear that the suit is so unconnected with the District as to warrant its dismissal in the public interest.

For the foregoing reasons, it is, this 16th day of July, 1985,

ORDERED, that defendant's motion to dismiss is denied.

VETO

(Cont'd. from p. 1897)

propriation of funds for financial assistance, *see* 49 U.S.C. app. §1552(a), this portion of the employee protection program is inoperative and, accordingly, no implementing regulations have been promulgated under it.

The employee protection program's second prong triggered the litigation now before us. That portion consists of a "first hire" requirement. That is to say, a person who had been employed for at least four years prior to October 24, 1978 (the effective date of the Act), by an air carrier holding a certificate under the pre-deregulation regime and who was furloughed or terminated (other than for cause) prior to the Act's effective date had a first right of hire by other pre-deregulation certificated air carriers. *See* 49 U.S.C. app. §1552(d), (h)(1). This right of first hire was without regard to age but applied only to airlines hiring within the individual's occupational specialty; moreover, airlines must lawfully recall their own furloughed employees before hiring those displaced from other carriers. *See* 49 U.S.C. app. §1552(h).

The Secretary of Labor was granted authority to issue, amend and repeal rules and regulations necessary to administer the employee protection plan. *See* 49 U.S.C. app. §1552(f)(1), (h)(3). However, that authority was limited by the following provisions:

> The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

49 U.S.C. app. §1552(f)(3). Exceptionally, this section combines the "report and wait" provision (found in the first sentence of the quoted language) with a one-House legislative veto (set forth in the second sentence).

Pursuant to his statutory authority, the Secretary of Labor published regulations for the administration of both prongs of the protection plan in March 1979. *See* 44 Fed.Reg. 19,146 (1979). A revision of the proposed regulations, covering only the first hire provisions, was published in September 1982. *See* 47 Fed.Reg. 41,304 (1982). Final regulations were published on November 22, 1983, *see* 48 Fed.Reg. 52,854 (1983), were duly transmitted to Congress, and were to become effective after sixty legislative days.

In February 1984, however, before the regulations became effective, Alaska Airlines, Inc. and [illegible]

the Act were invalid because of the inclusion of an unconstitutional legislative veto in section 43(f)(3). In addition, they challenged the regulations themselves as violative of the Due Process Clause and, on non-constitutional grounds, as arbitrary and capricious, an abuse of agency discretion and otherwise not in accordance with law. The Department of Labor conceded below, *see Alaska Airlines, Inc. v. Donovan*, 594 F.Supp. 92, 94 (D.D.C. 1984), and does not contest here, that the legislative veto provision is unconstitutional under *Chadha*. The Government argued, however, that the invalid veto provision is severable from the remainder of the Act and that the remainder of the employee protection plan, and the rules and regulations adopted thereunder, are lawful and valid.

Plaintiffs-appellees moved for summary judgment, and the Department of Labor moved to dismiss or for an order affirming the validity of the regulations. On May 17, 1984, the day the regulations were to become effective, the District Court granted the airlines' motion, holding that section 43 was invalid in its entirety due to the inclusion of what the court deemed to be an inseverable legislative veto provision. The court's opinion issued the following day. Neither the order nor the opinion addressed the other issues raised in the airlines' complaint.

II

Before reaching the principal issue presented on this appeal, namely the severability of the legislative veto from the remainder of section 43 of the Airline Deregulation Act, several preliminary issues must be addressed.

A

The first question is whether we have jurisdiction over this appeal. The issue is raised only in a footnote in the Alaska Airlines Brief, *see* Appellees' Brief at 9 n.*, where appellees question, in passing, whether jurisdiction in fact lies in this court; because of the obvious importance of that question, the subject merits our analysis at the outset. A basic jurisdictional provision of Title 28 is that the Supreme Court, not the Courts of Appeals, is vested with jurisdiction over appeals from District Court decisions holding an Act of Congress unconstitutional in any civil action in which the United States, or an agency, official or employee thereof, is a party. 28 U.S.C. §1252 (1982). In keeping with this provision, the several Courts of Appeals enjoy jurisdiction over appeals from final decisions of the district courts "*except* where a direct review may be had in the Supreme Court." 28 U.S.C. §1291 (1982) (emphasis added). The airlines suggest that since the District Court held the entire section unconstitutional, exclusive review of that judgment should lie in the Supreme Court.

Those two Title 28 provisions might be read to support the airlines' position. In fact, the appeal in this action was originally filed in the Supreme Court, but due to a recent Supreme Court decision was thereafter refiled in this court. To determine whether the shift in tribunals was proper and jurisdiction actually lies here we examine that recent Supreme Court disposition.

In *Equal Employment Opportunity Commission v. Allstate Insurance Co.*, 104 S.Ct. 3499 (1984), the Court, by order, held that it had no jurisdiction in a legislative veto case. The obvious difficulty in analyzing the Supreme Court's decision in *Allstate* is that the dismissal for lack of jurisdiction was without opinion. There was, however, a dissent by the Chief Justice, joined by Justice O'Connor, which presents at least two Justices' view of the Court's reasoning. The district court in that case, 570 F.Supp. 1224 (S.D.Miss. 198[illegible]), had held the [illegible]

That statute contained the provision pursuant to which the Equal Employment Opportunity Commission had been authorized to enforce the Equal Pay Act, Pub.L. No. 88-38, 77 Stat. 56 (1963). After ruling that the Reorganization Act failed in its entirety, the court held that the EEOC lacked authority to enforce the Equal Pay Act and granted summary judgment in favor of Allstate.

An appeal thereafter taken directly to the Supreme Court was summarily dismissed for want of jurisdiction. Appearing to find the Court's approach overbroad, the Chief Justice stated:

> Had the District Court simply determined, as a matter of statutory construction, that appellant cannot exercise the authority to enforce the Equal Pay Act because Congress did not wish the Act to be operative absent the veto provision, I would agree that dismissal would clearly be compelled under *Heckler v. Edwards*[, 104 S.Ct. 1532 (1984)]. Under these circumstances, it would be clear, as in *Heckler*, that appellant was not challenging the constitutional holding of the District Court since it concedes the validity of the court's holding on the legislative veto provision. But this is not the holding of the District Court. And the mere assertion now by the Solicitor General, and implicitly by the Court, that the holding was in reality one of statutory construction cannot change the fact that the District Court explicitly and unambiguously held the entire Act *unconstitutional*.

Allstate, supra, 104 S.Ct. at 3502 (emphasis in original).

Using this explanation as guidance to the Court's position on the jurisdictional issue, it appears that the appeal in the case at hand appropriately lies in this court. The District Court here did not break any new ground with respect to a constitutional issue. To the contrary, its decision that the legislative veto provision was unconstitutional was squarely rooted in *Chadha*, as evidenced by the fact that neither side contests that portion of the District Court's decision. Thus, the constitutional decision is, in truth, not a part of this appeal. What is at issue on appeal, rather, is the severability *vel non* of the remainder of the section in which the legislative veto appears. That question, as we shall see, reduces to a matter of statutory interpretation. *see generally* Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV.L.REV. 76, 115 (1937). As even the *Allstate* dissenters opined, jurisdiction would not under those circumstances lie in the Supreme Court but would instead be vested in this court. *See also Heckler v. Edwards, supra*, 104 S.Ct. at 1536 ("a party does not have a right to direct review in the Supreme Court under 28 U.S.C. §1252 unless the holding of federal statutory unconstitutionality is in issue"). Accordingly, we are persuaded that the present appeal is properly before us.

B

The second preliminary issue is whether this dispute is ripe for review, inasmuch as Congress has not attempted to exercise the legislative veto power purportedly conferred by the Airline Deregulation Act. * * *

* * *

* * * In the post-*Chadha* era in which Congress knows that it may not lawfully exercise the purported veto authority, to hold that a court cannot reach the issue of the constitutionality of such a device unless Congress has exercised the provision would be, in effect, to shield all agency [illegible] from [illegible] whether Congress [illegible]

Chadha presumes severability of the offensive provision if what remains after severance is fully operable as law. To this end, the burden is placed squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provision without the severed portion. This presumption articulated by *Chadha* was echoed in a later Supreme Court severability case: "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.*, 104 S.Ct. 3262, 3269 (1984). The Court has thus clearly laid down a presumption in favor of severability if what remains is operative as law; in a word, severance lies unless it is "evident" that what remains would not have been enacted.

Our charge is to save as much of the statute as we can, consistent of course with the underlying legislative intent. Only if we conclude that Congress would not have included a provision absent the constitutionally flawed portion is that provision to fall. * * *

Section 43 of the ADA is an extensive and elaborate provision, yet only one part of one subsection, namely section 43(f)(3), is unconstitutional under *Chadha*. That section, codified at 49 U.S.C. app. §1552(f)(3), contains two provisions as we have seen. The first, the so-called "report and wait" provision, is left unaffected in *Chadha*'s wake; the second is, of course, the legislative veto provision constitutionally eviscerated by *Chadha*. If the veto provision were severed, the remainder of the section (including the first sentence of the subsection) would be fully operable as law. The employee protection program would still be spelled out in great detail, and the Secretary of Labor would still retain authority to promulgate the necessary rules and regulations. The sole difference would be that the Secretary would be required only to submit the rules and regulations to the appropriate Congressional committees on a "report and wait" basis rather than expose those regulations to the gauntlet of possible invalidation by way of an exercise of the purported veto authority.

To overcome the presumption of severability with respect to this provision, the airlines must show, as we have seen, that it is *evident* that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality. Or, as the Temporary Emergency Court of Appeals would put it, the challengers must show that it is evident that Congress would have preferred no airline employee protection provision at all to the existing provision sans the veto provision. Not only is evidence for that position lacking; what evidence there is indicates that Congress had a strong, humanitarian desire to provide for airline employee protection. In contrast to this clearly expressed intent to erect protective safeguards for displaced workers, Congress expressed relatively little concern about the veto provision. That is to say, the evidence, in our view, positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan. * * *

* * *

We emerge from our trek through the legislative history of the Airline Deregulation Act far short of the destination that must be reached for the airlines to prevail. We fail to find satisfied here the exacting inseverability standard that it be "evident" that Congress would have preferred no employee protection program over the program passed by Congress shorn of its veto provision. Ample evidence persuades us that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan.

In sum, we hold the legislative veto provision here to be severable from the remainder of the employee protection provisions; the remainder of section 43 therefore remains viable. However, since the District Court did not have occasion to rule on the other grounds advanced by the airlines in their challenge to the rules adopted by the Secretary, the case is remanded to that court for consideration and adjudication of those issues.

Reversed and remanded.

GINSBURG, J., *concurring in the judgment*: The court's intricate discussion of preliminary issues seems to me distracting. As I view this case, only one genuine issue appears: would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions. Before the district court, the Department conceded the unconstitutionality of the veto, and does not contest that matter here. Therefore, we face no appeal from decision of a constitutional question; instead, a ripe statutory interpretation controversy—a construction of legislation dispute securely within our appellate jurisdiction—is before us. Furthermore, as the court recognizes, slip op. at 14-15 & n.6, a ruling that the labor protective prescriptions are severable strips discourse on *Chadha*'s "retroactive application" of "any importance."

On the severability question, I am in full agreement with the court's judgment, which undertakes a moderate salvage operation. Deletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress. A declaration of inseverability, tearing down the section in its entirety, would be far more destructive of the legislature's will. *Cf. Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (per curiam).

LEGAL NOTICES

GOVERNMENT

The District of Columbia: Whereas on the 8th day of August, 1985, the District of Columbia filed a Libel in the Superior Court of the City of Washington, District of Columbia In Superior Court Case No. CA5719-85 against: ONE (1) 1977 RED/WHITE FORD GRANADA SERIAL NO. 7E84F222383 (Kevin Coghill). And whereas by virtue of process in due form of law, to me directed, I have seized and taken into my possession, to wit: ONE (1) 1977 RED/WHITE FORD GRANADA SERIAL NO. 7E84F222383 (Kevin Coghill). I hereby give notice to all persons claiming the said described above, or knowing or having anything to say why the same should not be condemned and forfeited, that they appear and assert said claim in the cause on or before the date returnable October 9, 1985, in the Superior Court of the City of Washington, District of Columbia at 10:00 O'Clock a.m. /s/ HERBERT M. RUTHERFORD, III, UNITED STATES MARSHAL, DISTRICT OF COLUMBIA

Sep. 18

The District of Columbia: Whereas on the 8th day of August, 1985, the District of Columbia filed a Libel in the Superior Court of the City of Washington, District of Columbia In Superior Court Case No. CA5718-85 against: ONE (1) 1977 BROWN CHRYSLER CORDORA SERIAL NO. SS22N7R107536 (Jimmy Lee Allen). And whereas by virtue of process in due form of law, to me directed, I have seized and taken into my possession, to wit: ONE (1) 1977 BROWN CHRYSLER CORDORA SERIAL NO. SS22N7R107536 (Jimmy Lee Allen). I hereby give notice to all persons claiming the said described above, or knowing or having anything to say why the same should not be condemned and forfeited, that they appear and assert said claim in the cause on or before the date returnable October 9, 1985, in the Superior Court of the City of Washington, District of Columbia at 10:00 O'Clock a.m. /s/ HERBERT M. RUTHERFORD, III, UNITED STATES MARSHAL, DISTRICT OF COLUMBIA

Sep. 18

FIRST INSERTION

DARGAN, Pearl Frances

James T. Wright, *Attorney*
720 5th St., N.W., Washington, D.C. 20001

[Filed Sep. 4, 1985. Superior Court of the District of Columbia, Washington, D.C.] Superior Court of the District of Columbia, Family Division, Domestic Relations Branch. Pearl Frances Dargan, Plaintiff vs. Harold William Dargan, Defendant. Jacket No. D1251-85. ORDER PUBLICATION—ABSENT DEFENDANT. The object of this suit is to obtain an absolute divorce from the defendant (separation for more than one year). On motion of the plaintiff, it is this 27th day of August, 1985, ordered that the defendant, Harold William Dargan, cause his appearance to be entered herein on or before the fortieth day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the cause will be proceeded with as in case of default. Provided, a copy of this order be published once a week for three successive weeks in the Washington Law Reporter, and the Washington Afro-American before said day. /s/ SHELLIE F. BOWERS, *Judge*. [Seal.] Attest: THOMAS A. DUCKENFIELD, *Clerk of the Superior Court of the District of Columbia*. By Elaine B. Wilson, *Deputy Clerk*.

Sep. 18, 25, Oct. 2

DAY, Morrow Frederick

Morrow Frederick Day, *Pro Se*
1456 Harvard Street, N.W., Apt. D
Washington, D.C. 20010

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION. IN RE: Application of Morrow Frederick Day. Civil Action Number: CA6406-85. ORDER OF PUBLICATION—CHANGE OF NAME. Morrow Frederick Day, having filed a complaint for judgment changing his name to Morrow Frederick Savoy, and having applied to the Court for an order of publication of the notice required by law in such cases, it is by the Court, this 6th day of September, 1985, ORDERED that all persons concerned show cause, if any there be, on or before the 8th day of October, 1985, why the prayers of said complaint should not be granted: PROVIDED, That a copy of this order be published once a week for three consecutive weeks before said day in The Washington Law Reporter. /s/ HARRIETT R. TAYLOR, Judge. [Seal.] A True Copy. Test: Sep. 6, 1985. By Shirley F. Jackson, Deputy Clerk.

Sep. 18, 25, Oct. 2

FINNEY, Bernice E. — Deceased

Superior Court of the District of Columbia
Probate Division
Administration No. 1659-85 S.E.
Bernice E. Finney, deceased
Notice of Appointment, Notice to Creditors
and Notice to Unknown Heirs

George H. Windsor, whose address is 1511 K Street, N.W., Suite 445, Washington, D.C. 20005, was appointed Personal Representative of the estate of Bernice E. Finney, who died on January 26, 1984, without a Will. All unknown heirs and heirs whose whereabouts are unknown shall enter their appearance in this proceeding. Objections to such appointment shall be filed with the Register of Wills, D.C., 500 Indiana Avenue, N.W., Washington, D.C. 20001, on or before October 21, 1985. Claims against the decedent shall be presented to the undersigned with a copy to the Register of Wills or to the Register of Wills with a copy to the undersigned, on or before October 21, 1985, or be forever barred. Persons believed to be heirs or legatees of the decedent who do not receive a copy of this notice by mail within 25 days of its publication shall so inform the Register of Wills, including name, address and relationship. GEORGE H. WINDSOR. Name of Newspaper: Washington Law Reporter. TRUE TEST COPY. Henry L. Rucker, Register of Wills. [Seal.]

Sep. 18

Gibson, Alice E.

Jerry L. Hunter, *Attorney*
1822 11th Street, N.W., D.C. 20001

[Filed June 10, 1985. Superior Court of the District of Columbia, Washington, D.C.] Superior Court of the District of Columbia, Family Division, Domestic Rela-

June 30, 1983

TO: THE DIRECTOR

FROM: Pete Modlin

SUBJECT: Deferrals and the legislative veto issue

By our count, 100 (not 65) of the 1,059 deferrals that have been reported to the Congress since the Impoundment Control Act became effective have been disapproved. The disapproved deferrals are summarized and then listed, by fiscal year, in the attached tables. They are classified in two ways: by type (i.e., antideficiency (i.e., routine) or policy) and by Congressional action (resolution or appropriations).

- o Not surprisingly, nearly 80 percent of the number of those that have been disapproved since the distinction between "policy" and "antideficiency" deferrals began in FY 1976 were "policy" deferrals.

- o What is surprising is the recent pronounced shift to appropriations bills rather than deferral resolutions as the means of disapproving deferrals. In this Administration to date, nearly 60 percent of the number and nearly 90 percent of the dollar amount of the deferrals disapproved have been disapproved in appropriations bills, not deferral resolutions. In 1981, every one of the 15 deferrals that were disapproved was disapproved in an appropriations bill.

This shift to the use of appropriations bills as the vehicle for disapprovals was done, in large part, as a scorekeeping trick, to disguise appropriations increases over the President's request. A (probably) unexpected benefit to the Congress is that this vehicle also solves the problem created for them by the Supreme Court's recent Chadha decision on legislative vetoes.

This suggests to me that issue of what to do about deferrals in the wake of the Chadha decision is a non-issue.

- o The Impoundment Control Act requires that an impoundment report be sent to the Congress whenever funds are withheld from obligation and the Congress has not granted prior authority to withhold the funds. There are no exceptions.

- o If funds are withheld from obligation and the President does not report that fact, the General Accounting Office is required to report the withholding. The only reason that GAO does not make a report in such a case is that it does not know about the withholding.

- o Now, based on the experience of the last few years, it is clear that the Congress can avoid the issue of a legislative veto by disapproving the deferral in an appropriations bill.

An alternative that has been suggested is to propose rescissions rather than defer the obligation of funds in "sensitive" cases. I do not believe that that would solve the legislative veto problem.

- o First, the deferral route is used often to reduce the appropriations requested by the President. In these cases, funds appropriated but not now needed for a specific purpose are withheld from obligation pending Congressional approval of their use for a different purpose. No new budget authority is needed if the Congress approves. This method has the advantage to both the Congress and the Administration that it reduces the need for new budget authority. If the rescission route is taken and the Congress agrees, the funds would be rescinded and funds in an equal amount would have to be appropriated to replace them.

- o Second, should the Congress not act on a deferral, there is the advantage that the funds do not have to be made available for the undesired purpose. If there is no action on a proposed rescission, the funds must be made available for that purpose and additional funds would have to be requested for the alternative purpose. This is the worst of both worlds.

- o Third, what we classify as sensitive or "policy" and what the Congress classifies as sensitive is not always the same. Seven of the deferrals that were disapproved in appropriations acts were antideficiency (or "routine") deferrals. In short, the use of the rescission route will not avoid the legislative veto issue.

- o Fourth, it does not matter whether the President's power to defer is inherently constitutional. If the President's power to defer is inherently constitutional, so is the Congress's power to overturn a deferral by legislation. (It is my recollection that Missouri v. Volpe involved a deferral of highway trust fund obligations and that the Court said that the power to defer is not inherently constitutional.)

My suggestion is this:

- o Send the deferral reports to the Congress as in the past.
- o Explain in discussions with and in letters to the Leadership and the Chairmen of the Appropriations and Budget Committees that this is not a confrontation but rather is a simple carrying out of the law.
- o Explain to them also that the Congress can act through the appropriations process to disapprove deferrals when it wishes to do so.
- o The letters that transmit the deferral reports could contain these explanations.

Attachments

Stockman agreed and discussed this approach with the chairmen of the appropriations committees, who also agreed.

cc:	Joe Wright	John Cogan
	Don Moran	Connie Horner
	Dave Gerson	Al Keel
	Mike Horowitz	Fred Khedouri
	Mike Hudson	Sue Hause
		Ed Dale

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53 George Washington Law Review 168 (Janaury 1985)

THE FATE OF THE LEGISLATIVE VETO AFTER *CHADHA* *

In *INS v. Chadha,*[1] the Supreme Court held that the exercise by the House of Representatives of the one-house legislative veto provision of the Immigration and Nationality Act of 1952[2] is unconstitutional.[3] That provision permitted either house of Congress to overturn a decision of the United States Attorney General to suspend deportation proceedings against an alien.[4] The Court in *Chadha* held the one-house veto mechanism is an unconstitutional attempt to exercise legislative power because it fails to comply with the constitutional requirements that all legislative acts receive the approval of both houses of Congress and be signed into law by the President.[5]

The decision resolves a long-standing dispute between the Executive and Congress as to the validity of the legislative veto device,[6] whereby Congress delegates legislative authority to an administra-

* This note was developed by William F. Leahy.

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

2. 8 U.S.C. § 1254(c)(2) (1982).

3. 103 S. Ct. at 2787.

4. The Immigration and Nationality Act permits the United States Attorney General to suspend deportation proceedings against an alien, subject to congressional review. By a majority vote of either House or Senate, a decision by the Attorney General to suspend deportation proceedings against a particular alien could have been "vetoed" and the proceedings would have been reinstituted. *See* 8 U.S.C. § 1254 (c)(2) (1982).

In 1974, the Attorney General suspended deportation proceedings against Jagdish Rai Chadha, whose student visa had expired in 1972. The House of Representatives subsequently vetoed that decision. 103 S. Ct. at 2771. When the Immigration and Naturalization Service reinstituted proceedings against Mr. Chadha, he successfully argued that Congress's action was unconstitutional and that the INS therefore had no authority to recommence deportation proceedings. *Id.* at 2772.

In addition to the one-house veto addressed in *Chadha,* legislative vetoes may take a variety of forms: veto by a concurrent resolution passed by the House and Senate, *see, e.g.,* War Powers Resolution, 50 U.S.C. § 1544(c) (1982); by passage of a resolution by either house of Congress, *see, e.g.,* Arms Control and Disarmament Act of 1961, 22 U.S.C. § 2587(b) (1982); by passage of a resolution by a single committee, *see, e.g.,* Water Resources Development Act of 1974, 33 U.S.C. § 579 (1982); or by requiring the approval of a congressional committee before giving effect to a proposed rule, *see, e.g.,* Futures Trading Act of 1978, 7 U.S.C. § 16a (1982).

5. 103 S. Ct. at 2787. The presentment clauses, U.S. CONST. art. I, § 7, cls. 2, 3, require that legislation be presented to the President and approved by him before it can become law. The bicameral requirement, U.S. CONST. art. I, § 1, § 7, cl. 2, provides that legislative power resides in the House and Senate and that law can be created only with the approval of each house.

6. *See* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 449 (D.C. Cir. 1982) ("Congress and the Executive have been at odds for decades over the constitutionality of the legislative veto . . . ."), *aff'd mem.,* 103 S. Ct. 3556.

tive or political body, subject to the ability of Congress to "veto" selectively the agency's use of that authority. At the same time, the result in *Chadha* provokes two immediate questions: how will Congress compensate for the loss of the veto tool in checking administrative rulemaking,[7] and how will the courts respond to challenges to actions taken pursuant to other statutes that contain legislative veto provisions? While there is no evidence that Congress's loss of the veto mechanism will significantly increase the power of the executive branch,[8] uncertainty does remain as to the fate of other statutes that contain veto provisions[9] and the validity of administrative agencies' actions legally dependent upon statutes that may be rendered unconstitutional by the *Chadha* decision.

Within weeks of its ruling in *Chadha,* the Court affirmed without discussion two decisions of the District of Columbia Circuit invalidating the exercise of legislative vetoes to prevent implementation of a natural gas pricing rule and the Federal Trade Commission's "used car rule."[10] The second case involved the exercise of a two-house veto, and thus its summary affirmance suggests that the two-house legislative veto is as unacceptable as the one-house veto.[11] The Court's action, however, offers no answers

7. *See generally The Supreme Court Decision in* INS v. Chadha *and Its Implications for Congressional Oversight and Agency Rulemaking, 1983: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. (1983) [hereinafter cited as *Hearings*]. *See also* Bolton & Abrams, *The Judicial and Congressional Response to the Invalidation of the Legislative Veto,* 1 J. LAW & POL. 299 (1984).

8. Although use of the veto gained increasing attention in recent years, Congress seldom exercised the veto. Through the summer of 1982, Congress had vetoed executive actions only 230 times over a 50-year period. Smith & Struve, *Aftershocks of the Fall of the Legislative Veto,* 69 A.B.A. J. 1258 (1983). Of those vetoes, 48% concerned deportation actions, 28% concerned proposals to defer spending federal funds pursuant to the Congressional Budget and Impoundment Control Act, and 10% concerned proposals to reorganize the executive branch. *Id.*

Despite loss of the veto, Congress has at its disposal a range of other, clearly constitutional methods of exerting influence over executive action. *See Chadha,* 103 S. Ct. at 2786 n.19 (referring to authorizing legislation that limits the scope of an administrative agency's authority and "report and wait" requirements); *see also* Bolton & Abrams, *supra* note 7, at 318-38; Kaiser, *Congressional Control of Executive Actions in the Aftermath of the* Chadha *Decision,* 36 AD. L. REV. 239 (1984) (discussing congressional authority over administrative actions, including joint resolutions of disapproval, restrictions imposed by appropriations, and oversight by congressional committees).

9. A study prepared by the Department of Justice in July, 1983, identified 126 public laws that include a legislative veto provision. *See Hearings, supra* note 7, at 23. *See also Chadha,* 103 S. Ct. at 2811-16 (White, J., dissenting).

10. Process Gas Consumers Group v. Consumer Energy Council of Am., 103 S. Ct. 3556 (1983), *aff'g mem.,* Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982) *and* Consumers Union of U.S. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

11. *Consumers Union,* 691 F.2d 575. In its memorandum, the Supreme Court affirmed the holdings of the District of Columbia Circuit in *Consumers Union of U.S.,* 691 F.2d at 577-78 (two-house veto contained in section 21 of Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1(a)(2) (terminated 1983), held uncon-

to other questions raised by its opinion in *Chadha.*

Recently a number of federal courts have attempted to apply *Chadha* where litigants have challenged the constitutionality of statutes that include a legislative veto.[12] These decisions have produced disparate results: different courts reviewing the same statute have disagreed as to whether an unexercised veto is constitutional[13] and whether the same veto provision is severable from the remainder of the statute.[14] These cases suggest the variety of issues generated by the Court's opinion in *Chadha* and reflect the difficulty encountered by lower federal courts in resolving those questions.

This Note reviews these decisions in light of a number of the issues raised by *Chadha.* Part I inquires into the constitutionality of a veto that has not been exercised and the constitutionality of veto provisions in areas in which Congress has special authority to act. Part II examines the appropriate test to determine whether an unconstitutional provision is severable from a statute. Whether courts should apply the holding in *Chadha* retroactively is discussed in Part III, and whether Congress can subsequently ratify actions taken pursuant to a statute containing an unconstitutional veto provision is addressed in Part IV. Finally, Part V examines the relevance of the delegation doctrine to the legislative veto issue.

I. The Constitutionality of Veto Provisions

A. Validity of Acts Where Veto is Unexercised

In *Chadha,* the Court invalidated the exercise of the legislative veto provision of the Immigration and Nationality Act on the grounds that the veto is an unconstitutional attempt to exercise legislative power without satisfying the requirements of bicameral approval and presentment to the President.[15] Some courts have distinguished *Chadha* on the basis of whether there has been an

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stitutional) and in *Consumer Energy Council,* 673 F.2d at 478-79 (one-house veto provision of Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c) (1982), held unconstitutional). In each case, the veto had been exercised by Congress.

12. Although most of the reported decisions concern challenges to only a few different statutes, *see, e.g.,* EEOC v. Columbia Broadcasting Sys., 743 F.2d 969 (2d Cir. 1984) (Reorganization Act of 1977); Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984) (Reorganization Act of 1977); Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App. 1984) (Emergency Petroleum Allocation Act of 1973 and Energy Policy and Conservation Act); United States v. McIntosh, No. F-4892—83 slip op. (D.C. Super. Ct. Mar. 27, 1984), 112 Daily WASH. L. REP. 787 (Apr. 20, 1984) (District of Columbia Home Rule Act), at least 126 statutes presently contain a legislative veto. *See supra* note 9.

13. *Compare Muller Optical,* 743 F.2d 380 (unexercised veto in Reorganization Act does not represent an unconstitutional exercise of legislative power) *with Columbia Broadcasting Sys.,* 743 F.2d 969 (unexercised veto is unconstitutional).

14. *Compare* EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1190-92 (5th Cir. 1984) (unconstitutional veto provision in Reorganization Act is severable from statute) *with Columbia Broadcasting Sys.,* 743 F.2d at 971-74 (unconstitutional veto provision is inseverable from Reorganization Act).

15. 103 S. Ct. at 2787.

exercise of legislative power. They have suggested that, if Congress has not exercised the veto authorized by the challenged statute, there is no exercise of legislative power and thus *Chadha* is not applicable.

In *Muller Optical Co. v. EEOC*,[16] the Sixth Circuit addressed the constitutionality of the Reorganization Act of 1977,[17] which gave the President limited authority, subject to a one-house veto,[18] to reorganize the executive branch. Using this authority, President Carter transferred from the Department of Labor to the Equal Employment Opportunity Commission (EEOC) the power to enforce the Equal Pay Act (EPA)[19] and the Age Discrimination in Employment Act (ADEA).[20]

When the EEOC charged the Muller Optical Company with violating the ADEA, the company challenged the EEOC's authority to bring the action. The company argued that the unconstitutional legislative veto provision of the Reorganization Act, even though unexercised, invalidated the entire Act. Therefore, the company contended, the transfer of authority to the EEOC to enforce the ADEA would have no effect.[21]

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16. 743 F.2d 380 (6th Cir. 1984).
17. 5 U.S.C. §§ 901-912 (1982).
18. 5 U.S.C. § 906 (1982).
19. 29 U.S.C. § 206(d) (1982).
20. 29 U.S.C. §§ 621-634 (1982). *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in* 5 U.S.C.A. app. at 111 (West Supp. 1984) *and in* 92 Stat. 3781 (1980) (consolidation of equal employment opportunity activities in EEOC). President Carter submitted three other reorganization plans in 1978. *See* Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1979), *reprinted in* 5 U.S.C.A. app. at 117 (West Supp. 1984) *and in* 92 Stat. 3783 (1980) (creating Office of Personnel Management and Merit Systems Protection Board); Reorg. Plan No. 3 of 1978, 3 C.F.R. 329 (1979), *reprinted in* 5 U.S.C.A. app. at 123 (West Supp. 1984) *and in* 92 Stat. 3788 (1980) (creating Federal Emergency Management Agency); Reorg. Plan No. 4 of 1978, 3 C.F.R. 332 (1979), *reprinted in* 5 U.S.C.A. app. at 126 (West Supp. 1984) *and in* 92 Stat. 3790 (1980) (redefining administrative authority of Treasury and Labor Departments with respect to Employee Retirement Income Security Act of 1974 (ERISA)).

President Carter submitted additional reorganization plans in 1979 and 1980. *See* Reorg. Plan No. 1 of 1979, 3 C.F.R. 505 (1980), *reprinted in* 5 U.S.C.A. app. at 130 (West Supp. 1984) *and in* 93 Stat. 1373 (1981) (creating Office of Federal Inspector for Alaska Natural Gas Transportation System); Reorg. Plan No. 2 of 1979, 3 C.F.R. 510 (1980), *reprinted in* 5 U.S.C.A. app. at 135 (West Supp. 1984) *and in* 93 Stat. 1378 (1981) (creating International Development Cooperation Agency); Reorg. Plan No. 3 of 1979, 3 C.F.R. 513 (1980), *reprinted in* 5 U.S.C.A. app. at 139 (West Supp. 1984) *and in* 93 Stat. 1381 (1981) (creating, *inter alia*, Office of the United States Trade Representative); Reorg. Plan No. 1 of 1980, 3 C.F.R. 345 (1981), *reprinted in* 5 U.S.C.A. app. at 147 (West Supp. 1984) *and in* 94 Stat. 3585 (1981) (making administrative changes in Nuclear Regulatory Commission).

21. *Muller Optical*, 743 F.2d at 381. Other courts have adopted the view urged by the defendant. *See, e.g.*, EEOC v. Columbia Broadcasting Sys., 743 F.2d 969, 971 (2d Cir. 1984); EEOC v. Martin Indus., 581 F. Supp. 1029, 1030 (N.D. Ala. 1984), *appeal docketed*, No. 84-6063 (2d Cir. 1984). A decision invalidating the Reorganization Plan centralizing equal employment opportunity enforcement in the EEOC would suggest that all other reorganization plans adopted pursuant to the Reorganization Act of 1977

The court of appeals disagreed, holding that, because Congress did not veto the Reorganization Plan at issue, the plan could not be challenged simply because the Reorganization Act contained a legislative veto.[22] Distinguishing *Chadha* from the facts of the case before it, the court observed that "Congress did not exercise the veto and did not act to legislate contrary to its constitutional grant of power" to the President to reorganize the executive branch.[23]

According to the reasoning of *Muller Optical,* the veto is unconstitutional if exercised, but not unconstitutional if unexercised. This theory finds support in the Supreme Court's rationale in *Chadha,* but it too raises certain questions. If the legislative veto provision of a statute is unconstitutional only if exercised, then congresssional intent in enacting the provision would be irrelevant as long as the veto is not exercised.[24] If, however, Congress does exercise the veto, congressional intent becomes an issue of great importance because the court must then analyze the legislative intent to determine whether the veto is severable from the remainder of the statute.[25] If the court finds that Congress did not intend the veto to be severable, the entire statute will be held unconstitutional. That result raises the issue of retroactivity: once an entire statute is found unconstitutional, are administrative actions taken pursuant to the statute before the veto was exercised also invalid?[26]

By holding a veto provision to be unconstitutional only if exercised, a court in effect converts all statutes containing a legislative veto into "conditionally constitutional" statutes, the condition being that the veto never be exercised. This result casts doubts on all regulations promulgated under authority of a "conditionally constitutional" statute that later becomes invalid by a subsequent exercise of the veto. Does the defect relate back and thereby invalidate the regulations as well?[27] Furthermore, the *Muller Optical* court's rationale ignores the political consequences of the mere threat of a legislative veto. Even an unexercised veto may give Congress leverage over the administrative process in much the same way as a threatened presidential veto influences congres-

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are also invalid. *See supra* note 20. Arguably, actions of affected agencies taken pursuant to powers granted by the respective reorganization plans would also be unauthorized and unenforceable.

Most courts have upheld the enforcement powers of the EEOC despite the veto provision of the Reorganization Act, although the reasons underlying their decisions vary greatly. *See, e.g., Muller Optical,* 743 F.2d 380, 388; EEOC v. Hernando Bank, 724 F.2d 1188, 1190 (5th Cir. 1984); EEOC v. Pan Am. World Airways, 34 Fair Empl. Prac. Cas. (BNA) 321, 324 (N.D. Cal. 1984); EEOC v. Chrysler Corp., 595 F. Supp. 344, 351-52 (E.D. Mich. 1984); EEOC v. Dayton Power & Light Co., 35 Fair Empl. Prac. Cas. (BNA) 401 (S.D. Ohio 1984).

22. 743 F.2d 380, 387 (6th Cir. 1984).

23. *Id.* at 386.

24. *Id.* at 387.

25. *See infra* Section II (concerning severability).

26. *See infra* Section III (discussing retroactivity).

27. *See id.*

sional decision making. This in itself may conflict with the spirit of *Chadha*.[28] The better view appears to be that it is an unconstitutional attempt to exercise legislative power for Congress to delegate power subject to a legislative veto, even if an individual veto is never exercised.[29] A number of courts have adopted this view and, therefore, have invalidated unexercised veto provisions.[30] This result appears more consistent with the opinion in *Chadha*.[31]

28. Chief Justice Burger's opinion in *Chadha* devoted little discussion to the political controversy surrounding the legislative veto, framing the issue as a simple application of the plain meaning of the language of the Constitution. 103 S. Ct. at 2781. Nonetheless, prior to *Chadha*, the simple threat of a legislative veto could have much the same practical effect as a veto itself. Indeed, Congress's leverage over the administrative process by the threat of a legislative veto was the basis of criticism of the veto mechanism itself. *See* Smith & Struve, *supra* note 8, at 1260-61; *see also* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1410, 1420-23 (1977).

How, then, should the courts respond when a litigant contends that the threat of a legislative veto directly caused an administrative action injurious to the plaintiff? In City of Alexandria v. United States, 3 Cl. Ct. 667 (1983), *rev'd*, 737 F.2d 1022 (Fed. Cir. 1984), the Claims Court considered a case where a threatened veto by a congressional committee of a proposed sale of federal property by the General Services Administration (GSA) prevented consummation of the sale. Relying on the rationale of *Chadha*, the Claims Court held that the threat constituted improper congressional interference with an administrative action. *Id.* at 678. The court thus found an implied-in-fact contract of sale between the GSA and the purchaser. *Id.*

However, the "veto" provision at issue in this case was embodied in a regulation and not in the enabling statute itself. Pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 484(e)(6) (1982), the GSA must inform Congress of its intent to dispose of federal property. The regulations implementing this statute provide that a sale may be consummated "[i]n the absence of adverse comment by an appropriate committee or subcommittee of the Congress" within 35 days of notifying the committees of the intended sale. 41 C.F.R. § 101-47.304-12(f) (1983).

On appeal, the Court of Appeals for the Federal Circuit reversed. 737 F.2d 1022. The circuit court recognized that the statute at issue only requires the GSA to send an explanatory message to Congress when it plans to sell federal property. *Id.* at 1023. The court also examined GSA's regulation that establishes a committee veto over any proposed sale, but was persuaded that the regulation did not, in fact, create a veto power. *Id.* at 1026. The court's decision illustrates the difficult factual issue presented by veto-threat cases: was the administrative decision not to process the sale the result of an anticipated veto, or was it the exercise of discretion by a savvy bureaucrat, understandably hesitant to antagonize his congressional overseer? The circuit court felt that on these facts the GSA's decision not to submit the contemplated sale to Congress resulted from these latter motivations. *Id.* at 1026-27. Although executive agencies need no longer fear a congressional veto, many regulations and administrative decisions adopted in the past may be the product of a process of negotiation between Congress and the Executive prodded along by the prospect of a congressional veto.

29. The distinction between "exercising" a veto through threatened use and vigorous congressional oversight can be a fine one. *See* discussion of *City of Alexandria v. United States*, 3 Cl. Ct. 667 (1983), *rev'd*, 737 F.2d 1022 (Fed. Cir. 1984), *supra* note 28.

30. EEOC v. Columbia Broadcasting Sys., 743 F.2d 969 (2d Cir. 1984) (invalidating an unexercised veto and finding it was not severable from the act in which it was embedded); EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1190, 1192 n.2 (5th Cir. 1984) (court invalidated an unexercised legislative veto, though noted a distinction between that and an exercised veto).

31. Although the constitutionality of an unexercised veto was not litigated in *Chadha*, the majority opinion made no retort to Justice White's conclusion in dissent that *Chadha* "sounds the death knell for nearly 200 other statutory provisions in

In *EEOC v. Columbia Broadcasting System,*[32] the Second Circuit followed this view, holding that the unexercised veto provision of the Reorganization Act invalidated the entire statute and consequently the EEOC did not have authority to enforce the ADEA and EPA.[33] Acknowledging, however, that dismissal of the action against the defendant employer would be "an unnecessarily drastic remedy," the court stayed its judgment for four months in order to give Congress an opportunity to take action to affirm the EEOC's authority.[34] Congress shortly thereafter approved legislation ratifying all reorganization plans adopted pursuant to the Reorganization Act, as well as all actions taken by administrative agencies affected by those plans.[35]

B. Validity of Legislative Veto Where Congress Has Special Authority to Act

At first glance, the holding of *Chadha* appears to affect every legislative veto enacted by Congress. It has been argued, however, that under certain circumstances the special powers granted Congress by the Constitution make the reasoning of *Chadha* inapplicable.

For example, the War Powers Resolution,[36] which Congress enacted in 1973 pursuant to its constitutional power to declare war,[37] requires the President to notify Congress when American troops have been sent to a foreign country where hostilities are "imminent."[38] Section 5(b) of the Resolution provides that, unless Congress affirmatively acts to approve his decision, the President must "terminate any use" of American armed forces in that country within sixty days of giving Congress notice of their presence.[39] Absent a declaration of war, section 5(c) authorizes Congress, by passage of a concurrent resolution, to compel the President to recall any American troops engaged in hostilities in a foreign coun-

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which Congress has reserved a 'legislative veto.'" 103 S. Ct. at 2792 (White, J., dissenting).

32. 743 F.2d 969 (2d Cir. 1984).
33. *Id.* at 975.
34. *Id.*
35. *See* Ratification of Reorganization Plans as a Matter of Law, Pub. L. No. 98-532, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat. 2705) 442. *See also* 130 CONG. REC. H10516 (daily ed. Oct. 1, 1984) (comments of Rep. Brooks). This congressional ratification attempts to remove any doubt as to the authority of the EEOC to enforce the ADEA and the EPA. While the dispute in these cases challenging the EEOC now appears to be moot, the discussion in these decisions of the issues raised by *Chadha* will be relevant to future challenges to other statutes containing a legislative veto. Congress also recently amended and extended the Reorganization Act itself, repealing, *inter alia,* the one-house veto provision of the Reorganization Act of 1977. Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984). Under the amendments, a presidential reorganization plan can become effective only if both the House and Senate pass a joint resolution approving it within a certain period. Pub. L. No. 98-614, § 3; *see also infra*, Section IV (discussing ratification).
36. 50 U.S.C. §§ 1541-1548 (1982).
37. U.S. CONST. art. I, § 8.
38. 50 U.S.C. § 1543(a) (1982).
39. *Id.* § 1544(b) (1982).

try.[40] The decision in *Chadha* has rekindled debate about the constitutionality of these provisions.[41]

Some commentators have stated that, because the Constitution gives only Congress the power to declare war,[42] the vetoes contained in the War Powers Resolution are not affected by *Chadha*.[43] In this view, because the President cannot wage war without the approval of Congress, passage of a concurrent resolution simply expresses Congress's refusal to declare war and tells the President that Congress objects to his unauthorized and unconstitutional warmaking.[44] Opponents of this view note first that the Constitution designates the President as the Commander-in-Chief,[45] and second, that to compel the President to remove troops by order of a concurrent resolution denies the President his constitutional role in approving legislation.[46]

Similarly, the independent constitutional authority of Congress to legislate for the District of Columbia[47] has been cited to defend the legislative veto provision of the District of Columbia Home Rule Act (Home Rule Act).[48] This provision permits either house of Congress to reject changes to certain sections of the District of Columbia Code proposed by the city council. In criminal cases litigating the constitutionality of this provision, courts have reached diametrically opposed results.[49]

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40. 50 U.S.C. § 1544(c) (1982).

41. *See, e.g.*, Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After* Chadha, 132 U. PA. L. REV. 1217 (1984). The War Powers Resolution has been of questionable constitutionality since its enactment. Indeed, President Nixon vetoed the resolution on the grounds that section 5(c) "denies the President his constitutional role in approving legislation." Veto of the War Powers Resolution, 1973 PUB. PAPERS 893, at 893 (Oct. 24, 1973). Congress overrode President Nixon's veto.

42. U.S. CONST. art. I, § 8, cl. 11.

43. *See Hearings, supra* note 7, at 234-35, 239 (testimony of Prof. Neil H. Cogan).

44. *See id.* at 239.

45. The Constitution provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." U.S. CONST. art. II, § 2.

46. *See supra* note 41; *see also Hearings, supra* note 7, at 129 (testimony of Kenneth W. Dam, Deputy Secretary of State) (section 5(c) of the War Powers Resolution "is clearly unconstitutional under the Supreme Court's holding in *Chadha*").

47. U.S. CONST. art. I, § 8.

48. Pub. L. No. 93-198, §§ 303, 602(c)(1)-(2), 87 Stat. 774, 784, 814 (1973) (codified at D.C. CODE ANN. § 1-233(c)(2) (1981)).

49. The majority of District of Columbia Superior Court judges who have addressed the issue have held that *Chadha* does not apply to the District of Columbia Home Rule Act. United States v. Langley, No. F-3666-82, slip op. at 3 (D.C. Super. Ct. March 28, 1984), 112 DAILY WASH. L. REP. 801, 807 (Apr. 23, 1984); United States v. McIntosh, No. F-4892-83, slip op. at 3 (D.C. Super. Ct. Mar. 27, 1984), 112 DAILY WASH. L. REP. 789, 793 (Apr. 20, 1984). *But see* United States v. Cole, No. F-5111-82, slip op. at 7-10 (D.C. Super. Ct. May 9, 1984), 112 DAILY WASH. L. REP. 1117, 1121 (June 6, 1984), *appeal docketed*, No. 84-703 (D.C. 1984).

The District of Columbia Circuit, en banc, heard oral argument on the applicability

For example, many challenges to the constitutionality of the Home Rule Act have been brought by defendants charged with rape under section 22-2801 of the District of Columbia Code.[50] On the basis of *Chadha,* defendants have argued section 22-2801 was repealed by the District of Columbia Sexual Assault Reform Act of 1981 (Reform Act), which was passed by the city council pursuant to the Home Rule Act, but vetoed by the House of Representatives.[51] Because the Reform Act generally provided lesser maximum penalties,[52] defendants have argued that the House of Representatives' veto of the Reform Act was unconstitutional, that the Reform Act replaced section 22-2801 in 1981, and that their convictions or their sentences under section 22-2801 must be vacated.[53]

In *United States v. McIntosh,*[54] a District of Columbia Superior Court judge held that, because of the plenary power accorded Congress over the laws of the District of Columbia by Article I of the Constitution,[55] the presentment and bicameral requirements — central to the Supreme Court's reasoning in *Chadha* — do not apply to the Home Rule Act.[56] Viewing the bicameral and presentment requirements as a constitutionally imposed means of assuring a "national" perspective when federal legislation is enacted and as a means of protecting the interests of smaller states, the court asserted that such concerns are not present when Congress legislates on matters of "purely local" interest.[57] The court also found no violation of the doctrine of separation of powers because the legislative veto served as a check on the actions of the District of Columbia City Council rather than on actions of the executive branch.[58] The court thus determined that the legislative veto provision of the Home Rule Act was not an unconstitutional exercise

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of *Chadha* to the Home Rule Act on October 22, 1984. The cases heard by the court in a consolidated appeal were Gary v. United States, No. 83-796; Cole v. United States, No. 84-703; and Pee v. United States, No. 84-997. Subsequent congressional action attempted to moot the issues raised in these cases. *See infra* note 64 and accompanying text.

50. D.C. CODE ANN. § 22-2801 (1981). *See, e.g.,* United States v. Cole, No. F-5111-82, slip op. (D.C. Super. Ct. May 9, 1984), 112 DAILY WASH. L. REP. 1117 (June 6, 1984); United States v. McIntosh, No. F-4892-83, slip. op. (D.C. Super. Ct. Mar. 27, 1984), 112 DAILY WASH. L. REP. 789 (Apr. 20, 1984).

51. *See* H.R. Res. 208, 97th Cong., 1st Sess. (1981).

52. For example, the maximum penalty for rape under section 22-2801 of the District of Columbia Code is life imprisonment, whereas the maximum penalty for sexual assault under the Sexual Assault Reform Act would be twenty years imprisonment. *See* United States v. McIntosh, No. F-4892-83, slip op. at 1 (D.C. Super. Ct. Mar. 27, 1984), 112 DAILY WASH. L. REP. at 789 (Apr. 20, 1984).

53. *See, e.g., Cole,* No. F-5111-82, slip op. at 1, 112 DAILY WASH. L. REP. at 1117; *McIntosh,* No. F-4892-83, slip op. at 2-3, 112 DAILY WASH. L. REP. at 789.

54. No. F-4892-83, slip op. (D.C. Super. Ct. Mar. 27, 1984), 112 DAILY WASH. L. REP. 789.

55. Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." U.S. CONST. art. I, § 8, cl. 17.

56. *McIntosh,* slip op. at 12, 112 DAILY WASH. L. REP. at 796.

57. *Id.* at 6-7, 112 DAILY WASH. L. REP. at 793.

58. *Id.*

of legislative power under *Chadha*.[59]

In *United States v. Cole*,[60] however, another judge of the District of Columbia Superior Court held that the veto provision of the Home Rule Act is unconstitutional under *Chadha*. The *Cole* court held that, although the plenary power of Congress over the District of Columbia government authorizes Congress to exercise a broader scope of power over the District than it could exercise when enacting national legislation, this power does not authorize Congress to circumvent constitutional requirements imposed upon the legislative process itself, namely bicameral action and presentment to the President.[61] The court concluded that to uphold the congressional veto in the Home Rule Act would be to grant Congress unchecked power over the District, clearly inconsistent with the intention of the Framers that the power of Congress be circumscribed by the requirement that all legislation be presented to the President for approval.[62] The court thus held the congressional veto of the Sexual Assault Reform Act unconstitutional.[63]

In response to these and other challenges to the Home Rule Act, Congress repealed the one-house veto provision of the Act and replaced it with a "report and wait" provision.[64] The legislation also specified that Congress "deem[s] valid" all laws passed by the city council and approved by Congress under the original Act, but declared "null and void" any law enacted by the council and vetoed by Congress.[65]

59. *Id.* at 12, 112 DAILY WASH. L. REP. at 795-96.

60. No. F-5111-82, slip op. (D.C. Super. Ct. May 9, 1984), 112 DAILY WASH. L. REP. 1117 (June 6, 1084), *appeal docketed*, No. 84-703 (D.C. 1984).

61. *Id.* at 3, 112 DAILY WASH. L. REP. at 1117.

62. *Id.* at 9, 112 DAILY WASH. L. REP. at 1122.

63. *Id.* at 20, 112 DAILY WASH. L. REP. at 1124. This holding was of little comfort to Mr. Cole, however, as Judge Smith also held that the unconstitutional veto provision is not severable from the remainder of the Home Rule Act, thereby invalidating the authority of the city council to enact the Reform Act in the first place. *Id.* Hence, the court concluded that Cole was prosecuted under the proper statute. *Id.*

64. Continuing Appropriations, 1985 — Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 131, 98 Stat. 1837, 1974 (1984). "Report and wait" requirements generally provide that Congress must be given notice of a proposed action by an administrative agency, but the action will become effective only after the lapse of a specified time, during which Congress may effectively "veto" the action by passage of legislation. *See also infra* text accompanying notes 82-84. In addition to this "report and wait" provision, Congress added a severability clause to the Home Rule Act and expressly affirmed the validity of all laws enacted pursuant to the Act while it contained the questionable one-house veto. *See* Pub. L. No. 98-473, § 131(l), 98 Stat. 1837, 1975 (1984). *See also* 130 CONG. REC. H11894 (daily ed. Oct. 10, 1984); 130 CONG. REC. S14211 (daily ed. Oct. 11, 1984) (statement of Sen. Mathias).

65. Pub. L. No. 98-473, § 131(k), 98 Stat. 1837, 1975 (1984). This congressional action may provide some comfort to the District of Columbia government, which has enacted numerous criminal and civil laws pursuant to the Home Rule Act. *See, e.g.*, District of Columbia Death Penalty Act of 1980, D.C. CODE ANN. § 22-404 (1981); District of Columbia Uniform Controlled Substances Act of 1981, D.C. CODE ANN.

Although this action may clarify the future of the Home Rule Act, congressional attempts to moot past cases may be ineffective. It is by no means clear that Congress can retroactively ratify an unconstitutional statute, particularly where the rights of criminal defendants are at issue.[66] If the Home Rule Act in effect at the time of a criminal prosecution was invalid, all prosecutions under laws passed by the city council pursuant to the Act's authority would be arguably unenforceable. Furthermore, this scenario raises an issue of significance beyond the context of the Home Rule Act: where legislative actions amending or repealing earlier legislation are found to be invalid because of a legislative veto, is the earlier law revived? There is no clear answer to that question.[67]

II. Severability

Other than the veto provisions of the few statutes enacted by Congress pursuant to special constitutional authority, virtually all legislative veto provisions that have been exercised, and probably even those not yet exercised, will be adjudged unconstitutional. This does not necessarily mean, however, that the statute containing the veto is unconstitutional. In *INS v. Chadha,* though the Supreme Court found the veto section of the Immigration and Nationality Act to be unconstitutional, it also found the veto to be severable from the remainder of the Act.[68] If a veto provision is severable, the statute will be upheld; if the veto provision is inseverable, the entire statute will fall.[69] Severability, therefore, is a crucial issue in every case challenging a legislative veto.

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§§ 16-2320, 33-501-567 (Supp. 1984); District of Columbia Criminal Statute of Limitations Act of 1982, D.C. CODE ANN. § 23-113 (Supp. 1984).

66. See *infra,* note 67, for a discussion of criminal prosecutions, and Part IV, for discussion of ratification.

67. Moreover, efforts to apply a "revived" criminal law against a defendant charged prior to the congressional action raises the question of *ex post facto* application of law, because the defendant would be charged with an offense that was not a crime at the time of his act. *See* Beazell v. Ohio, 269 U.S. 167, 169-70 (1925) ("It is settled . . . that any statute which punishes as a crime an act previously committed, which was innocent when done . . . is prohibited as *ex post facto.*").

In addition, if the Home Rule Act containing the veto provision was unconstitutional, convictions secured under criminal laws enacted pursuant to the Act would be open to challenge. For example, the United States Attorney for the District of Columbia declared that more than 1,700 convictions obtained under one 1982 statute concerning theft and white-collar crime could be jeopardized by a holding that *Chadha* invalidates the Home Rule Act. *See* Wash. Post, May 10, 1984, at A1, col. 2. The United States Attorney's Office stated that since enactment of the District of Columbia Uniform Controlled Substances Act of 1981, D.C. CODE ANN. §§ 33-501 to 33-567 (Supp. 1984), there have been 10,117 convictions under that law. Brief for Appellee at 13 n.15, United States v. Pee, No. 84-997 (D.C., filed Sept. 7, 1984). In *Pee,* the defendant was convicted of violating the Controlled Substances Act of 1981, which was adopted pursuant to the Home Rule Act, but not vetoed by Congress. Nonetheless, Pee argued on appeal that the presence of the veto in the Home Rule Act invalidated that Act, and therefore the District of Columbia City Council never had the authority to adopt the Controlled Substances Act. Brief for Appellant at 2, United States v. Pee, No. 84-997 (D.C., filed July 30, 1984).

68. INS v. Chadha, 103 S. Ct. 2764, 2775-76 (1983).

69. *Id.* at 2775.

Traditionally, the Supreme Court has looked to two factors when judging severability: the intent of Congress in enacting the statute and the ability of the statute to function as a fully operable law absent the offending provision.[70] The Court reaffirmed in *Chadha* the general rule governing legislative intent that a court may sever invalid portions of a statute "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not."[71] The Court quickly acknowledged, however, that reviewing legislative history to discern the importance of the veto to the statutory scheme may be an "elusive inquiry."[72] Moreover, the requirement that courts inquire into congressional intent in enacting each legislative veto prohibits any general finding that veto provisions are severable and necessitates an examination of severability on a statute-by-statute basis.

In response to courts' invalidation of statutes that include unconstitutional provisions, Congress has frequently attached a severability clause to a statute in order to clarify its intent that each section of the statute is to be judged independently of its other sections.[73] The Supreme Court has held that the inclusion of a severability clause in a statute raises a presumption that Congress intended an invalid section to be severable.[74] The Court found this presumption in *Chadha,* because the Immigration and Nationality Act contains a severability clause.[75]

If a statute does not contain a severability clause to guide the courts, the search for congressional intent becomes much more difficult.[76] For example, review of the legislative history of the

70. *Id.* at 2774-75.

71. *Id.* at 2774 (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

72. 103 S. Ct. at 2774.

73. *See, e.g.,* Immigration and Nationality Act, 8 U.S.C. § 1101 (1982). A severability clause expresses Congress's intent that, if a section of a statute is found to be unconstitutional, only that section is to be affected and the validity of the other sections of the statute are not to be affected. The Immigration and Nationality Act, at issue in *Chadha,* contained the following severability clause:

> 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.

Id.

74. *Chadha,* 103 S. Ct. at 2774. *See also* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 441 (D.C. Cir. 1982) (presence of severability clause makes it "extremely difficult" to prove inseverability), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council of Am., 103 S. Ct. 3556 (1983).

75. 103 S. Ct. at 2774; *see also supra* note 73.

76. *See* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 442 (D.C. Cir. 1982) (legislative history will almost always contain contradictory statements about importance of particular provision), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council of Am., 103 S. Ct. 3556 (1983); Muller Optical Co. v. EEOC,

veto provision included in the Reorganization Act of 1977 led different courts to antithetical conclusions on the severability of that veto provision. One court found it "absolutely clear that . . . the legislative veto provision was an indispensable part of the statute,"[77] whereas another court concluded, "neither the express language of the statute nor the Act's legislative history makes it 'evident that the legislature would not have enacted' the remainder of the Act in the absence of the legislative veto provision."[78]

Although the standard for determining legislative intent on the severability issue is easy to state — is it evident that Congress would have rejected the statute if shorn of the veto? — it necessarily poses a hypothetical question that will often prove difficult to answer given the frequent ambiguity of legislative histories. As a result, a court so inclined has wide latitude to find severability.[79] Nevertheless, courts have not been reluctant to hold a veto provision inseverable where they perceive that Congress clearly intended to delegate authority only on the condition that it retain a veto power.[80]

In addition to analyzing congressional intent to determine whether a provision is severable, a court must ensure that the remainder of the statute after severance "is fully operative as a law."[81] It is unlikely, however, that a statute will become inoperable simply because a veto provision is removed. By definition,

574 F. Supp. 946, 951 (W.D. Tenn. 1983) (determining congressional intent requires an "unavoidable attempt at clairvoyance"), *aff'd,* 743 F.2d 380 (6th Cir. 1984); *see also* Note, *Severability of Legislative Veto Provisions: A Policy Analysis,* 97 HARV. L. REV. 1182 (1984) (flexibility of severability doctrine will generally enable courts to sever legislative veto provision).

77. EEOC v. Chrysler Corp., 595 F. Supp. 344, 349 (E.D. Mich. 1984); *see also* EEOC v. Columbia Broadcasting Sys., 743 F.2d 969, 973 (2d Cir. 1984) ("without such a [veto] provision, congress [sic] would have been unwilling to delegate to the President such extensive authority to reorganize the executive branch").

78. EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1192 (5th Cir. 1984), *quoting* Buckley v. Valeo, 424 U.S. 1, 109 (1976); *see also* EEOC v. Pan Am. World Airways, 34 Fair Empl. Prac. Cas. (BNA) 321, 322 (N.D. Cal. 1984) ("there is no conclusive evidence . . . concerning the importance of the veto").

79. For example, despite the persuasive dissent of Justice Rehnquist in *Chadha,* arguing that the legislative history of the veto provision of the Immigration and Nationality Act demonstrates that it is not severable from the remainder of the Act, 103 S. Ct. at 2816-17 (Rehnquist, J., dissenting), the majority found that provision severable. 103 S. Ct. at 2774-76. *See also* Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), *cert. denied,* 105 S. Ct 173 (1984). In *Gulf Oil Corp. v. Dyke,* the Court found the veto provision of the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 (1982), to be severable despite the express statement in the purpose clause of the statute that the veto served as a limitation on the grant of authority to the President, Gulf Oil Corp. v. Dyke, 734 F.2d at 803, and that there were "continued and heated debates" over the provision. *Id.* at 804. *See also* Note, *supra* note 76, at 1195-97 (severability analysis is a flexible doctrine that will permit courts to uphold almost all challenged statutes).

80. *See* EEOC v. Columbia Broadcasting Sys., 743 F.2d 969 (2d Cir. 1984) (invalidating entire Reorganization Act of 1977, 5 U.S.C. § 901 (1982)); United States v. Cole, No. F-5111-82, slip op. at 19-20 (D.C. Super. Ct. May 9, 1984), 112 DAILY WASH. L. REP. 1117, 1124 (June 6, 1984) (invalidating District of Columbia Home Rule Act, D.C. CODE ANN. § 1-233 (1981)).

81. *Chadha,* 103 S. Ct. at 2775 (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

the veto is a device that can only prevent implementation of an administrative rule or action taken pursuant to the authority granted by a particular statute. Dropping the veto provision only limits Congress's ability to halt the exercise of the authority it originally delegated.

If a veto provision of a statute is held to be unconstitutional but severable, Congress may still have the opportunity to prevent a proposed administrative action taken pursuant to the statute from becoming effective. In *Chadha,* the Court acknowledged that, although the veto provision of the Immigration and Nationality Act is unconstitutional, a decision by the Attorney General to cancel deportation proceedings against an alien will be effective only after the expiration of the statutory time period given Congress to enact legislation to overturn that decision.[82] Although Congress can no longer use a one-house veto to reverse the Attorney General's decision, it can pass legislation during that period for signature by the President to achieve the same result.[83] The Court found the statute shorn of its veto to be similar to the "report and wait" provision held constitutional in *Sibbach v. Wilson.*[84] This reasoning may be applied to other statutes containing severable veto provisions.

Given the importance of a finding of severability in upholding statutes that contain veto provisions and court's flexibility in reviewing typically inconsistent and inconclusive legislative histories of veto provisions, courts will probably hesitate before finding a particular veto inseverable.

III. Retroactivity

A decision that a veto provision is unconstitutional but severable leaves the remainder of the statute intact, but provides no guidance to a court if a party is challenging the validity of an administrative action because the congressional veto, though severable, was exercised.[85] In addition, if a veto is held to be inseverable and

82. 103 S. Ct. at 2775-76.

83. *Id.* at 2775 nn.8-9. The Court wrote that without the one-house veto provision Congress would presumably retain the authority, within the time alotted in the veto provision, to halt a law, in accordance with the requirements of the Constitution, to deport an alien whose deportation proceedings had been suspended by the Attorney General. *Id.* Thus, the Court implied that a decision to suspend deportation would not become effective until the time period in the veto provision had expired. At least one court has read *Chadha* this way. *See* Lewis v. Sava, No. 83 Civ. 8397 (RLC), slip op. (S.D.N.Y. Dec. 12, 1984).

84. 312 U.S. 1 (1941). *See* 103 S. Ct. at 2776 n.9; *see also supra* note 64 (discussing "report and wait" provisions).

85. *Compare, e.g.,* Exxon Corp. v. Department of Energy, 744 F.2d 98 (Temp. Emer. Ct. App. 1984) (exercise of severable, unconstitutional veto did not taint regulations issued under Emergency Petroleum Allocation Act and Energy Policy and Con-

the entire statute unconstitutional, a court must then determine whether all actions taken by an administrative agency pursuant to that statute are also to be invalidated.[86] These questions require a court to decide whether the ruling in *Chadha* is to be given prospective-only application, thereby upholding administrative actions taken under the presumption that the statute and legislative veto provision were fully effective, or whether *Chadha* is to be given retroactive application.

Like severability analysis, the test for determining whether a new holding of law will be applied retroactively in a civil case is straightforward. In *Chevron Oil v. Huson*,[87] the Supreme Court explained its three-step test for assessing retroactive application of a new rule. First, it determines whether the new holding overrules past decisions and marks a significant change in the law or answers a question of first impression that could not have been clearly foreseen. Second, it inquires whether retroactive application of the new rule furthers or retards the purpose of that rule. Finally, the Court decides whether retroactive application of the rule will cause an inequitable result.[88] Because the fairness of retroactive application of the rule is a factor a court must assess, the court will have to decide on a case-by-case basis whether to apply *Chadha* retroactively.[89]

The holding in *Chadha* appears to be eligible for prospective-only application under the tests of *Chevron*. First, *Chadha* did mark the Court's first clear pronouncement on the constitutionality of the legislative veto, despite Congress's enactment of legislative vetoes for more than fifty years.[90] Even though the

servation Act), *cert. denied sub nom.* Energy Reserves Group, Inc. v. United States Dep't of Energy, 105 S. Ct. 576 (1984) *with* Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983) (severability of one-house veto did not save regulation thrice revised as a result of exercise of veto). Where the veto is severable, but has not been exercised, there is no basis to attack the use of the power delegated by Congress. *Exxon Corp.*, 744 F.2d at 115.

86. *Compare, e.g.*, EEOC v. Columbia Broadcasting Sys., 743 F.2d 969 (2d Cir. 1984) (because the unconstitutional veto provision of Reorganization Act was inseverable, all enforcement actions taken by EEOC were invalid) *with* EEOC v. Chrysler Corp., 595 F. Supp. 344 (E.D. Mich. 1983) (even though one-house veto was not severable from Reorganization Act, retroactive invalidation of EEOC enforcement actions would be unfair).

87. 404 U.S. 97 (1971).

88. *Id.* at 106-07. For a survey of the Supreme Court's treatment of retroactive application of its decisions, see Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975); Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. REV. 745 (1983).

The test for retroactive application of a new rule of law in a criminal case is slightly different than that in the civil context. In a criminal case, courts will focus on the purpose of the new rule, the reliance of law enforcement officials on the old law, and the effect of retroactive application of the new rule on the administration of justice. *See* Stovall v. Denno, 388 U.S. 293, 297 (1967). *But see* United States v. Johnson, 457 U.S. 537 (1982) (different standard in fourth amendment cases). If the purpose of the new rule in the criminal context "goes to the heart of the truth-finding function," however, the Court will apply the rule retroactively. *See* Solem v. Stumes, 104 S. Ct. 1338, 1343 (1984).

89. *See* Allen v. Carmen, 578 F. Supp. 951, 966 (D.D.C. 1983).

90. In an unusual procedure, the parties to *Chadha* briefed and argued their case

constitutionality of the legislative veto had long been debated in legal journals and long been criticized by the executive branch, [91] the result in *Chadha* was hardly "clearly foreshadowed."[92]

Second, retroactive application of *Chadha* will unlikely further or retard the holding that the congressional veto is an unconstitutional attempt to exercise legislative power. Numerous administrative actions such as the EEOC's enforcement of the Age Discrimination in Employment Act and Equal Pay Acts have been undertaken pursuant to authority delegated by statutes that long contained a veto. To undo these actions because the Court subsequently declared the legislative veto unconstitutional provides no additional incentive for Congress to abstain from exercise of its now defunct veto power, but instead penalizes administrative agencies for performing their statutory responsibilities.[93]

Whether *Chadha* should be applied retroactively will depend on the particular circumstances of a case. Thus far, relatively few courts have adjudicated the issue. In *Allen v. Carmen*,[94] the court applied *Chadha* retroactively to the Presidential Recordings and Materials Preservation Act.[95] Former officials of the Nixon administration challenged the General Services Administration's (GSA) regulations concerning the public release of previously unpublished presidential papers. On three separate occasions, Congress had vetoed earlier variations of the regulations before the responsible congressional committees and the GSA negotiated an acceptable version.[96]

The court concluded that the veto provision of the Preservation Act is unconstitutional under *Chadha*, but severable from the remainder of the Act.[97] It then addressed whether to apply *Chadha* retroactively to invalidate the current regulations, which were revised only after exercise of the congressional veto. Applying the three-part test of *Chevron*, the court first concluded that *Chadha* does not represent a statement of new law.[98] While acknowledging that there are no prior decisions of the Court holding the veto unconstitutional, the *Allen* court declared that the congressional veto procedure on its face violates the presentment clauses and bicameral requirement of the Constitution, a fact that legal schol-

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twice before the Court. This suggests the caution with which the Court approached the issue. 103 S. Ct. at 2780.

91. 2 K. Davis, Administrative Law Treatise § 2:6 (1982).
92. *Chevron Oil*, 404 U.S. at 106.
93. *See, e.g.*, EEOC v. Chrysler Corp., 595 F. Supp. 344, 351 (E.D. Mich. 1983).
94. 578 F. Supp. 951 (D.D.C. 1983).
95. 44 U.S.C. § 2107 (1982).
96. 578 F. Supp. at 956-59.
97. *Id.* at 968.
98. *Id.* at 967.

ars have long asserted.[99] Second, the court found that, because the GSA's regulations had been vetoed three times, Congress had itself effectively rewritten the regulations, making retroactive application of *Chadha* acceptable.[100] Finally, the court decided that invalidating the regulations would not be unfair to the litigants or to other affected parties because invalidation would only delay making the documents publicly available. Moreover, the court reasoned, in other lawsuits concerning the same regulations, the GSA had indicated that it believed the congressional veto of the Preservation Act to be unconstitutional.[101] Rather than negate the legislative vetoes of the regulations and give effect to the regulations as first proposed, however, the court directed the GSA to develop new regulations, free of unwarranted congressional interference.[102]

In contrast, *EEOC v. Chrysler Corp.*[103] held that the veto provision of the Reorganization Act of 1977 was unconstitutional and inseverable from the Act, but the court declined to give its ruling retroactive application.[104] The EEOC argued that applying the ruling retroactively would necessitate dismissal of actions pending before the EEOC. The court agreed that actions filed by the EEOC prior to the decision in *Chadha* should not be dismissed.[105]

Applying the three-part retroactivity test, the court first found that the holding in *Chadha* was not clearly foreshadowed by any earlier decision and thus addressed an issue of first impression before the Supreme Court.[106] Second, the *Chrysler* court concluded that prospective-only application of *Chadha* would neither encourage nor discourage Congress from passing legislation containing a veto.[107] Finally — and in the court's view most importantly — it held that it would be "extremely unfair" to individuals who came to the EEOC for assistance two years before *Chadha* to apply that decision retroactively and thereby trigger the dismissal of their claims.[108] In determining not to apply *Chadha* retroac-

99. *Id.* Despite this assertion, in an earlier section of the *Allen* opinion discussing the GSA's claim that Allen should be barred by laches from first raising the issue of the legislative veto provision long after the suit was originally filed, the court stated that "*Chadha* was the first time the Supreme Court had definitively decided the one-house veto question. This Court is reluctant to charge the plaintiffs with laches when the law has been so unsettled and complex." *Id.* at 963.

100. *Id.* at 966-67. *But cf. Exxon Corp.*, 744 F.2d at 115 (Temp. Emer. Ct. App. 1984) (no "tainting" of regulations which were promulgated following veto where regulations were approved by both houses, where President "composed and promulgated the challenged regulation" and where there is no showing of unconstitutional "coercion" of President).

101. 578 F. Supp. at 968.

102. *Id.* at 971-72.

103. 595 F. Supp. 344 (E.D. Mich. 1984).

104. *Id.* at 351-52.

105. *Id.* at 350-53.

106. *Id.* at 351.

107. *Id.*

108. *Id. See also* Exxon Corp. v. Department of Energy, 744 F.2d 98, 112-14 (Temp. Emer. Ct. App. 1984) (*Chadha* will not be applied retroactively to invalidate regulations issued pursuant to Emergency Petroleum Allocation Act (EPAA) and Energy Policy and Conservation Act (EPCA), both of which contain veto provisions, despite

tively in the case before it, the court did suggest that its holding, invalidating the transfer of enforcement power to the EEOC, may prevent the EEOC from bringing new actions in the post-*Chadha* era.[109]

In *EEOC v. Columbia Broadcasting Systems, Inc.*,[110] the Second Circuit took a very different approach to the question of retroactivity. Like the *Chrysler* court, the court in *Columbia Broadcasting* found that the veto provision of the Reorganization Act is unconstitutional and inseverable from the Act.[111] Instead of deciding whether to apply its holding retroactively or prospectively, however, the court remanded the case to the district court and stayed its judgment for a period of four months, in order "to afford Congress an opportunity to take appropriate measures to validate the EEOC's authority over ADEA enforcement, or to otherwise clarify its requirements for enforcing that statute."[112] The court added that, if Congress did pass appropriate legislation, the district court could continue the action.[113] Congress did pass legislation affirming the EEOC's enforcement power over the ADEA shortly thereafter.[114]

The court stayed its judgment dismissing the case because it believed that "automatic dismissal of the complaint would be an unnecessarily drastic remedy."[115] In support, the court cited *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[116] In *Northern Pipeline*, the Supreme Court stayed for three months its judgment that the Bankruptcy Act of 1978 unconstitutionally conferred article III powers on non-article III bankruptcy judges, in order to permit Congress to amend the Bankruptcy Act.[117] The Court stated that retroactive application of its holding "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts."[118] Moreover, by staying its judgment, the Court gave Congress an opportunity to rectify the Bankruptcy Act, "without

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Congress's exercise of EPAA's veto), *cert. denied sub nom.* Energy Reserves Group, Inc. v. United States Dep't of Energy, 105 S. Ct. 576 (1984).

109. *Chrysler Corp.*, 595 F. Supp. at 351.

110. 743 F.2d 969 (2d Cir. 1984).

111. *Id.* at 973.

112. *Id.* at 975.

113. *Id.* at 976. The court did not indicate whether it would apply its ruling retroactively if Congress did not take any action in response to its decision. The court did suggest, however, that the complaint against CBS would be dismissed if Congress did not act. 743 F.2d at 975-76.

114. *See supra* note 35 and accompanying text.

115. 743 F.2d at 975.

116. 458 U.S. 50 (1982).

117. *Id.* at 88.

118. *Id.*

impairing the interim administration of the bankruptcy laws."[119] These concerns about substantial hardship and injustice and the interim administration of the law are particularly relevant to challenges to the validity of statutes on the basis that they include a legislative veto.[120]

The Second Circuit's approach in *Columbia Broadcasting* is preferable to the more limited ruling offered in *Chrysler*. Although a clear statement that *Chadha* will not be applied retroactively protects decisions and actions taken when a statute was presumed to be valid, it leaves unresolved the present enforceability of regulations issued before, and of actions commenced after, the *Chadha* decision. By following the examples of *Northern Pipeline* and *Columbia Broadcasting* and staying judgment for a reasonable period of time, courts can provide Congress with an incentive to correct an unconstitutional statute without causing unnecessary disruption or hardship.

IV. Ratification

An issue raised in those cases addressing the validity of the Reorganization Act is whether Congress can implicitly ratify actions taken pursuant to a statute containing a legislative veto by taking steps short of the express affirmation that followed the *Columbia Broadcasting* ruling. Under one theory, if the Reorganization Act is unconstitutional because of an inseverable veto, a reorganization constitutes an unauthorized act by the President, until Congress ratifies that act by passing legislation approving it.[121] The EEOC has argued, with some success, that, even if the Reorganization Act is unconstitutional, Congress has demonstrated its approval of the EEOC's authority under the Reorganization Plan by appropriating funds for the EEOC to enforce the Equal Pay Act and Age Discrimination in Employment Act and by referring in subsequent legislation to the transfer of authority to the EEOC under the Reorganization Plan.[122]

In the past, the Supreme Court has approved other executive department reorganizations. In *Swayne & Hoyt v. United States*[123] and *Isbrandtsen-Moller Co. v. United States,*[124] the Court

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119. *Id.*

120. *See, e.g., Exxon Corp.*, 744 F.2d at 114 (retroactive application of *Chadha* to proceedings under EPAA and EPCA would affect "proceedings and transactions . . . so numerous that they are uncountable, nearly infinite, immeasureable and irreversible in economic effects and legal rights").

121. *See id.* at 115 (regulations issued under EPAA were not tainted by fact that Congress had vetoed earlier versions of the regulations; rather they were "confirmed and extended" by enactment of EPCA, which repealed and replaced EPAA).

122. *See* EEOC v. Pan Am. World Airways, 34 Fair Empl. Prac. Cas. (BNA) 321, 323 (N.D. Cal. 1984); Muller Optical Co. v. EEOC, 574 F. Supp. 946, 953-54 (W.D. Tenn. 1983) (both finding congressional ratification of Reorganization Plan No. 1 concerning authority of EEOC), *aff'd on other grounds,* 743 F.2d 380 (6th Cir. 1984). *But see* EEOC v. Columbia Broadcasting Sys., 743 F.2d 969 (2d Cir. 1984); EEOC v. Chrysler Corp., 595 F. Supp. at 350 (E.D. Mich. 1984) (both finding insufficient evidence of congressional ratification of Reorganization Plan No. 1).

123. 300 U.S. 297 (1937).

upheld the President's abolition of certain powers of the United States Shipping Board and the transfer of its powers to the Department of Commerce.[125] The Court stated that, even if unauthorized, the transfer had been ratified by Congress when Congress appropriated funds to permit the Department of Commerce to administer those powers and had passed a statute expressly acknowledging those powers to be within the domain of the Department.[126] Because of the similarity between the facts of these cases and the dispute over the Reorganization Plans, the EEOC vigorously argued that *Swayne & Hoyt* and *Isbrandtsen-Moller* were dispositive of the ratification issue.[127]

Other Supreme Court decisions, however, suggest that Congress must demonstrate a specific intent to ratify an unauthorized administrative action. In *Greene v. McElroy*,[128] the Court held that passage of an appropriations bill for funded aspects of a Department of Defense program, which developed new guidelines for security clearance for government contractors, is not sufficient to establish congressional ratification of those guidelines.[129] The guidelines would have permitted a contractor to be stripped of his security clearance — a matter of great economic significance to a defense contractor — without first providing him an opportunity to confront his accusers.[130] Explicit intent to ratify is required, explained the Court, particularly if the act in question is of "doubtful constitutionality," such as an apparent violation of the confrontation clause.[131] Relying on *Greene*, a few courts have held that annual congressional appropriations to the EEOC for enforcement of the EPA and ADEA are insufficient evidence of congressional intent to ratify the transfer of enforcement powers to the EEOC.[132]

124. 300 U.S. 139 (1937).
125. *Swayne & Hoyt*, 300 U.S. at 301-02; *Isbrandtsen-Moller*, 300 U.S. at 148-49.
126. *Swayne & Hoyt*, 300 U.S. at 301-02; *Isbrandtsen-Moller*, 300 U.S. at 147-48.
127. EEOC v. Pan Am. World Airways, 34 Fair Empl. Prac. Cas. (BNA) 321, 322 (N.D. Cal. 1984); EEOC v. El Paso Natural Gas Co., 33 Fair Empl. Prac. Cas. (BNA) 1837, 1838 (W.D. Tex. 1984); EEOC v. Radio Montgomery, Inc., 34 Fair Empl. Prac. Cas. (BNA) 378, 379 (W.D. Va. 1984).
128. 360 U.S. 474 (1959).
129. *Id.* at 508.
130. *Id.* at 506-07.
131. As the Court stated, "[w]e deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures." *Id.*
132. *See, e.g.*, EEOC v. Columbia Broadcasting Sys., 743 F.2d 969, 974 (2d. Cir. 1984). In *Columbia Broadcasting*, the Second Circuit held that, in order to ratify an unauthorized executive action, Congress "must recognize that the actions involved were unauthorized when taken and must also expressly ratify those actions in clear and unequivocal language." *Id.* The court was not satisfied that Congress had clearly and unequivocally approved the transfer of power to the EEOC. *Id.* at 974.

The Second Circuit's test, when applied to administrative actions that do not im-

Nevertheless, when Congress has squarely faced judicial invalidation of an act because it includes a legislative veto provision, such as the District of Columbia Home Rule Act and the Reorganization Act of 1977, Congress has settled the dispute by enacting legislation to ratify the challenged statute.[133] Consequently, none of the litigation spawned by *Chadha* has reached the Supreme Court. Until Congress encounters a statute that it refuses to ratify without the veto provision or an administrative action it refuses to affirm, Congress may continue to moot these cases before they can be considered by the Court.

V. *Delegation Doctrine*

In its brief to the Supreme Court in *INS v. Chadha,* the House of Representatives argued that to hold the legislative veto unconstitutional would be to permit the Attorney General to enact law without congressional approval. The House contended that the Immigration and Nationality Act permits the Attorney General only to recommend the suspension of deportation proceedings. If the veto were ruled invalid, the House claimed, a decision by the Attorney General to suspend deportation proceedings would be final and would, in effect, constitute "lawmaking."[134]

The Court expressly rejected this argument, asserting that the Attorney General acts "presumptively" in his executive capacity when exercising authority delegated by Congress.[135] Furthermore, the Court declared, the check of bicameral approval is not necessary to restrain the Executive in this context, as Congress can amend or eliminate the delegation of power to the Attorney General by enacting new law. Moreover, judicial review of administrative action acts as a check by ensuring that the agency complies with the guidelines established by Congress in the statute itself.[136] The Court's somewhat tangential reference to the delegation doctrine has led some courts to consider whether invalidation of the veto, which acts as a check on administrative agencies,

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pinge on an individual's constitutional rights, is more restrictive than that established by the Supreme Court. The *Greene* decision, which is quoted in *Columbia Broadcasting,* 743 F.2d at 974, reflects the Court's unwillingness to permit bureaucrats to make "decisions of great constitutional import," which it believes only Congress can make. 360 U.S. at 507. The decision to transfer enforcement of the ADEA from the Department of Labor to the EEOC may be of some political consequence, but does not involve any substantive amendment of the law and does not appear to be of constitutional import. Hence, when recognized constitutional rights are not challenged, courts should look to decisions such as *Swayne & Hoyt* for guidance on the proper standard for reviewing ratification. Although evidence still must be produced that Congress has the authority to ratify, and has in fact ratified, the act in question, whether the ratification is sufficiently clear and unequivocal under the Second Circuit's test creates a standard that will prove difficult to satisfy. This is particularly true when Congress, at the time of the alleged ratification, is not aware that the act in question is unauthorized and thus treats ratification as a routine matter.

133. *See supra* notes 35, 64 and accompanying text.

134. Brief for Appellee-Petitioner United States House of Representatives at 38, 40, INS v. Chadha, 103 S. Ct. 2764 (1983).

135. 103 S. Ct. at 2785 n.16.

136. *Id.*

creates a delegation problem. The courts are concerned that perhaps Congress intended to retain a veto power in order to prevent a statute from delegating excessive law-making power to an agency.[137]

In *Muller Optical Co. v. EEOC*,[138] the Sixth Circuit, after upholding the Reorganization Act of 1977 despite its inclusion of an unexercised legislative veto,[139] stated that the "real issue" in all cases involving unexercised legislative vetoes is whether there has been an unconstitutionally broad delegation of legislative power.[140] The court then reviewed the restrictions on the President's use of the reorganization power granted by the Act, other than the congressional veto, and found that Congress had not violated the delegation doctrine as articulated in the Supreme Court's decisions.[141]

Compliance with the delegation doctrine may be an issue for review in challenges to statutes containing a legislative veto. Nevertheless, concern about the limits of proper delegation should not be heightened simply because a statute contains a legislative veto. A statute embodying a legislative veto may still be as overbroad a delegation as one that never contained such a veto. Thus, a finding that the veto is unconstitutional is irrelevant to the question of whether the delegation is unconstitutionally broad.[142]

The Court stated in *Chadha* that the legislative veto is simply an unconstitutional attempt at short-cut legislation. To suggest that a veto provision could remedy an overbroad delegation by Congress would be to suggest that Congress's mere possession of the power to amend a delegation by enacting subsequent legislation is sufficient to validate an otherwise unconstitutional delegation. Clearly, such a position would entirely undermine the delegation doctrine. *Chadha* concerns the constitutionality of Congress's retraction of power it has delegated; it does not address, or affect, the legitimate breadth of the delegation.

Conclusion

INS v. Chadha has yet to cause the prophesized administrative upheaval and diminution of congresssional power in relation to the

137. *See, e.g.*, Muller Optical Co. v. EEOC, 743 F.2d 380, 388 (6th Cir. 1984).
138. 743 F.2d 380 (6th Cir. 1984).
139. *Id.* at 387. *See supra* text accompanying notes 16-23.
140. 743 F.2d at 388.
141. *Id.* at 388-91. *Accord* EEOC v. Ingersoll Johnson Steel Co., 34 Fair Empl. Prac. Cas. (BNA) 875, 880 (S.D. Ind. 1984).
142. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 162 (1978) ("a delegation too broad under current doctrine should not be deemed acceptable simply because Congress has reserved to itself or to part of that body a power to veto action after it has been proposed").

executive branch. Nonetheless, challenges to statutes and uncertainty about their continuing validity have impeded enforcement of those laws.[143] Moreover, though the test for severability to assess the validity of a statute containing a veto provision is fairly simple to articulate, courts applying this test have reached widely divergent conclusions, even as to the same statute.

Although guidance on the scope of *Chadha* must await further reflection by the Supreme Court, Congress has thus far been willing to concede the invalidity of the veto and rewrite a statute to delete its veto provision. Whether it will continue to pass such legislation in the future as to other statutes that contain veto provisions is uncertain. The effect of such legislation, however, is to render moot challenges to statutes or regulations on the basis of a legislative veto.

As Justice White argued in his dissent to *Chadha*, the legislative veto developed as a political compromise between the Executive, which sought to preserve its independence in administration of the laws, and the Congress, which sought to make the Executive accountable for its use of delegated authority.[144] Although Justice White feared that elimination of the veto would present Congress with the "Hobson's choice" of surrendering all control over delegated authority or simply refusing to delegate,[145] Congress does retain other means to check executive action.[146] For example, Congress can pass legislation overriding an agency's proposed action; it can amend an agency's jurisdiction or directly limit its discretion; it can require that it receive notice before an agency takes any action; and it can impose restrictions on the use of appropriated funds.[147] *Chadha* invalidates the use of the veto, but does nothing to impair these other, clearly constitutional, means of exerting congressional influence.

143. For example, after an early challenge to the EEOC's authority to enforce the ADEA and EPA was decided in the employer's favor, employers began to object routinely to the EEOC's motions for depositions and subpoenas in enforcement actions, whereas cooperation had previously been equally routine. Consequently, the need to file motions to establish the EEOC's jurisdiction to enforce those acts placed a heavy burden on the EEOC's staff attorneys. Conversation with Mark S. Flynn, Esq., Appellate Division, EEOC.

The District of Columbia government was unable to issue municipal bonds for a period of time because of the unwillingness of bond counsel to opine that the District was authorized to issue bonds under the District of Columbia Home Rule Act, which contained a legislative veto. Wash. Post, Apr. 4, 1984, at C1, col. 2. By an act of Congress, the District's authority to issue the bonds was reaffirmed. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 647, 98 Stat. 494, 941 (1984).

144. INS v. Chadha, 103 S. Ct. 2764, 2793-95 (1983).

145. *Id.* at 2793.

146. *See* Bolton & Abrams, *supra* note 7; Kaiser, *supra* note 8.

147. *See* Kaiser, *supra* note 8, at 253-76 (suggesting various ways Congress may supervise administrative agencies without use of legislative veto mechanisms).

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ALASKA AIRLINES, INC., et al. v. RAYMOND J. DONOVAN, individually and as Secretary of Labor, et al. v. BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al., APPELLANTS; ALASKA AIRLINES, INC., et al. v. RAYMOND J. DONOVAN, individually and as Secretary of Labor, et al. ASSOCIATION OF FLIGHT ATTENDANTS, APPELLANT; ALASKA AIRLINES, INC., et al. v. RAYMOND J. DONOVAN, individually and as Secretary of Labor, et al. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, APPELLANT; ALASKA AIRLINES, INC., et al. v. RAYMOND J. DONOVAN, individually and as Secretary of Labor, et al., APPELLANTS; AIR LINE PILOTS ASSOCIATION, et al.

No. 84-5442; No. 84-5467; No. 84-5468; No. 84-5470

United States Court of Appeals For The District of Columbia Circuit

Slip Opinion

Argued March 28, 1985

July 16, 1985

APPEAL-STATEMENT:
Appeals from the United States District Court for the District of Columbia

(Civil Action No. 84-00485)

COUNSEL:
Douglas Letter, Attorney, Department of Justice, with whom Richard K. Willard, Acting Assistant Attorney General, Department of Justice, Joseph E. diGenova, United States Attorney, and Anthony J. Steinmeyer, Attorney, Department of Justice were on the brief, for appellant Secretary of Labor in No. 84-5470.

William J. Birney, with whom William G. Mahoney, John O'B. Clarke, Jr. and Clinton J. Miller, III were on the brief, for appellants Brotherhood of Railway and Airline Clerks, et al. in No. 84-5442.

Eugene B. Granof, with whom Gary Green was on the brief, for appellant Air Line Pilots Association in No. 84-5468.

Matthew Finucane was on the brief, for appellant Association of Flight Attendants in No. 84-5467.

William T. Coleman, Jr., with whom Richard C. Warmer, Donald T. Bliss and John H. Beisner were on the brief, for appellees Alaska Airlines, Inc., et al. in Nos. 84-5442, 84-5467, 84-5468 and 84-5470.

OPINIONBY: STARR

OPINION:
Before: TAMM, GINSBURG and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge STARR.

Statement concurring in the judgment filed by Circuit Judge GINSBURG.

STARR, Circuit Judge: This case raises a question left in the wake of Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), invalidating as violative of separation of powers principles the device of the legislative veto of administrative regulations. The context is Congress' pre-Chadha deregulation of the airline industry. The specific issue is whether an unconstitutional legislative veto provision contained in section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f), 92 Stat. 1705, 1750 (1978), is severable from the remainder of the airline employee protection provisions of that statute. We conclude that the veto provision should be severed; we therefore reverse the judgment of the District Court, which held the veto provision inseverable. Inasmuch as the District Court did not have occasion to address the other issues raised by the airlines, we remand the case for further consideration.

I

The Airline Deregulation Act of 1978 contains an employee protection program for the benefit of employees displaced through the impact of deregulation on the shifting fortunes of individual air carriers. See id. § 43 at 92 Stat. 1750, codified at 49 U.S.C. app. § 1552 (1982). As originally crafted, the program contained two prongs. The first provided monetary support and assistance in relocation to individuals who had lost their employment or suffered a diminution in compensation as a result of a qualifying industry dislocation. See 49 U.S.C. app. § 1552(a)-(c). While that provision is still on the books, Congress has never funded its implementation; inasmuch as that provision's operation was expressly made subject to Congress' appropriation of funds for financial assistance, see 49 U.S.C. app. § 1552(a), this portion of the employee protection program is inoperative and, accordingly, no implementing regulations have been promulgated under it.

The employee protection program's second prong triggered the litigation now before us. That portion consists of a "first hire" requirement. That is to say, a person who had been employed for at least four years prior to October 24, 1978 (the effective date of the Act) by an air carrier holding a certificate under the pre-deregulation regime and who was furloughed or terminated (other than for cause) prior to the Act's effective date had a first right of hire by other pre-deregulation certificated air carriers. See 49 U.S.C. app. § 1552(d), (h)(1). This right of first hire was without regard to age but applied only to airlines hiring within the individual's occupational specialty; moreover, airlines could lawfully recall their own furloughed employees before hiring those displaced from other carriers. See 49 U.S.C. app. § 1552(d).

The Secretary of Labor was granted authority to issue, amend and repeal rules and regulations necessary to administer the employee protection plan. See 49 U.S.C. app. § 1552(f)(1), (h)(3). However, that authority was limited by the following provisions:

> The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of

Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that resolution has been adopted by both House stating that the Congress approves of them.

49 U.S.C. app. § 1552(f)(3). Exceptionally, this section combines the "report and wait" provision (found in the first sentence of the quoted language) with a one-House legislative veto n1 (set forth in the second sentence).

n1 Justice White's dissent in Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), summarizes the history of the implementation of the legislative veto. See id. at 968-74 (White, J., dissenting). He traces that history from its American genesis in the reorganization provisions of Pub. L. No. 72-212, 47 Stat. 382, 413-15 (1932), through its inclusion "in nearly 200 statutes . . . in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy." Id. at 968. Earlier use of the device, dating back to the Nineteenth Century, is found in English administrative law. See Schwartz, The Legislative Veto and the Constitution -- A Reexamination, 46 GEO. WAS. L. REV. 351, 359 (1978).

Pursuant to his statutory authority, the Secretary of Labor published regulations for the administration of both prongs of the protection plan in March 1979. See 44 Fed. Reg. 19,146 (1979). A revision of the proposed regulations, covering only the first hire provisions, was published in September 1982. See 47 Fed. Reg. 41,304 (1982). Final regulations were published on November 22, 1983, see 48 Fed. Reg. 52,854 (1983), were duly transmitted to Congress, and were to become effective after sixty legislative days.

In February 1984, however, before the regulations became effective, Alaska Airlines, Inc. and various other airlines filed a complaint in United States District Court for the District of Columbia. They alleged that the first hire provisions of the Act were invalid because of the inclusion of an unconstitutional legislative veto in section 43(f)(3). In addition, they challenged the regulations themselves as violative of the Due Process Clause and, on non-constitutional grounds, as arbitrary and capricious, an abuse of agency discretion and otherwise not in accordance with law. The Department of Labor conceded below, see Alaska Airlines, Inc. v. Donovan, 594 F. Supp. 92, 94 (D.D.C. 1984), and does not contest here, that the legislative veto provision is unconstitutional under Chadha. The Government argued, however, that the invalid veto provision is severable from the remainder of the Act and that the remainder of the employee protection plan, and the rules and regulations adopted thereunder, are lawful and valid.

Plaintiffs-appellees moved for summary judgment, and the Department of Labor moved to dismiss or for an order affirming the validity of the regulations. On May 17, 1984, the day the regulations were to become effective, the District Court granted the airlines' motion, holding that section 43 was invalid in its entirety due to the inclusion of what the court deemed to be an inseverable legislative veto provision. The court's opinion issued the following day. Neither the order nor the opinion addressed the other issues raised in the airlines' complaint.

II

Before reaching the principal issue presented on this appeal, namely the severability of the legislative veto from the remainder of section 43 of the Airline Deregulation Act, several preliminary issues must be addressed.

A

The first question is whether we have jurisdiction over this appeal. The issue is raised only in a footnote in the Alaska Airlines Brief, see Appellees' Brief at 9 n.*, where appellees question, in passing, whether jurisdiction in fact lies in this court; because of the obvious importance of that question, the subject merits our analysis at the outset. A basic jurisdictional provision of Title 28 is that the Supreme Court, not the Courts of Appeals, is vested with jurisdiction over appeals from District Court decisions holding an Act of Congress unconstitutional in any civil action in which the United States, or any agency, official or employee thereof, is a party. 28 U.S.C. § 1252 (1982). In keeping with this provision, the several Courts of Appeals enjoy jurisdiction over appeals from final decisions of the district courts "except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1982) (emphasis added). The airlines suggest that since the District Court held the entire section unconstitutional, exclusive review of that judgment should lie in the Supreme Court.

Those two Title 28 provisions might be read to support the airlines' position. In fact, the appeal in this action was originally filed in the Supreme Court, but due to a recent Supreme Court decision was thereafter refiled in this court. See Appellant Secretary of Labor's Brief at 10 n.5. To determine whether the shift in tribunals was proper and jurisdiction actually lies here we examine that recent Supreme Court disposition.

In Equal Employment Opportunity Commission v. Allstate Insurance Co., 104 S.Ct. 3499 (1984), the Court, by order, held that it had no jurisdiction in a legislative veto case. The obvious difficulty in analyzing the Supreme Court's decision in Allstate is that the dismissal for lack of jurisdiction was without opinion. There was, however, a dissent by the Chief Justice, joined by Justice O'Connor, which presents at least two Justices' view of the Court's reasoning. The district court in that case, 570 F.Supp. 1224 (S.D. Miss.1983), had held the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (1977), unconstitutional because of the presence of a non-severable legislative veto provision. That statute contained the provision pursuant to which the Equal Employment Opportunity Commission had been authorized to enforce the Equal Pay Act, PUb. L. No. 88-38, 77 Stat. 56 (1963). After ruling that the Reorganization Act failed in its entirety, the court held that the EEOC lacked authority to enforce the Equal Pay Act and granted summary judgment in favor of Allstate. n2

n2 After the district court decision in EEOC v. Allstate, but before the Supreme Court's consideration, the Fifth Circuit held, in a separate case, that the legislative veto in the Reorganization Act was severable and that the EEOC did have authority to enforce the Equal Pay Act. See Equal Employment Opportunity Commission v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir.1984).

An appeal thereafter taken directly to the Supreme Court was summarily dismissed for want of jurisdiction. Appearing to find the Court's approach overbroad, the Chief Justice stated:

Had the District Court simply determined, as a matter os statutory construction, that appellant cannot exercise the authority to enforce the Equal Pay Act because Congress did not wish the Act to be operative absent the veto provision, I would agree that dismissal would clearly be compelled under Heckler v. Edwards, [, 104 S.Ct. 1532 (1984]. Under these circumstances, it would be clear, as in Heckler, that appellant was not challenging the constitutional holding of the District Court since it concedes the validity of the court's holding on the legislative veto provision. But this is not the holding of the District Court. And the mere assertion now by the Solicitor General, and implicitly by the Court, that the holding was in reality one of statutory construction cannot change the fact that the District Court explicitly and unambiguously held the entire Act unconstitutional.
Allstate, supra, 104 S.Ct. at 3502 (emphasis in original).

Using this explanation as guidance to the Court's position on the jurisdictional issue, it appears that the appeal in the case at hand appropriately lies in this court. The District Court here did not break any new ground with respect to a constitutional issue. To the contrary, its decision that the legislative veto provision was unconstitutional was squarely rooted in Chadha, as evidenced by the fact that neither side contests that portion of the District Court's decision. Thus, the constitutional decision is, in truth, not a part of this appeal. What is at issue on appeal, rather, is the severability vel non of the remainder of the section in which the legislative veto appears. That question, as we shall see, reduces to a matter of statutory interpretation, see generally Stern, Separability and Separability Clauses in the Supreme Court, 51 HARV. L. REV. 76, 115 (1937). As even the Allstate dissenters opined, jurisdiction would not under those circumstances lie in the Supreme Court but would instead be vested in this court. See also Heckler v. Edwards, supra, 104 S.Ct. at 1536 ("a party does not have a right to direct review in the Supreme Court under 28 U.S.C. § 1252 unless the holding of federal statutory unconstitutionality is in issue"). Accordingly, we are persuaded that the present appeal is properly before us.

B

The second preliminary issue is whether this dispute is ripe for review, inasmuch as Congress has not attempted to exercise the legislative-veto power purportedly conferred by the Airline Deregulation Act. In a case suggesting the possiblity of a lack of ripeness, Clark v. Valeo, 559 F.2d 642 (D.C. Cir.), aff'd sub nom. Clark v. Kimmitt, 431 U.S. 950 (1977), this court in a pre-Chadha ruling stated that "[u]ntil Congress exercises the one-house veto, it may be difficult to present a case with sufficient concreteness as to standing and ripeness to justify judicial resolution of the pervasive constitutional issue which the one-house veto provision involves." Id. at 649. However, this court also stated, importantly for our purposes, that "[a] contention that there are no real considerations of ripeness here can only rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed is inform the judgment of the court." Id. at 649 n.8. This court, at that time, was unwilling to deem the legislative veto device patently unconstitutional; however, in Chadha's wake, this sort of veto provision is manifestly unconstitutional, and thus under Clark v. Valeo's teaching the issue before us may well be ripe for adjudication.

On the other hand, the proposition that the issue is not ripe finds its strongest support in a decision from another circuit, Muller Optical Co. v. Equal Employment Opportunity Commission, 743 F.2d 380 (6th Cir. 1984). In that case, the legislative veto provision of the Reorganization Act of 1977 was once again in issue. The Sixth Circuit concluded that "the existence of a one-House veto provision in a statute does not render the statute invalid but only renders the act of Congress, if it attempts to exercise its one-House veto[,] invalid. . . ." Id. at 388. The Reorganization Plan No. 1 of 1978, which transferred authority to the EEOC to enforce the Age Discrimination in Employment Act, see infra note 5, had long since been reviewed by Congress, and Congress had chosen not to exercise its legislative veto. The court stated:

To inquire at this point in time whether Congress would have passed the Reorganizational [sic] Act without the one-House veto provision and, thereby, whether the substantive provisions of the Act are effective absent the provision, makes no sense when Congress has already declined to use the veto provision and thus has already approved the plan.
Id.

In Muller, the Reorganization Plan in question was promulgated, and Congress elected not to veto it, prior to Chadha. Congress thus tacitly approved the plan, thereby strengthening the argument that the constitutionality vel non of the unutilized veto provision should not have been adjudicated. Here, however, the Department of Labor promulgated its regulations after Chadha was handed down. At that point, Congress did not, in truth, enjoy the option of vetoing the rules; indeed, to have attempted to do so, in light of Chadha, would have been an exercise in futility. Hence, the Congressional approval found tacitly in Muller cannot, in reason, be read into the situation at hand. In the post-Chadha era in which Congress knows that it may not lawfully exercise the purported veto authority, to hold that a court cannot reach the issue of the constitutionality of such a device unless Congress has exercised the provision would be, in effect, to shield all agency action from review as to whether Congress would have provided the underlying authority without its veto oversight. This we decline to do.

C

The final preliminary question is whether Chadha should be applied retroactively. The test for retroactivity of a judicial decision is laid out in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), and Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Northern Pipeline states that there are

three considerations . . . properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, . . . second, "whether retrospective operation will further or retard [the] operation" of the holding in question, . . . and third, whether retroactive application "could produce substantial inequitable results" in individual cases. . . .

Northern Pipeline, supra, 458 U.S. at 88 (quoting Chevron, supra, 404 U.S. at 106-07).

With regard to the first factor, the Association of Flight Attendants argues before us that Chadha erected a new principle of law that could not reasonably have been anticipated. In response, the airlines point to fifty years of political and scholarly debate and speculation as to the constitutionality of such provisions; over the years various commentators have questioned the constitutionality of the legislative veto device, n3 while others have rushed to its defense. n4 Furthermore, this court in Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), held prior to Chadha that the legislative veto provision of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978), was unconstitutional. In view of all this, at the very least, some considerable doubt had been raised prior to Chadha with respect to the constitutionality of legislative veto provisions.

n3 See, e.g., Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. REV. 569 (1953); Dixon, The Congressional Veto and Separation of Powers: The Executive on a Leash, 56 N.C. L. REV. 423 (1978); Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 VA. L. REV. 253 (1982). For a more complete compilation, see Chadha, supra, 462 U.S. at 976 n.12 (White J., dissenting).

n4 See, e.g., Newman 7 Keaton, Congress and the Faithful Execution of Laws -- Should Legislators Supervise Administrators?, 41 CALIF. L. REV. 565 (1953); Cooper & Cooper, The Legislative Veto and the Constitution, 30 GEO. WASH. L. REV. 467 (1962). For a more complete compilation, see Chadha, supra, 462 U.S. at 976 n.12 (White, J., dissenting).

The second factor, the furtherance or retarding of the decision's operation, speaks more strongly in favor of Chadha's retroactive application. That decision, of course, pertained to a bedrock issue fo the structure of the National Government, namely the separation of powers enshringed by the Framers in Philadelphia in the summer of 1787. The fundamental concern over fidelity to that principle of governance of a free people would scarcely be furthered by shielding from challenge a separation-of-powers violation simply by virtue of the fact that the unconstitutional provision was passed prior to Chadha. While it may be argued that regulations promulgated and not vetoed (or even promulgated but vetoed) prior to Chadha should not be subjected to retroactive application, it seems strained to argue that the provision itself should be protected from Chadha's retroactive application. The veto device works a potential violation of separation of powers principles; that provision indisputably ripens into a very real violation when regulations are purportedly vetoed. An alternative problem arises in this post-Chadha day and age in which Congress is plainly forbidden from exercising a veto. If we refuse to apply Chadha to the post-Chadha adoption of regulations under a pre-Chadha statute that includes a legislative veto, the Executive branch might thereby be permitted to exercise power that Congress would not have delegated had it not retained some power of review through the legislative veto device. In short, while the second factor might shield from retroactive application those regulations fully in place prior to Chadha, that factor should not shield the legislative veto provisions themselves from constitutional scrutiny.

The third factor, substantial inequitable results from retroactive application, weighs heavily on neither side. The Association of Flight Attendants argues that great inequity would result from Chadha's retroactive application in that employees would no longer enjoy the protective mechanisms carefully crafted by a Congress which recognized "an almost moral obligation" to protect airline employees. See Association of Flight Attendants' Brief at 41. However, whatever inequity the flight attendants may discern arises not entirely from the retroactive application of Chadha but, more precisely, from any judicial decision not to sever the remainder of section 43. Their arguments speak to the Congressional intent important to the severance decision; they do not speak to the retroactivity vel non of Chadha.

There is, as yet, little case law on Chadha's retroactive application. n5 Three pre-Chadha cases in this circuit struck down legislative veto provisions as unconstitutional, see American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982); Consumers Union of the United States, Inc. v. Federal Trade Commission, 691 F.2d 575 (D.D. Cir. 1982), aff'd mem. sub nom. Process Gas Consumer Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983); Consumer Energy Council of America v. FERC, supra, 673 F.2d 425. Inasmuch as all three decisions were pre-Chadha, they were not of direct relevance to the issue of the retroactivity of Chadha. Furthermore, while Pierce relies on Consumer Energy Council and Consumers Union, the veto clause found unconstitutional in Pierce was enacted after this court's decision in Consumer Energy Council, hence the reliance on Consumer Energy Council was not a retroactive application. On the other hand, the Supreme Court's summary affirmance of Consumers Union and Consumer Energy Council was rendered after Chadha. That summary disposition, while obviously enjoying less precedential significance than a case afforded plenary consideration, see, e.g., Mandel v. Bradley, 432 U.S. 173, 176-77 (1977); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring), might be viewed as assuming Chadha's retroactive application.

n5 The issue was raised in one case in the D.C. District Court, and the court there held that under a case-by-case analysis Chadha would apply retroactively to the Presidential Recordings and MAterials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974). See Allen v. Carmen, 578 F. Supp. 951, 966-68 (D.D.C. 1983). The Temporary Emergency Court of Appeals has also considered the question. In Exxon Corp. v. United States Department of Energy, 744 F.2d 98 (T.E.C.A.), cert. denied, 105 S. Ct. 576 (1984), the court held that Chadha should not be applied retroactively. But, the retroactive application under discussion was as to obligations imposed by, and regulations adopted pursuant to, the infirm statutes prior to Chadha. The court found substantial inequitable results in voiding such obligations and regulations. In our view, this analysis should not be extended to the case at hand in which the resulations were adopted post-Chadha. Other cases do not directly address the issue. For example, in Equal Employment Opportunity Commission v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984), the legislative veto provision of the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (1977), was held unconstitutional, but the provision was ruled severable; this, the issue of retroactive application vel non lost any importance. In Equal Employment Opportunity Commission v. CBS, Inc., 743 F.2d 969 (2d Cir. 1984), the Second Circuit reached the opposite conclusion on severability of this provision. The entire Reorganization Act was held unconstitutional and the EEOC was found to have no authority to enforce the Age Discrimination in Employment Act ("ADEA"), Pub. L. No. 90-202, 81 Stat. 602 (1967). Having reached that conclusion, the court did discuss retroactivity, but it was the retroactivity of its ruling regarding the ADEA. The retroactivity of the Chadha decision must have been assumed, however, inasmuch as the Second Circuit ultimately concluded that the EEOC was lacking in authority.

The airlines advance one additional argument in favor of retroactive application. They note observations in both Justice Powell's concurrence in Chadha, supra, 462 U.S. at 959 ("The Court's decision . . . apparently will invalidate every use of the legislative veto.") (Powell, J., concurring), and Justice White's dissent, id. at 967 ("Today the Court . . . sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'") (White, J., dissenting), that the Court's ruling would invalidate all legislative veto provisions. The airlines emphasize that the opinion of the Court did not respond to these observations, while it did respond to others offered by the dissent; the airlines draw from this an indication that the Court has indicated that Chadha should have retroactive effect. This is a weak reed on which to rest. Failure to respond to these comments is, at bottom, probative of nothing. Nonetheless, when all is said and done, we agree, by virtue of the analysis previously set forth, that Chadha should be given retroactive effect.

II

Having disposed of these preliminary inquiries, we turn now to the question of the severability vel non of the remainder of section 43 from the unconstitutional legislative veto provision. n6 Since it is, of course, a veto provision whose severability is in question, the severability analysis set forth in Chadha itself is particularly instructive for us. In Chadha, the Court stated that "the invalid portions of a statute are to be severed '"[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not."'" Chadha, supra, 462 U.S. at 931-32 (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932))). "A provision is further presumed severable if what remains after severance 'is fully operable as a law.'" Chadha, supra, 462 U.S. at 934 (quoting Champlin, supra, 286 U.S. at 234). While the immigration statute at issue in Chadha contained a severability clause, thus distinguishing it from the Airline Deregulation Act before us, n7 the analytical framework enunciated by Chadha applies to the severability issue which we are called upon to resolve.

n7 It is not clear what weight is to be given to the absence of a severability clause.

The presence of a severability clause, which expressly sets forth congressional intent that a statute stand in the event one of its provisions is struck down, makes it extremely difficult for a party to demonstrate inseverability. When there is no such clause, however, as in this case, the test is less certain.

Consumers Energy Council of America v. FERC, supra, 673 F.2d at 441 (footnote omitted.)

Here, even less weight is merited than might ordinarily be attributed to such an absence. Several of the appellants argue that section 43 of the Airline Deregulation Act amended the Federal Aviation Act, Pub.L.No. 85-726, 72 Stat. 731 (1958), a statute already containing a severability clause, see 49 U.S.C. app. § 1301 note (1982). See Brief of Appellants Brotherhood of Railway and Airline Clerks Flight Engineers' International Association, International Association of Machinists and Aerospace Workers, and Transport Workers Union of America at 12-13. Appellees retort that while section 43 of the ADA is codified along with the Federal Aviation Act, the "[s]ection was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958 which comprises this chapter," 49 U.S.C. app. § 1552 note (1982). They contend that the severability clause thus does not encompass section 43. See Appellees' Brief at 16 n.*.

The Airline Deregulation Act is, by its own terms, an act to amend the Federal Aviation Act. See Pub L. No. 95-504, 92 Stat. 1705, 1705 (1978). Many provisions of the ADA do, in fact, specificallly amend provisions of the Federal Aviation Act, while section 43 does not. It is, instead, simply a provision added to the U.S. Code. Whether the severability clause of the Federal Aviation Act carries over to section 43 is thus unclear. We do not resolve that question, but note only that the point may not have been clear to Congress that it was not so included; we will thus not read any legislative intent into the absence of an additional severability clause specifically encompassing section 43.

Chadha presumes severability of the offensive provision if what remains after severance is fully operable as law. To this end, the burden is placed squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provsion without the severed portion. n8 This presumption articulated by Chadha was echoed in a later Supreme Court severability case: "Whether an unconstitutional provision is severable from the remainder of the statue in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." Regan v. Time, Inc., 104 S. Ct. 3262, 3269 (1984). The Court has thus clearly laid down a presumption in favor of severabiltiy if what remains is operative as law; in a word, severance lies unless it is "evident" that what remains would not have been enacted.

n8 This court has held the presumption to be unimportant in a pre-Chadha legislative veto severability case. See Consumer Energy Council of America v. FERC, supra, 673 F.2d at 442 ("We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision. . . . We do not view the imposition of any unspecified burden of persuasion either side as beneficial to the inquiry."). Since the Consumer Energy court found the p;rovision severable, its holding is not at odds with later Supreme Court opinions. Furthermore, the court was focusing on what presumption should be derived from the absence of a severability clause. The conclusion that no presumption was to be drawn from that particular fact may not have been applicable to the general presumption in favor of severability.

Our charge is to save as much of the statute as we can, n9 consistent of course with the underlying legislative intent. Only if we conclude that Congress would not have included a provision absent all constitutionally flawed portion is that provision to fall. The issue cannot be whether Congress preferred the statute with the unconstitutional provision over the same statute without that provision. Manifestly, Congress' preference is abundantly clear from its inclusion of the unconstitutional provision. Nor is the question whether Congress would have passed some alternative version of the statute if it knew that it could not lawfully have included the offending provision. That is, "the question is not whether Congress would have enacted thi[is] exact statute [] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute [], after severance of the legislative veto provision [], to no statute[] at all." Gulf Oil Corp. v. Dyke, 734 F.2d 797, 804 (T.E.C.A.) (emphasis in original), cert. denied, 105 S. Ct. 173 (1984).

n9 "'The cardinal principle of statutory construction is to save and not to destroy.'" Tilton v. Richardson, 403 U.S. 672, 684 (1971) (plurality opinion) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)).

Section 43 of the ADA is an extensive and elaborate provision, yet only one part of one subsection, namely section 43(f)(3), is unconstitutional under Chadha. That section, codified at 49 U.S.C. app. § 1552(f)(3), contains two provisions, as we have seen. The first, the so-called "report and wait" provision, is left unaffected in Chadha's wake; the second is, of course, the legislative veto provision constitutionally eviscerated by Chadha. If the veto provision were severed, the remainder of the section (including the first sentence of the subsection) would be fully operable as law. The employee protection program would still be spelled out in great detail, and the Secretary of Labor would still retain authority to promulgate the necessary rules and regulations. The sole difference would be that the Secretary would be required only to submit the rules and regulations to the appropriate Congressional committees on a "report and wait" basis rather than expose those regulations to the guantlet of possible invalidation by way of an exercise of the purported veto authority.

To overcome the presumption of severability with respect to this provision, the airlines must show, as we have seen, that it is evident that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality. Or, as the Temporary Emergency Court of Appeals would put it, the challengers must show that it is evident that Congress would have preferred no airline employee protection provision at all to the existing provision sans the veto provision. Not only is evidence for that position lacking, what evidence there is indicates that Congress had a strong, humanitarian desire to provide for airline employee protection; in contrast to this clearly expressed intent to erect protective safeguards for displaced workers, Congress expressed relatively little concern about the veto provision. That is to say, the evidence, in our view, positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan. It is to that evidence that we now turn.

The employee protection provisions contained in the Airline Deregulation Act had their genesis in the Senate bill. The Senate Report is thus particularly instructive as to the importance Congress attributed to that program. Noting the concern expressed by airline employees over the security of their jobs once deregulation was effected, the Senate Report stated:

The Committee felt that this concern [of airline employees] should not be ignored and that careful consideration of the question of employee protection programs was warranted. The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past. . . . The Committee believes that the Congress . . . must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority -- the airline employees and their families who have relied on the present system.

S. Rep. No. 631, 95th Cong., 2d Sess. 113-14 (1978). To that end, the Senate bill, S. 2493, included an employee protection program very much like the regime that was ultimately adopted. See Conference Report, H.R. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978) (observing that the Conference substitute was "basically the same as the Senate bill" with certain stated exceptions, including some reworking of the subsection containing the veto provision).

The House bill, H.R. 12611, also contained an employee protection program. As explained by the House Report:

The bill stipulate[d] that no authority granted by th[e] act shall be exercised by any carrier unless the Secretary of Labor has certified to the CAB that interests of employees have been adequately protected by fair and equitable arrangements, with benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act.

H.R. Rep. No. 1211, 95th Cong., 2d Sess. 26 (1978). That this provision was viewed both as an important feature of the bill and as being stronger than the Senate plan is evidenced in the various comments disparaging the perceived reduction in protection resulting from the Conference substitute. n10

n10 See 124 Cong. Rec. 38,522 (1978) (statement of Rep. Anderson) ("The House provisions on employee protection . . . were stronger than those in the conference bill."); 124 Cong.Rec. 38,523 (1978) (statement on Rep. Harsha) ("I am not totally satisfied with the conference agreement on the provisions for employee protection. . . . [B]enefits are not to be paid . . . until there is at least 7 1/2 percent employee reduction in the airline. It makes no sense to me to defer these benefits until this percentage trigger is reached. . . . However, in the spirit of compromise we managed to reduce by one-half the percentage trigger contained in the Senate bill."); 124 Cong. Rec. 38,524-25 (1978) (statement of Rep. Mineta) ("I am . . . compelled to rise to express my grave concern about the employee protection program included in [the ADA]. . . . By comparison with the House-passed provision, the conference agreement -- which was based on the Senate language -- is not much protection at all.").

The airlines argue, however, that "Congress was uncertain about the need for additional labor protection beyond that already available through the CAB." Appellees' Brief at 41. This is quite true. Indeed, statements in the legislative history reasonably can be read as evidencing a sense that employee protection was not in fact vital to the crafting of a comprehensive deregulatory regime. Those statements stemmed not from legislative oversight or, worse yet, callousness to the potential plight of displaced workers, but reflected, rather, the sincerely held belief in various legislative quarters that loss of employment in a deregulated industry was unlikely. n11 While that sentiment is certainly present in the debate, as the airlines correctly and understandably emphasize, the sentiment does not, upon analysis, truly speak to the precise issue at hand. For, inherent in the notion of increased competition in the industry is the reality that some carriers will likely lose business, while other carriers will gain. Thus, in Congress' view at the time, while total employment within the industry, once deregulated, might well remain stable or grow, individual employees might nonetheless lose their jobs due to deregulation; and, on the other hand, jobs with other carriers would likely become available. The preferred hiring status provisions fashioned by Congress would thus move those employees who lost their jobs into the newly opened or created positions.

n11 See S.REP. No. 631, 95th Cong., 2d Sess. 119 (1978) ("it is highly unlikely that such payments [by the Government to displaced employees] will ever be necessary"); 124 Cong. Rec. 37,417 (1978) (statement of Sen. Pearson) ("Some say that the bill may have a harmful effect on labor while others argue to the contrary. I believe that this legislation will be good for labor, management, and the investor."); 124 Cong. Rec. 37,419 (1978) (statement of Sen. Kennedy) ("the indicators are all postive, and employement will continue to increase as the carriers respond to the changes and new opportunities deregulation has brought"). But see S. REP. No. 631, 95th Cong., 2d Sess. 221 (1978) (Minority view of Sen. Inouye) ("That supporters of the legislation recognize the very real possibility of these consequences [loss of jobs for airline personnel and support workers] is . . . evidenced by adoption in Committee on an 'employee protection' amendment").

In our view, legislative comments with respect to the overall employment picture within the industry speak more to the provision for payment of benefits from federal coffers than to the first hire provisions. Congress deemed it unlikely that the former provision would, in fact, come into play; that sense of the National Legislature is eloquently evidenced by the fact that Congress to this day has not funded that program. These comments thus do not speak, as the airlines would read them, to the "first hire" provisions. Indeed, the "first hire" provisions could, in theory, play a constructive fiscal role in keeping potentially costly federal relief provisions from being triggered in the first instance. These comments, then, do nothing to counter the evidence that Congress placed great importance on the existence of the employee protection plan as an integral part of a comprehensive deregulatory regime.

In stark contrast to the numerous comments indicating the importance of the employee protection plan, the only discussion cited by the parties with respect to the veto provision is a solitary comment by then-Representative Elliott Levitas of Georgia expressing approval of the presence of a legislative veto in the provision. n12 Not only is this sole source a thin reed for eviscerating an entire remedial system fashioned out of humane Congressional concern for adversely affected airline employees but, what is more, Rep. Levitas was a vigorous advocate generally for the proposition, eviscerated by Chadha, that Congress must retain control over administrative agencies via the legislative veto device. n13 Now to be sure, Rep. Levitas was, as the airlines rightly emphasize, a member of the Conference Committee for the Airline Deregulation Act and of the House Committee on Public Works and Transportation, the committee to which the House bill was referred. Thus, his statement was not one merely of a zealous advocate championing his well-known position in favor of lavishly sprinkling regulatory (or deregulatory) legislation with legislative veto devices. However, there is not a shred of evidence that Rep. Levitas' statement represented the view of Congress as a whole (or even his full Committee), nor is there any indication that Congressman Levitas himself attached especial significance to this particular veto provision, as opposed to his keen interest generally in seeing the incorporation of such devices in legislation enacted by the Congress.

n12 I am happy to say that this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on regulations that will have the effect of law.

124 Cong. Rec. 38,524 (1978) (statement of Rep. Levitas). By his own description, Rep. Levitas was "making [an] observation," id., not setting forth what he was maintaining to be an indispensable legislative ingredient of an acceptable bill.

n13 In a post-Chadha article, then-Representative Levitas and his co-author, former counsel to the House of Representatives, Stanley M. Brand, stated:

As Congress increasingly delegated authority, the bureaucratic agencies . . . swelled in number and in the size of their personnel. These agencies were given the authority to write rules and regulations that govern our society with the same force and effect as the laws written by the elected Congress. In order to maintain its control over this authority, Congress often -- though not often enough in our opinion and in the opinion of others -- required that these rules and regulations be subjected to congressional review, and if the Congress deemed appropriate, a legislative veto.

Under our system of government, which is based on democratic principles, those who are accountable to the people must have the final say over the rules and regulations that have the force and effect of law. If Congress finds that a rule or regulation is arbitrary, oppressive, or contrary to the intent of a the law, then the Congress ought to have the right to stop that rule from going into effect. The legislative veto provided a means for doing that.

Levitas & Brand, The Post Legislative Veto Response: A Call to Congressional Arms, 12 Hofstra L. Rev. 593, 611-12 (1984) (emphasis in original).

Failing to find any direct statement evidencing a Congressional intent of inseverability, appellees advance various items of circumstantial evidence of what they perceive to be such an intent. Appellees first point to the fact that only section 43 of the Act is subject to the veto provision. That fact, however, is hardly surprising. The Act was, of course, a deregulatory statute, as its very name suggests, whereas section 43 was, for lack of a better term, a regulatory provision. It is, a matter of common sense, the regulatory provision which would be the most likely candidate for inclusion of a legislative veto device. That fact, however, still does not speak to whether Congress would have preferred no employee protection plan at all, as opposed to a plan containing a "report and wait" mechanism but lacking a veto provision.

The airlines also argue that the legislative veto provision in section 43 is "distinctive among the almost 200 legislative veto provisions which Congress has included in federal statutes." Appellees' Brief at 22. Admittedly, the provision reflects, as a whole, a unique combination of features. For one thing, as we have seen, a "report and wait" requirement exists alongside the veto, see 49 U.S.C. app. § 1552(f) (3); in addition, a requirement is imposed upon the Secretary of Labor to promulgate rules and regulations necessary to carry out the section within six months after October 24, 1978, see 49 U.S.C. app. § 1552(f)(2). It is not clear to us that anything of decisional import is to be drawn from the inclusion of these features.

The "report and wait" requirement simply directs the submission of rules and regulations, prior to issuance as final rules, to particular oversight committees of Congress. This mechanism may reasonably be viewed as the assertion of an interest by committees not normally charged with the review of labor regulations but directly concerned with the airline industry over labor regulations affecting deregulation of that industry. This understandable interest does not indicate that the veto is inseverable, particularly since the "report and wait" clause remains inviolate notwithstanding Chadha.

Neither is it clear what conclusion is to be drawn from the six-month requirement imposed on the Secretary. The airlines suggest that this subsection was designed to insure that the regulations would be reviewed by essentially the same members of Congress who had shaped the Airline Deregulation Act. While an election would have intervened between the passage of the Act and the required time of submission, the historical experience of reelections of incumbents might presumably lend some credence to this interpretation. Nonetheless, like election predictions, this approach is all purely speculative. The provision could just as readily be seen as an indication of the high importance Congress attached to the employee protection plan, which Congress therefore mandated be implemented as quickly as possible. Furthermore, even assuming arguendo appellees' point, that aview fails, at bottom, to speak to the issue at hand. From it, we cannot conclude that Congress, or even the committees involved, would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision.

Appellees also seek support in the treatment of the veto provision, and the protection plan as a whole, in the deliberations of the Conference Committee. They argue that

> the House accepted the Senate's novel concept of an [employee protection plan] that it had not theretofore embraced, but only with a significantly strengthened legislative review provision. The terms of this compromise constitute strong evidence of nonserverability because, as in [American Federation of Government Employees v. Pierce, supra], one house accepted the overall thrust of the other house's conflicting legislation, but only with the veto-related restrictions incorporated.

Appellees' Brief at 33 (footnote omitted). The airlines thus argue that the decision here should be influenced by our decision in Pierce, a case in which a veto provision was held inseverable. However, Pierce is readily distinguishable from the case at hand. Pierce concerned a provision of an appropriations act for the Department of Housing and Urban Development, Pub. L. No. 97-272, 96 Stat. 1160, 1164 (1982), which provided that funds could not be used for any reorganization by HUD, prior to January 1, 1983, without prior approval of the two Appropriations Committees. The district court had assumed the invalidity of the approval clause and severed it from the remainder of the provision. This court reversed, finding intent of nonseverability. However, as we shall now see, the Conference Committee compromise providing the evidence of inseverability in Pierce differed totally from the compromise reached in conference with respect to the Airline Deregulation Act.

In Pierce, the House had "never put forward a provision without a committee approval clause tied to it." Pierce, supra, 697 F.2d at 307. On the other hand, "the Senate initially opposed any restraint on the Department . . . [and] the Senate Committee [] clearly expressed reservations about the House version of the bill." Id. The Conference Committee compromise gave control to the Appropriations Committees, but only for a limited duration. Neither House, it was abundantly clear in Pierce, would have accepted a complete ban on reorganizing HUD -- yet that is precisely the result severance would have brought about.

The Conference Committee compromise reached here bears no resemblance at all to the situation in Pierce. As to the airline deregulation bill, the Conference adopted, for the most part, the Senate bill's employee protection plan. That plan contained a veto clause, to which the Conference Committee added the "report and wait" provision. Even if the "report and wait" provision may be viewed as designed to strengthen the legislative veto provision, we have found no evidence that the House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device. In fact, the House's protection plan was viewed, at least by several Representatives, as being much stronger than the Senate's plan. See supra note 10. It seems to us unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy. Nor have we found any indication that the Senate's agreement to the minor modifications in its version of the plan was premised on a "strengthening" of the veto provision. In short, we conclude that Pierce is wholly inapposite to the case at hand.

III

We emerge from our trek through the legislative history of the Airline Deregulation Act far short of the destination that must be reached for the airlines to prevail. We fail to find satisfied here the exacting inseverability standard that it be "evident" that Congress would have preferred no employee protection program over the program passed by Congress shorn of its veto provision. Ample evidence persuades us that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan.

In sum, we hold the legislative veto provision here to be severable from the remainder of the employee protection provisions; the remainder of section 43 therefore remains viable. However, since the District Court did not have occasion to rule on the other grounds advanced by the airlines in their challenge to the rules adopted by the Secretary, the case is remanded to that court for consideration and adjudication of those issues.

Reversed and remanded.

CONCURBY: GINSBURG

CONCUR:

GINSBURG, Circuit Judge, concurring in the judgment: The court's intricate discussion of preliminary issues seems to me distracting. As I view this case, only one genuine issue appears: would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions. Before the district court, the Department conceded the unconstitutionality of the veto, and does not contest that matter here. Therefore, we face no appeal from decision of a constitutional question; instead, a ripe statutory interpretation controversy -- a construction of legislation dispute securely within our appellate jurisdiction -- is before us. Futhermore, as the court recognizes, slip op. at 14-15 & n. 5, a ruling that the labor protective prescriptions are severable strips discourse on Chadha's "retroactive application" of "any importance."

On the severability question, I am in full agreement with the court's judgment, which undertakes a moderate salvage operation. Deletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress. A declaration of inseverability, tearing down the section in its entirety, would be far more destructive of the legislature's will. Cf. Buckley v. Valeo, 424 U.S. 1, 108-09 (1976) (per curiam).

94 YALE LAW JOURNAL 1493 (May 1985)

Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto

The principle of absolute nondelegation, as first articulated by John Locke, holds that legislators, as agents of the people, may not delegate to others their legislative power.[1] Strict construction of this principle would forbid the executive to exercise *any part* of the legislative power. The Framers of the Constitution rejected such a pure separation of the legislative and executive branches, however, requiring only that one branch of government not exercise the *entire* power of another.[2] Consequently, when the Supreme Court gave the nondelegation principle practical effect during the New Deal era, the Court did not insist upon absolute nondelegation.[3] Instead, the Court upheld a standards requirement,[4] requiring only that Congress make primary policy choices and devise statutory standards[5] to guide subordinate policymaking in the executive branch. Since the New Deal, however, the Court has repeatedly refused to strike down standardless delegations,[6] divesting even this compromise of Locke's absolute nondelegation principle of much practical significance.[7]

Encouraged by the Court's lax enforcement of the standards requirement, Congress has dramatically increased its delegations of policymaking

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1. J. Locke, *The Second Treatise of Government* § 141, in Two Treatises of Government 408–09 (P. Laslett ed. 1963) ("The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands.").

2. *See* The Federalist No. 47 (J. Madison) (arguing that Constitution prohibits only exercise by one branch of *whole* power of another, but permits partial agency relationship between branches); The Federalist No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961) ("[T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments.").

3. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) (Congress may delegate limited power to determine facts and prescribe subordinate rules); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) (same).

4. *See infra* notes 18–29 and accompanying text.

5. A "standard," as used in this Note and generally in the literature on delegation, is a restriction upon the discretion that an administrative agency may exercise in implementing a statute. "Implementation" of a statute contemplates the making of secondary policy choices, the choice of situations to which a statute is to apply, and the choice of a mechanism for enforcing a statute.

6. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 778–86, *reh'g denied sub nom.* Pownall v. United States, 335 U.S. 836 (1948) (upholding Renegotiation Act, which authorized executive agencies to recover "excessive profits" from defense contractors, without defining term "excessive"); National Broadcasting Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding Federal Communications Act authorizing Federal Communications Commission to license radio stations in accord with "public interest").

7. Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 17 (1982) (nondelegation doctrine relegated to "fugitive existence" after New Deal) [hereinafter cited as Aranson].

authority to the executive branch—a practice greatly facilitated by use of the legislative veto provision.[8] With its 1983 decision in *Immigration and Naturalization Service v. Chadha*,[9] however, the Court struck down a one-House legislative veto,[10] using a line of reasoning derived from the principle of absolute nondelegation. This Note argues that the Court should have been true to its earlier compromise of the nondelegation principle. Under the standards requirement, judicial enforcement of statutory standards that govern agency policymaking provided a workable substitute for the constitutional checks of presentment and bicameralism to which legislative lawmaking is subject. By analogizing to the standards requirement, the Court could have found these constitutional checks, the explicit concerns of the *Chadha* opinion, inapplicable, and approved a modified "affirmative" legislative veto[11] restricted by judicial review. Such a veto

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8. *See infra* text accompanying notes 44-45, 50-52. The legislative veto enabled Congress to approve or reject actions taken by administrative agencies exercising discretionary authority delegated by Congress. For more detailed descriptions of the legislative veto, see Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 467-69 (1962); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 456-58, 462-65 (1977).

9. 462 U.S. 919 (1983). Jagdish Chadha was a nonresident alien who, after overstaying his student visa, applied to the Immigration and Naturalization Service (INS) for suspension of his deportation. Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1) (1982) provides that the Attorney General may, in his discretion, suspend deportation of an alien who has been physically present in the United States for a continuous period of not less than seven years, who proves that during all of such period he was and is a person of good moral character, and whose deportation would result in extreme hardship to the alien or to a spouse, parent or child who is a citizen or permanent resident. The Attorney General discharges his responsibilities under this provision through the Immigration and Naturalization Service, a division of the Department of Justice. *See* 8 U.S.C. § 1103(a) (1982).

Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982) provides that if either the Senate or the House of Representatives passes a resolution stating that it does not favor the suspension of an alien's deportation, the Attorney General shall deport the alien or authorize his voluntary departure at his own expense. If neither the Senate nor the House passes such a resolution, the Attorney General may cancel deportation proceedings. *Id.* After an immigration judge suspended Chadha's deportation, the House of Representatives, acting pursuant to this legislative veto provision, passed a resolution to veto the judge's decision. The House resolution was apparently prompted by the determination of the House Committee on the Judiciary that Chadha, together with five other aliens, did not meet the Act's hardship requirement. *See* 462 U.S. at 926-27.

Chadha responded to the House resolution by challenging the constitutionality of § 244(c)(2). *Id.* at 928. The Supreme Court, in a 7-2 decision, held this one-House veto unconstitutional by virtue of its failure to comply with the presentment and bicameralism requirements.

10. Depending upon the terms of the enabling legislation, both Houses of Congress, one House, or a congressional committee could exercise a legislative veto. (Under an affirmative veto provision, *infra* note 11, both Houses "exercise" the veto by failing to act; this might be termed a "no-House" veto.).

11. Two forms of the legislative veto were possible. Under the affirmative form, presidential or agency action took effect only upon passage of a resolution of approval, so that a veto was accomplished by congressional inaction. *See* Cooper & Cooper, *supra* note 8, at 468. Examples of affirmative veto provisions are contained in the Export-Import Bank Amendments of 1974, 12 U.S.C. § 635e (1982) (Presidentially-proposed limitation on exports to Soviet Union in excess of $300 million must be approved by concurrent resolution), and the Trade Expansion Act of 1962, 19 U.S.C. § 1981(a)(2) (1982) (tariff or duty recommended by International Trade Commission may be imposed by concurrent resolution of approval).

would advance the goals that gave rise to the standards requirement; it could also resolve the problem which forced the Court to abandon the standards requirement after the New Deal, namely that Congress cannot prescribe appropriate standards for unforeseeable situations.

I. *Chadha* AND THE NONDELEGATION DOCTRINE

The nondelegation principle derives its theoretical foundation from the rule of agency law that power transferred by a principal to an agent cannot be delegated in turn by the agent; such a redelegation would conflict with the purpose of the original transfer.[12] In the legislative context, this rule implies that congressional delegation of legislative power frustrates the intent of the people to entrust such power only to representatives whom they have chosen.[13] Such delegation, moreover, permits lawmaking by parties not subject to constitutional requirements governing adoption of legislation—namely the election process, presentment,[14] and bicameralism.[15] Together these requirements ensure a sort of legislative due process without which the people would not have delegated lawmaking power to Congress.[16]

Interpreted strictly, the nondelegation doctrine would require Congress to make all policy determinations. Yet it is impractical to require that Congress predict each and every circumstance in which its policy must apply. Before *Chadha*, the Supreme Court never required either complete nondelegation of the legislative power, or the absolute separation of powers which would result.[17] Instead, the Court sought at most to preserve

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Under the negative form, agency action took effect after a specified period of time, unless vetoed by Congress with a resolution of disapproval. *See* Cooper & Cooper, *supra* note 8, at 468. Examples of negative veto provisions are contained in the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1(a) (1982) (FTC rules may be disapproved by concurrent resolution), and the Act of January 2, 1975, 28 U.S.C. § 2076 (1982) (Supreme Court's proposed amendments to Federal Rules of Evidence may be disapproved by resolution of either House). By whomever exercised and in either form—inaction or resolution—the legislative veto was as binding upon the affected agency as if enacted in legislation, and as enforceable in the federal courts. *See* Cooper & Cooper, *supra* note 8, at 474.

12. *See* Aranson, *supra* note 7, at 4.
13. *Id.*
14. U.S. CONST. art. I, § 7, cls. 2, 3.
15. U.S. CONST. art. I, § 1 & § 7, cl. 2.
16. *See* Aranson, *supra* note 7, at 4–5.
17. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 121 (1976) ("[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government . . . . [A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[The Constitution] contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."); *see also* THE FEDERALIST No. 47 (J. Madison) (arguing that three branches need not be wholly separate); *cf. Chadha*, 462 U.S. at 984 (White, J., dissenting) ("[L]egislative authority is routinely delegated to the Executive branch, to the independent regulatory agencies, and to private individuals and groups.").

the nondelegation principle in spirit by enforcing the standards requirement,[18] which recognizes the practical need for executive discretion in implementation of the law.

The Court first gave the standards requirement both definition and force[19] with its decisions in *Panama Refining Co. v. Ryan*[20] and *A.L.A. Schechter Poultry Corp. v. United States*,[21] striking down two provisions of the National Industrial Recovery Act as unconstitutional delegations of legislative authority. In *Panama Refining*, the Court held that Congress must "perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."[22] In *Panama Refining* and *Schechter*, the Court found the relevant NIRA provisions to lack adequate standards[23] and to contain numerous policy objectives that were both broad and diverse.[24] Subsequently, in *Yakus v.*

18. In *Chadha*, the Court apparently acknowledged this compromise in a footnote, but the text of the Court's opinion does not reflect such a recognition. In footnote 16, the Court distinguished between legislative action and "quasi-legislative" activity by executive agencies on the ground that, although "some administrative agency action—rule making, for example—may resemble 'lawmaking' . . . [t]hat kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review . . . ." 462 U.S. at 953 n.16. This distinction necessarily recognizes that executive agencies do, with the Court's indulgence, make policy determinations. In fact, the Court cited 5 U.S.C. § 551(4) (1982), defining an agency rule as a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe *law* or policy . . . ." *Id.* Footnote 16, however, addresses a claim raised in a brief submitted by the House of Representatives, that striking down the legislative veto would sanction lawmaking by the Attorney General. Although the Court refuted this claim with a logic derived from the standards requirement, the crux of the Court's argument instead relied implicitly upon absolute nondelegation.

19. Before 1935, the Court's exposition of the standards requirement was imprecise. The Court approved the ascertainment of facts, Field v. Clark, 143 U.S. 649, 693 (1892) (upholding provision of Tariff Act of 1890 authorizing President to impose tariff on products of foreign country whose government subjected American goods to tariff that President deemed "reciprocally unequal and unreasonable"), or the filling in of details, United States v. Grimaud, 220 U.S. 506, 517 (1911) (upholding authorization of Secretary of Agriculture to promulgate regulations governing use of national forests), by the executive branch, when Congress had declared an "intelligible principle" to guide executive action, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see also* Buttfield v. Stranahan, 192 U.S. 470 (1904) (upholding grant of power to Secretary of Treasury to set minimum quality standard for imported tea). *See generally* Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 566-69 (1947) (describing early cases in detail).

20. 293 U.S. 388 (1935) (invalidating § 9(c) of National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 200 (1935) (expired, as amended, 1936) [hereinafter cited as NIRA], which authorized President to prohibit interstate shipment of petroleum products produced or withdrawn from storage in violation of state law).

21. 295 U.S. 495 (1935) (invalidating § 3 of NIRA, which authorized President to promulgate codes of fair competition binding on all members of an industry).

22. 293 U.S. at 421.

23. *Panama Refining*, 293 U.S. at 430 ("Congress has declared no policy, has established no standard, has laid down no rule."); *Schechter*, 295 U.S. at 541 (Section 3 of NIRA "sets up no standards").

24. 293 U.S. at 418.

United States,[25] the Court prescribed criteria for evaluating legislative standards: Standards must be "sufficiently definite and precise"[26] to enable a court "to ascertain whether the will of Congress has been obeyed."[27]

Under the standards requirement, Congress retains responsibility for primary policy determination, the essential component of the legislative function. Congress may, however, delegate discretionary authority to administrators with more time and expertise to make detailed policy choices and prescribe subordinate rules. Executive policymaking merely implements the primary policy declared by Congress, and is thus subject derivatively to the checks of presentment and bicameralism. As *Yakus* makes clear, judicial review ensures derivative application of the constitutional checks by enforcing executive compliance with the statutory standards. Judicial review, moreover, serves in the context of executive policymaking a purpose analogous to one served by the presentment and bicameralism requirements for legislative lawmaking: to prevent lawmakers from arbitrary, unwise, or vindictive interference with the lives and property of individuals.[28] The standards requirement thus represents a workable and constitutional compromise of the nondelegation principle.[29]

With its decision in *Chadha*, however, the Supreme Court abandoned its practical approach to the issue of delegation and adopted a line of rea-

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25. 321 U.S. 414 (1944).
26. *Id.* at 426.
27. *Id.* at 425.
28. *See* THE FEDERALIST No. 73, at 442–43 (A. Hamilton) (C. Rossiter ed. 1961) (presentment requirement intended "to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design"); 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254 (1911) ("If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches."); *see also* The Pocket Veto Case, 279 U.S. 655, 678 (1929) (President's opportunity to study a bill before enactment is constitutional safeguard against "ill-considered and unwise legislation").

Judicial review of executive policymaking legitimates not only the delegation of power from Congress to executive agencies, but also from the people to Congress. The people arguably would be unwilling to delegate their power to Congress, knowing that Congress would redelegate to the executive branch, without the sort of due process protection provided by judicial review.

29. As the *Chadha* Court itself acknowledged, "[t]he bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it," limits to be enforced by judicial review. 462 U.S. at 953 n.16 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (President's power to act must stem from either Constitution or act of Congress), and Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir.) (en banc) (separate statement of Leventhal, J.), *cert. denied*, 426 U.S. 941 (1976) (courts have upheld delegations because judicial review ensures agencies exercise delegated power within statutory limits)). The presentment requirement is presumably also unnecessary as simply redundant in the context of action by executive agencies.

The *Chadha* Court also noted in footnote 16 that "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto." 462 U.S. at 954 n.16. This Note argues, in contrast, that Congress' authority to delegate provides strong support for a restricted legislative veto.

soning derived from the principle of absolute nondelegation. The *Chadha* opinion, in characterizing the legislative veto as an exercise of legislative power,[30] adopted a definition of legislative action which presumes absolute nondelegation.[31] The Court cited as evidence of the veto's legislative character its alteration of the legal rights of persons outside the legislative branch,[32] and its determination of policy.[33] These characteristics, however, do not currently distinguish legislative from executive action; administrative agencies, acting pursuant to delegations of broad authority, routinely determine policy and alter legal rights.[34] These characteristics can define legislative action only when the nondelegation principle is so strictly enforced that the executive must mechanically execute the law, without the exercise of discretion. The Court's definition thus rests upon a premise in direct conflict with that underlying the administrative state, which presumes that the executive may exercise discretion in implementing congressional policy.

Having used a presumption of nondelegation to classify the legislative veto as legislative action, the Court asserted that all exercises of legislative

30. The Court began with a presumption that the veto was an exercise of legislative power. 462 U.S. at 951 ("When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it."). The Court then proceeded to identify the characteristics, described in text above, which in fact rendered the veto "legislative in purpose and effect." *Id.* at 952.

31. Commentators on the *Chadha* decision thus far have generally adopted either of two positions with regard to the Court's definition of legislative power. The first simply characterizes that definition as a nondefinition, due to its functional inadequacy. *See, e.g.*, Strauss, *Was There A Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 794–801; Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 9–10 (1984). The second holds that the definition is derived from an arbitrarily strict construction of the constitutional text. *See, e.g.*, Smolla, *Bring Back the Legislative Veto: A Proposal for a Constitutional Amendment*, 37 ARK. L. REV. 509, 515–16 (1983); Note, INS v. Chadha*: The Future Demise of Legislative Delegation and the Need for a Constitutional Amendment*, 11 J. LEGIS. 317, 334–35 (1984). This Note, in contrast, recognizes the Court's definition as a definition, but one which rests upon a different premise—nondelegation—than does the modern administrative state. The use of nondelegation as a premise, moreover, supplies a rational basis for the Court's strict construction of article I.

Some critics have also drawn a connection between *Chadha* and the nondelegation doctrine, though generally on the basis of its result rather than its reasoning. The *Chadha* decision, by depriving Congress of a tool that greatly facilitates the delegation of legislative power, has the practical result of forcing Congress to cut back on such delegations. *See, e.g.*, Tribe, *supra*, at 17; Note, *supra*, at 339–42. Richard Goldsmith has recognized the importance of absolute nondelegation to the Court's reasoning, noting that the assertion that lawmaking cannot occur outside the legislature was the "linchpin" of the Court's rationale. Goldsmith, INS v. Chadha *and the Nondelegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749, 756 (1984). Goldsmith simply argues, however, that the Court should not revive the nondelegation doctrine. *Id.* at 751–61. This Note proceeds beyond the point of recognizing the importance of the doctrine to the Court to argue that the Court misapplied the doctrine.

32. 462 U.S. at 952.

33. *Id.* at 954.

34. *See, e.g.*, 47 U.S.C. §§ 307, 309 (1982) (Federal Communications Commission authorized to grant radio station licenses if "public convenience, interest, or necessity" will be served thereby); 49 U.S.C. § 45 (1982) (Federal Trade Commission authorized to prohibit "unfair or deceptive" trade practices).

power, including the veto, must satisfy the requirements of presentment and bicameralism.[35] These requirements, the Court observed, serve three essential functions. Presentment protects the executive branch from intrusion by Congress, and protects the people from improvident laws; bicameralism assures that the legislative power is exercised only after opportunity for study and debate in two separate settings.[36] Failure of the one-House legislative veto to comply with presentment and bicameralism left these concerns unmet and rendered the veto unconstitutional.[37] This position, too, comports with the principle of strict nondelegation, which assumes that presentment and bicameralism are checks without which the people would not have entrusted lawmaking power to Congress.

The *Chadha* reasoning is thus inconsistent with the Court's historical approach to the issue of delegation, a conflict made especially significant by its context. The legislative veto has in the past facilitated standardless delegations of the legislative power; appropriately restricted, however, the veto could in fact complement enforcement of the standards requirement. Had the Court in *Chadha* acted in accord with its earlier requirement of standards rather than nondelegation, the outcome of *Chadha* could have been quite different.

II. The Legislative Veto and the Standards Requirement

The Court's limited application of the standards requirement[38] led inexorably to a decline in the enactment of statutory standards. The princi-

35. The Court noted that the legislative veto did not qualify under any of the "four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto," including impeachment (House), art. I, § 2, cl. 5; trial following impeachment (Senate), art. I, § 3, cl. 6; review of presidential appointments (Senate), art. II, § 2, cl. 2; and treaty ratification (Senate), art. II, § 2, cl. 2. 462 U.S. at 955-56.

36. 462 U.S. at 951.

37. *Id.* at 959. In two summary affirmations, the Court extended the holding of *Chadha* to legislative vetos affecting rulemaking by executive and independent agencies. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), *aff'g* Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982); United States Senate v. FTC, 103 S. Ct. 3556 (1983), *aff'g* Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (per curiam).

38. In Kent v. Dulles, 357 U.S. 116 (1958), the Court struck down a regulation designating membership in the Communist Party as grounds for refusal of a passport. The Court declared the regulation unauthorized under a narrow interpretation of the Passport Act, reasoning that a broader interpretation would endanger individual liberties and might render the Act an unconstitutional delegation of legislative authority. *Id.* at 129. Justice Brennan, concurring in United States v. Robel, 389 U.S. 258, 275 (1967), observed that "[t]he area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights . . . . This is because the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake."

The Court has also implied that Congress may not delegate its explicit constitutional power to tax. *See* National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) (*NCTA*) and FPC v. New England Power Co., 415 U.S. 345 (1974), interpreting the Independent Offices Appropriation Act of 1952 to authorize the Federal Power Commission and the Federal Communications Commission, pal reason for the Court's lax enforcement of the standards requirement was apparently a recognition that meaningful standards are not feasible in every situation requiring Congress to delegate authority. As the Court acknowledged in *American Power & Light Co. v. SEC*,[39] Congress cannot devise a standard for use in unforeseeable circumstances.[40] Moreover, Congress may lack either the expertise or the institutional capacity to determine policy for even foreseeable circumstances. The number and complexity of issues facing the federal government preclude close and competent scrutiny by each individual member of Congress of every situation requiring discretionary agency action.[41] Strict adherence to the standards requirement when standards could not be written would have frustrated the efficient operation of government. Accordingly, the Court opted to relax the standards requirement.[42]

The sharp increase since the 1930's in the use of the legislative veto exacerbated the problem of standardless delegations.[43] As critics of the

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respectively, to charge regulated companies only fees to cover specific services rendered. The Court suggested in *NCTA*, 415 U.S. at 340-41, that if the Act were read to authorize a tax on regulated companies, rather than a fee, the Act might constitute an invalid delegation of legislative authority.

Justice Harlan's dissent in Arizona v. California, 373 U.S. 546, 603 (1963), remained until 1980 the only argument by a member of the Supreme Court for general application of the standards requirement. A number of commentators, however, have urged a return to the requirement on a widespread basis. *See, e.g.*, W. DOUGLAS, GO EAST, YOUNG MAN 217 (1974); J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980); J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 78-94 (1978); T. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 92-107, 300-01 (1979); Aranson, *supra* note 7; Gewirtz, *The Courts, Congress and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 46, 49-65.

39. 329 U.S. 90 (1946).

40. *American Power* upheld a vague delegation when it was "unreasonable and impracticable to compel Congress to prescribe detailed rules . . . ." 329 U.S. at 105; *see also* United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (upholding FCC regulation of cable television under Communications Act of 1934, even though Congress of 1934 could not have foreseen development of cable television).

41. *See* Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 722 (1969).

42. *But see* J. ELY, *supra* note 38, at 132-33 (arguing that nondelegation doctrine suffered "death by association" with substantive due process and restrictive interpretation of commerce power); Aranson, *supra* note 7, at 16 (suggesting that Court found other legal doctrines, such as procedural due process and equal protection, better suited than nondelegation doctrine to control "legislatively authorized executive excesses").

43. Since the first legislative veto appeared in 1934, Legislative Appropriations for Fiscal Year 1933, Pub. L. No. 72-212, § 407, 47 Stat. 382, 414-15 (1932) (expired 1935), legal scholars and the federal courts have debated the veto's constitutionality. For commentary in opposition to the legislative veto, see J. BOLTON, THE LEGISLATIVE VETO: UNSEPARATING THE POWERS (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423 (1978); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 REGULATION, Nov.-Dec. 1979, at 19; Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

veto correctly charged, Congress employed the veto mechanism more often than not for purposes antithetical to the standards requirement.[44] Congress often found it politically convenient to entrust the determination of general policy to agency officials not directly accountable to the voters, rather than to risk making a controversial policy choice itself.[45] Similarly, the veto most likely relieved Congress of the need to expend the time and effort required to achieve a compromise when policymaking would have been internally divisive. The legislative veto facilitated avoidance of difficult policy choices by permitting Congress to preempt any agency policy choice that it found politically unacceptable.

The objective apparently underlying the *Chadha* decision was to check the proliferation of broad congressional delegations of discretionary authority. The Court's concern is evident first in the Court's premise that Congress may not delegate legislative authority to another branch of government. Also, by invalidating the legislative veto, the Court deprived Congress of a significant control over administrators' policy decisions, a result which should make Congress less willing to delegate. Finally, as a number of commentators have noted,[46] the *Chadha* result is consistent with recent arguments by Justice Rehnquist for a revival of the standards requirement.[47] Although these arguments did not persuade a majority of the Court, the *Chadha* result indicates a commitment to nondelegation much greater than the lack of support for Justice Rehnquist's position suggests.

The legislative veto could also, however, complement and thereby rein-

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For commentary in support of the legislative veto, see Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Cooper & Cooper, *supra* note 8; Dry, *The Congressional Veto and the Constitutional Separation of Powers*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 195 (1981) (J. Bessette & J. Tulis eds.); Javits & Klein, *supra* note 8; Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593 (1976).

44. *See, e.g.*, Bruff & Gellhorn, *supra* note 43, at 1381–1409, 1426–28 (in five case studies of regulatory rulemaking, Congress left key issues unresolved in authorizing statutes and relied on legislative veto mechanism to maintain control over agency policy initiatives); Martin, *supra* note 43, at 268–71 (rather than make difficult policy choice on duty of local transit authorities to accommodate the disabled, Congress delegated decision to Department of Transportation, subject to Congressional veto of unpopular regulations).

45. *See* J. ELY, *supra* note 38, at 133 (quoting Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695 (1975)); Martin, *supra* note 43, at 267–74. Alternatively, Congress may be driven by mere laziness or by preoccupation with more pressing concerns.

46. *See, e.g.*, Goldsmith, *supra* note 31, at 754–55; Rabin, *An Overview of the* Chadha *Case*, 35 SYRACUSE L. REV. 703, 712 (1984); Note, *supra* note 31, at 340–41.

47. *See* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring) (arguing that Court should "reshoulder the burden of ensuring that Congress itself make the critical policy decisions"); American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting) (Congress may not "simply abdicate[ ] its responsibility for the making of a fundamental and most difficult policy choice").

force the standards requirement by providing an alternative for situations in which standards are not feasible. For example, when an agency had to cope with unstable or unforeseeable circumstances, Congress could identify a general objective and, through the veto mechanism, review particularized policy decisions made by the agency. Similarly, when Congress lacked sufficient time or expertise, it could entrust detailed policymaking to more expert agency staffs, reserving the power to veto agency proposals that conflicted with a stated general objective. The veto thus could serve the purpose of the standards requirement by enabling Congress to retain final control of subordinate policymaking where such control ex ante is impossible.[48]

III. Defining a Restricted Legislative Veto

Congressional abuse of the legislative veto to facilitate avoidance of difficult policy decisions has detracted from otherwise strong arguments that the veto could advance the goal of congressional responsibility underlying the standards requirement. Rather than discrediting these arguments entirely,[49] however, such abuse implies at most a need for restrictions on the exercise of the legislative veto. Such restrictions should serve two functions. First, they should ensure that the veto furthers the goal of the standards requirement. Specifically, the veto should be neither so available nor so structured as to encourage congressional avoidance of all policy determination at the time of delegating authority. Second, availability of the veto should be sufficiently restricted so that failure of the veto to comply with presentment and bicameralism would be for practical, if not theoretical, purposes insignificant, or at least in line with other instances in which the Court has already indicated that compliance is not necessary. The checks of presentment and bicameralism are explicit concerns of the *Chadha* opinion, but are also present implicitly in the standards requirement.

A. *Elimination of the Negative-Form Veto*

The first objective of encouraging congressional policymaking could be achieved in part by eliminating the negative-form legislative veto. Prior to *Chadha*, a substantial majority of veto provisions took the negative form,[50]

48. *See* Abourezk, *supra* note 43, at 330-35; Cooper & Cooper, *supra* note 8, at 511; Miller & Knapp, *supra* note 43, at 376-77.

49. *See, e.g.*, Bruff & Gellhorn, *supra* note 43, at 1439 (arguing that disadvantages of legislative veto cannot be ameliorated and require Congress to abandon veto); Martin, *supra* note 43, at 301-02 (same).

50. Of the 85 legislative veto provisions listed in Appendix 1 to Justice White's dissent in *Chadha*, 462 U.S. at 1003-13, 71, or 84%, are written in the negative form.

whereby agency action pursuant to a grant of discretionary authority took effect after a specified time unless Congress passed a resolution of disapproval.[51] This structure relieved Congress of the need to articulate policy when delegating authority, as Congress could easily veto agency proposals after passage of the enabling legislation.

Similarly, the decision either to exercise the veto or not, represented under the negative veto provision by action or inaction respectively, did not require Congress to articulate policy. The veto resolution itself was merely a negative reaction to an agency proposal, rather than an affirmative statement of congressional policy. Disapproval could be for any of a number of unstated reasons, and the legislative history typically provided few clues to Congress' actual motivation.[52] Similarly, inaction by Congress, representing tacit approval of an agency proposal, neither required nor encouraged Congress to indicate its policy preferences. As a result, the legislative veto in its negative form was a poor substitute for statutory policymaking.

The legislative veto in its affirmative form, by contrast, could encourage Congress to articulate a general policy when delegating discretionary authority. Under an affirmative veto provision, agency action would take effect after a specified time period only if Congress passed a resolution of approval. In practical terms, however, Congress simply lacks the time necessary for review and approval of every agency action. Demands for efficiency in congressional operations would thus require the prescription of policy guidelines for an agency to follow in most circumstances. The affirmative veto provision, moreover, would be more flexible than an unconditional delegation of authority, even one accompanied by policy instructions. As indicated earlier,[53] a primary reason for the demise of the standards requirement has been the impracticality of requiring Congress to predict all circumstances in which standards and policies must be applied. The affirmative veto would permit a requirement of general policy prescriptions, while providing a safety valve for situations in which such general prescriptions were inappropriate. In short, the structure of the affirmative legislative veto, together with practical restrictions on its availability, would advance the goal of the standards requirement when enforcement of the requirement would be impossible or unwise.[54]

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51. *See supra* note 11 and accompanying text.

52. *See* Bruff & Gellhorn, *supra* note 43, at 1417 (floor votes of an entire House on merits of veto resolution infrequent); Martin, *supra* note 43, at 274–77 (legislative history of legislative veto usually less effective and less reliable indicator of congressional intent than legislative history of statute).

53. *See supra* text accompanying notes 38–40.

54. Professor Kenneth Davis has argued that the purpose of the nondelegation doctrine is to guard against unnecessary and uncontrolled discretionary power, and that this purpose is best served by judicial attention to the totality of protections against arbitrariness, including both procedural safe-

B. *The Constitutionality of an Affirmative Legislative Veto*

Even under the affirmative form of the legislative veto, neither a veto nor its complement, a resolution approving agency action, would be in direct compliance with presentment and bicameralism.[55] The veto, however, could be designed to comply derivatively with those requirements, and the approval resolution could be so restricted that its failure to comply would be practically, if not theoretically, insignificant.

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guards and standards. Davis would require administrative agencies to create and articulate internal standards to govern their policy judgments and preclude arbitrariness; in the absence of such internal standards, agency action would be invalid. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:15, at 206–16 (2d ed. 1978). Davis' substitution of agency standards for legislative standards is a second-best solution, however, to the problem of congressional avoidance of policy determination. Davis would permit such avoidance as long as agency policymaking were sufficiently self-circumscribed.

55. Critics of the legislative veto maintain that it: (a) violated the presentment clause by denying the President the opportunity to exercise his veto power, *see, e.g.*, Dixon, *supra* note 43, at 440; Henry, *supra* note 43, at 749–51; Martin, *supra* note 43, at 295–300; (b) involved Congress too deeply in agency administration of the law, thereby infringing upon the constitutional duty of the President faithfully to execute the law, *see, e.g.*, Henry, *supra* note 43, at 756–60; Scalia, *supra* note 43, at 21; (c) unconstitutionally arrogated to Congress the power of judicial review, *see, e.g.*, Bruff & Gellhorn, *supra* note 43, at 1429–33; Dixon, *supra* note 43, at 442–45; and (d) violated, in its one-House form, the requirement of bicameralism, *see, e.g.*, Dixon, *supra* note 43, at 441; Henry, *supra* note 43, at 748–51; Martin, *supra* note 43, at 295–300.

Supporters of the legislative veto contend that: (a) the presentment requirement was satisfied when the President signed the original legislation containing a legislative veto provision, or when such legislation was passed over his veto, *see, e.g.*, Abourezk, *supra* note 43, at 338–39; Stewart, *supra* note 43, at 614; (b) the legislative veto was constitutional under the necessary and proper clause, which allows Congress to constrain grants of both quasi-legislative and quasi-judicial power to the executive branch, *see, e.g.*, Javits & Klein, *supra* note 8, at 473; Miller & Knapp, *supra* note 43, at 382–83; (c) the bicameralism requirement was satisfied when both Houses enacted legislation containing a one-House veto provision, *see, e.g.*, Abourezk, *supra* note 43, at 341; Dry, *supra* note 43, at 211; and (d) Congress has the right to make conditional delegations of authority, reserving partial authority to itself, *see, e.g.*, Cooper & Cooper, *supra* note 8, at 473–76; Javits & Klein, *supra* note 8, at 473.

The federal courts, too, have participated in this debate. The U.S. Court of Claims, in Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), upheld the one-House veto provision of the Federal Judicial Salary Act of 1967 as "a device authorized by article I, section 1, coupled with the necessary and proper clause." *Id.* at 1070–71. The Court noted that the veto "contravenes neither the broad principle of the separation of powers nor any specific provision of the Constitution." *Id.* at 1071.

The Court of Appeals for the D.C. Circuit, in Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), held the one-House veto provision of the Natural Gas Policy Act of 1978 to be an unconstitutional violation of both the presentment and bicameralism requirements. Relying on *FERC*, the same court subsequently struck down the one-House veto provision of the Federal Trade Commission Improvements Act, in Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (per curiam), *aff'd sub nom.* United States Senate v. FTC, 103 S. Ct. 3556 (1983).

In Buckley v. Valeo, 424 U.S. 1, 140 n.176 (1976), the Supreme Court dismissed as not ripe for decision a challenge to the one-House veto provision of the Federal Election Campaign Act Amendments of 1974, 2 U.S.C. § 438(d)(2) (1982), when the veto had not yet been exercised. Justice White dissented to this dismissal, however, noting that he would have upheld the veto provision as constitutional. *Id.* at 285–86.

1. *Denial of Exceptions to Statutory Policy*

Under the affirmative form of the legislative veto, actual veto of an agency proposal would take the form of congressional inaction—in other words, failure to approve. Such a veto, lacking any substantive manifestation, could not be subject as a practical matter to the requirements of presentment and bicameralism; yet the veto would represent a definite policy choice which, if given effect by positive action, would in theory be subject to those requirements. That policy choice, however, would simply be the policy previously authorized by the enabling legislation. More specifically, if the enabling legislation were to forbid an agency to deviate from a given policy without congressional approval, congressional failure to approve a deviation would merely reaffirm that policy. That policy choice, being contained in legislation passed by both Houses and submitted to the President, would have been previously subject to and in compliance with the constitutional requirements. The legislative veto, therefore, could be said to comply derivatively, if not directly, with those requirements. As described above,[56] the Court sustained such a derivative satisfaction of presentment and bicameralism when it devised the standards requirement.

2. *Approval of Exceptions to Statutory Policy*

Congressional approval of agency action, on the other hand, would present a problem requiring more than an analytical solution. Approval would take the form of an affirmative resolution, potentially representing an entirely new policy choice complying neither directly nor indirectly with the requirements of presentment and bicameralism. If the approval resolution could be limited, however, to a grant of an exception from the policy declared in the enabling legislation, then waiver of the constitutional requirements would comport with the Court's history of allowing similar waivers under the necessary and proper clause, when noncompliance was required by circumstance and limited in frequency.

The necessary and proper clause[57] confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers vested in the government. Congress is not limited under the clause to such measures as are indispensable to effectuating its express constitutional powers. Instead, a congressional act is constitutional under the clause when the desired end is legitimate and within the scope of the Constitution, and when the chosen means is appropriate, plainly adapted to the

56. *See supra* text accompanying notes 28–29.
57. U.S. CONST. art. I, § 8, cl. 18.

end, and consistent with the letter and spirit of the Constitution.[58] In *McGrain v. Daugherty*,[59] the Court found the congressional subpoena to be authorized under the clause. Congress issues a subpoena in the form of a one-House resolution, which clearly avoids presentment and bicameralism. Nevertheless, as the Court observed in *McGrain*, "[a] legislative body cannot legislate wisely or effectively in the absence of information . . . and where the legislative body does not itself possess the requisite information . . . some means of compulsion are essential to obtain what is needed."[60] The Court therefore upheld the congressional subpoena as "a necessary and appropriate attribute of the power to legislate,"[61] despite the subpoena's failure to comply with the constitutional requirements for legislation.

In *Humphrey's Executor v. United States*,[62] the Court permitted a congressional committee, when previously authorized by statute, to require by means of resolution that an administrative agency conduct an internal investigation. *Humphrey's Executor* gains special significance from its context: a direct intrusion by Congress into the operations of the executive branch. Despite such intrusion, the Court determined that neither constitutional check was relevant to Congress' performance of this particular legislative function—again the discovery of information without which Congress would be unable or unwilling to legislate. The Court simply declined, implicitly, to classify the demand for investigation, or the congressional subpoena, as "legislation" for which compliance is of constitutional necessity.

An approval resolution restricted to a grant of an exception from a statutory policy would help to ensure that Congress did not act without adequate information and would thereby facilitate consistent enforcement of the standards requirement. When Congress lacks necessary information by virtue of its simple inability to predict the future, it is often unwilling to prescribe a fixed and comprehensive policy. The restricted approval resolution would allow Congress to prescribe a policy according to information available at the time of legislation, but to make exceptions to that policy as the passage of time yielded further information.

Admittedly, the restricted affirmative veto would involve a different sequence of events than do the congressional subpoena and the order to investigate. The latter operate before the passage of legislation, while the veto would operate afterwards. There would be a difference also in practi-

58. M'Culloch v. Maryland, 17 U.S. 316, 421 (1819).
59. 273 U.S. 135 (1927).
60. *Id.* at 175.
61. *Id.*
62. 295 U.S. 602 (1935).

cal effect. The veto or the resolution of approval would forbid or permit some substantive action by an agency, while the subpoena and investigation order require only the provision of information.

These differences, however, would not rise to constitutional significance, for they would not render the affirmative veto's noncompliance with presentment and bicameralism more dangerous than that of the other devices. If anything, the potential dangers raised by the affirmative veto would be less significant. As the veto itself would merely reaffirm a policy of its enabling legislation, it would create no new interference with the executive branch and no new danger of an improvident law. A resolution approving an exception from stated policy would create no new interference with the actions of executive agencies, for the resolution would simply approve a request of the executive branch.[63] The approval resolution, moreover, would preclude improvident application of the enabling legislation to situations for which it was not designed.

C. *Additional Restrictions on the Affirmative Veto: New Information and Judicial Review*

Limitation of approvals to necessary exceptions might occur as a matter of course, were the standards requirement to be enforced. It would be extremely inefficient for Congress, having spent the time necessary to agree upon and articulate a policy, to devote considerably more time after passage of the enabling legislation to approving frequent deviations from that policy. External restrictions should nonetheless be imposed to provide more certainty.

1. *New Information*

The first such restriction should be a requirement that an agency articulate the particular circumstances or new information justifying an exception from the previously enacted policy. This restriction would confine the agency request to an exception rather than a change in policy. Congress would be required, in turn, to approve an agency request without amend-

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63. Resolutions approving policy proposals of independent agencies are less problematic in terms of the separation of powers than those approving executive proposals. Officials of independent agencies are not subject to the presidential removal power, Humphrey's Executor v. United States, 295 U.S. 602 (1935); moreover, "independent agencies are often free, at least in a formal sense, of other relationships with the White House that characterize the executive-branch agencies," Strauss, ***The Place of Agencies in Government: Separation of Powers and the Fourth Branch***, 84 COLUM. L. REV. 573, 589 (1984), including centralized oversight of rulemaking and the obligation to clear legislative matters with the Office of Management and Budget, *id.* at 590. Because independence removes an agency from much direct executive branch control, presidential disagreement with a policy exception requested by an independent agency and approved by Congress does not pose a problem of undue interference with executive prerogative.

ment. Such a restriction would, at least in theory, preclude Congress from using the approval mechanism to effect a policy shift.

A hypothetical revision of the legislative veto provision contained in the International Development and Food Assistance Act of 1975[64] can serve to illustrate this requirement. The Act now authorizes a general distribution of foreign aid but provides for a two-House veto of aid to governments engaged in "a consistent pattern of gross violations of internationally recognized human rights . . . ."[65] The Act then lists a number of practices representing such violations. Rewritten in the affirmative form, the Act would forbid distribution of aid to foreign governments engaged in these violations, but provide for limited approval of aid to such governments when justified by circumstance. Such a statute would set forth clearly the policy to be followed in most instances and in the absence of action by Congress. The executive could, however, request an exception to this policy by stating its justification in a particular instance. For example, the President might decide that aid to a foreign government with a record of human rights violations was nevertheless necessary to prevent an economic collapse. Congress could permit such aid by passing a resolution of approval. Congress would have to enact legislation, however, to impose additional restrictions on the provision of aid.

2. *Judicial Review*

The requirement that an agency delineate the specific circumstances justifying an exception, however, would by itself be insufficient; judicial review would be necessary as a supplemental restriction for several reasons. First, judicial review could ensure compliance with the approval procedure. The courts could ensure that an agency did not grant itself an exception by violating a statute without congressional approval, and, more importantly, that Congress granted exceptions without amendment and only when properly requested.

Additionally, judicial review could ensure that a resolution of approval permitted only a genuine exception to policy, not a disguised policy shift. In testing the justifications offered by an agency, courts would ask such

64. 22 U.S.C. § 2151n (1982).

65. 22 U.S.C. § 2151n(a) (1982) provides that:

> No assistance may be provided . . . to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.

Congress thus may veto foreign aid to a government whose human rights violations outweigh the importance of any benefit to needy people of that country.

questions as these: Does the circumstance offered as justification actually exist? Is the circumstance merely a one-time occurrence, or is it likely to recur and thus necessitate further exceptions? Is the exception significant relative to the size of the relevant program as a whole (in terms of cost, duration, or other appropriate measure)? Courts would evaluate an exception without inquiring whether Congress actually granted the exception for the reason offered by the executive, or, rather, for political or other reasons. An exception would be required to withstand scrutiny on its own.

Finally, judicial review could ensure that a subtle shift in policy did not occur by means of a pattern of congressional resolutions approving individual exceptions to a stated policy—exceptions which, taken together, represented a consistent failure to apply that policy in favor of another policy, not yet articulated in legislation. In most instances, presumably, exceptions under any given statute would be unrelated, stemming from circumstances or information of specific, but not general relevance. When such circumstances or information required a pattern of exceptions, however, congressional approval would be held invalid. Congress would be required to amend the enabling legislation to provide a policy capable of more consistent application.[66]

An illustration of the effect of such judicial review can be drawn from the Energy Security Act,[67] which currently authorizes either House to veto contract renegotiations by the Synthetic Fuels Corporation (SFC) that exceed 175% of initial cost estimates. Rewritten in the affirmative form, the Act would forbid the SFC to renegotiate contracts for amounts greater than the 175% limit without securing from Congress an approval resolution. Congress would be able to permit an exception from the 175% limit if, for instance, a synthetic fuels producer needed to replace existing equipment on a one-time basis to comply with a new requirement of the Environmental Protection Agency. If more expensive contracts were nec-

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66. The federal courts already have considerable experience with this type of judicial review in the determination of consistent patterns or practices in statutory application. In anti-discrimination law, for example, the discriminatory intent branch of equal protection analysis often requires courts to infer purposeful discrimination on the part of government officials from patterns emerging from official action. As Justice Powell, writing for the majority in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), described: "The impact of the official action . . . may provide an important starting point [in determining the existence of a discriminatory purpose]. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.* at 266. As Justice Powell noted, the pattern need not be extreme to be detected and held unlawful, although without a clear pattern, a finding of intent must be informed by such other evidentiary sources as historical background and legislative history. *Id.* at 266 n.13, 267–68. Despite obvious substantive differences, judicial experience with this means of detecting the policies which underlie official action can inform judicial review of approval resolutions for possible manifestations of underlying policy shifts.

67. 42 U.S.C. §§ 8724, 8741(d) (1982).

essary, however, to permit a substantial number of fuel producers to comply with that requirement, or if additional exceptions were necessary within a given time period for other reasons, such as severe inflation,[68] Congress would be required to amend the Act. Such patterns of exception would indicate that Congress was willing to exceed the specified limit, and thus vary from the expressed policy, on more than an exceptional basis.

Conclusion

A legislative veto written in the affirmative form and restricted to approval or denial of exceptions from a statutory policy would further the responsible exercise of legislative power by accommodating imperfections in Congress' inability to predict the future. Exercise of the veto, as well as passage of an approval resolution, would present dangers of no greater constitutional significance than do other congressional actions for which the Court has declined to require presentment and bicameralism.

Under the reasoning of this Note, the result in *Chadha*, viewed separately from the Court's analysis, was both right and wrong. The Court was correct in striking down a legislative veto provision written in the negative form. Had the veto been written in the affirmative form, however, the case need never have been litigated. Written affirmatively, the Immigration and Nationality Act would have provided that the INS could suspend deportation of any alien satisfying the specified criteria; the INS could not, however, suspend deportation of any alien failing to satisfy these requirements unless Congress passed a resolution of approval. If such had been the language of the Act, the INS, having decided that Chadha satisfied the necessary criteria, could have suspended his deportation without consulting Congress. Congress would have had to enact new legislation to revoke this suspension.

The Court in *Chadha* simply went too far by treating all legislative veto provisions as though they were alike in both form and intent. The Court should instead have been more circumspect in its analysis, as well as more attentive to its own historical compromises with respect to both the nondelegation principle and the requirements of article I. Had the Court approached the legislative veto from the perspective of the standards

68. Courts could determine the existence of a congressional pattern or practice of related exceptions in two ways: (1) by determining the ratio of exceptions granted to actions taken by the agency pursuant to the stated policy; and (2) by examining the number of exceptions granted within a given time period (e.g., whereas five exceptions granted in a twenty-year period probably would not represent a significant pattern, five exceptions within one or two years probably would). The choice of appropriate limiting ratios of exceptions per agency action and exceptions per time period would of necessity be somewhat arbitrary, governed by judicial discretion and the particular circumstances of the case.

requirement, it could have addressed abuse of the veto and restricted its use, rather than rejecting the mechanism entirely.

—*Emily S. McMahon*