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Congressional Oversight Through Legislative Veto After INS v. Chadha

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NOTES

CONGRESSIONAL OVERSIGHT THROUGH LEGISLATIVE VETO AFTER *INS V. CHADHA*

In *Immigration & Naturalization Service v. Chadha,*[1] the Supreme Court invalidated the one-house legislative veto provision of the Immigration and Nationality Act.[2] This Note considers whether Congress, in light of *Chadha,* may continue to use the legislative veto for administrative oversight or whether it must adopt new methods to monitor administrative agencies. The Note contends that the Court's reasoning invalidates not only one-house vetoes or vetoes of adjudicative actions but all legislative vetoes. The Note contends further that if Congress continues to exercise the legislative veto, the federal courts will not be deterred from reaching the merits of any case and determining the validity of any legislative veto provision by severability and standing considerations of the type raised in *Chadha.*

I
BACKGROUND

Congress has enacted approximately two hundred statutes containing legislative veto provisions.[3] Congress adopted the veto procedure to

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1 103 S. Ct. 2764 (1983).

2 8 U.S.C. § 1254(c)(2) (1982).

3 Justice White appended to his dissent a partial list of current federal statutes that provide for legislative vetoes. *Chadha,* 103 S. Ct. at 2811-16. For a more complete list of current federal statutes that contain legislative veto provisions, see *The Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. 26-102 (1983) [hereinafter cited as *House Legislative Veto Hearings*]; Watson, *Congress Steps Out: A Look At Congressional Control of the Executive,* 63 CALIF. L. REV. 983, 1002-24, 1089-94 (1974).

The legislative veto apparently was first deployed in response to President Hoover's reorganization of the executive branch in the Legislative Appropriation Act of 1932, Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414 (repealed) (granting reorganization authority to President whose decisions are subject to one-house veto). *See Legislative Veto and the "Chadha" Decision: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 98th Cong., 1st Sess. 2 (1983) (statement of Sen. Charles Grassley) [hereinafter cited as *Senate Legislative Veto Hearings*]. Although the legislative veto was employed only sparingly immediately after 1932, with the growth of the federal bureaucracy, Congress has turned to the veto device as a means of checking administrative agency actions. Congress feels that a need exists for congressional oversight of the agencies. As Senator Grassley notes, the federal regulatory matrix has become exceedingly complex and burdensome: the "unelected" bureaucracy promulgates some 18 regulations for every statute that Congress passes. *See id.* at 1. Although the estimate as to the total number of statutes enacted since 1932 containing legislative vetoes varies, *see, e.g., id.* at 2 (statment of Sen. Grassley) (over 300

control the increased authority delegated to the Executive in recent decades. Through the legislative veto, Congress attempts to check administrative discretion by requiring agencies to submit specified proposed actions to it for approval. If Congress disapproves the proposed action, the agency may not go forward with it. Congress does not usually express its disapproval through formal legislation, but through committee resolutions, one-house resolutions, or concurrent resolutions. Although the legislative veto has long been the subject of controversy and comment,[4] *Chadha* was the Court's first ruling on the matter.

A. Facts

Chadha's claim arose when the House of Representatives vetoed a suspension of deportation that the Immigration and Naturalization Service (INS) had granted Chadha.[5] Chadha, who held a British passport, entered the United States on a nonimmigrant student visa in 1966

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veto provisions in more than 269 statutes); *id.* at 159 (statement of Richard Smith, Chairman of ABA Coordinating Group on Regulatory Reform, and Philip Harter) (318 veto provisions in about 210 statutes), the vast majority of them have been included in statutes enacted since 1970. *See id.* at 2. Many of the veto provisions are in relatively insignificant statutes, *see, e.g.,* Marine Protection, Research, and Sanctuaries Act Amendments of 1980, Pub. L. No. 96-332, § 2, 94 Stat. 1057 (codified at 16 U.S.C. § 1432(b)(2) (1982)) (allowing Congress by concurrent resolution to disallow a designation by Secretary of Commerce of certain areas as marine sanctuary); National Parks and Recreational Act of 1978, Pub. L. No. 95-625, § 1301, 92 Stat. 3467, 3549 (Secretary of Agriculture may only process cxchanges of land in Montana between Burlington Northern Railroad and the U.S. government in excess of 6,400 acres if authorized by concurrent resolution), but others are in statutes that present significant separation of powers concerns. *See, e.g.,* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334-35 (codified at 2 U.S.C. § 684 (1982)) (requiring President to submit to Congress proposals to spend appropriated funds at rate less than that required by statute); War Powers Resolution, Pub. L. No. 93-148, § 5, 87 Stat. 555, 556-57 (codified at 50 U.S.C. § 1544 (1976)) (Congress may direct President to withdraw immediately U.S. armed forces engaged in foreigu hostilities if it has not declared war or statutorily authorized the action). This Note does not address the validity of the latter two statutes. It concentrates on the validity of the veto to check delegated authority; in the War Powers Resolution and the Budget Act, Congress did not delegate authority to the Executive, but sought to define and check the Executive's inhercnt constitutional authority. Accordingly, these two statutes are not considered legislative vetoes for the purpose of this Note.

Despite the existence of so many statutes with legislative veto provisions, Congress has chosen to use the device largely like Damocles's sword. Only 1,100 resolutions have been introduced to veto some regulatory action of which only 230 have passed. One-half of the vetoes have occurred in immigration cases similar to *Chadha,* one-fourth under the Congressional Budget and Impoundment Control Act, and another one-eighth in executive reorganization plans. *See Senate Legislative Veto Hearings, supra,* at 159 (statement of Smith and Harter). Even in view of the very limited actual usage of the legislative veto and thc availability of other methods of overseeing agency actions, *e.g.,* cutting off appropriations to recalcitrant agencies, delegation of authority for limited time periods, more specific authorizing legislation, sunset legislation, or formal article I vetoes, Congress remains wedded to the veto, perceiving that the thrcat of its use creates an indirect control on the agencies. For a general history of the legislative veto power, see Watson, *supra.*

4 For a representative sampling of the literature discussing the legislative veto, both pro and con, see *Chadha,* 103 S. Ct. at 2797 n.12 (White, J., dissenting).

5 *Chadha,* 103 S. Ct. at 2771-72.

but remained after his visa expired in 1972. The INS instituted deportation proceedings against Chadha in 1973. Chadha conceded that he was deportable but filed an application for suspension of deportation under the Immigration and Nationality Act (Act).[6] The Act empowers the Attorney General to suspend deportation and grant permanent residence status to an alien who is of "good moral character" and "whose deportation would, in the opinion of the Attorney General, result in extreme hardship."[7] Chadha alleged that neither Britain, the country whose passport he held, nor Kenya, his place of birth, would allow him to immigrate. He asserted that, in effect, he had become a man without a country and that deportation would thus pose an extreme hardship to him.[8] The INS investigated Chadha's claim and on June 25, 1974, an immigration judge granted his request for a suspension of the deportation proceedings.[9]

By suspending the proceedings, the immigration judge triggered the legislative veto in the Act. The Act requires the Attorney General to file with Congress a report in every case in which deportation is suspended detailing the factual and legal reasons supporting the suspension of deportation proceedings.[10] The Act provides that if, prior to the end of the session following the filing of the report, "either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien."[11] Prior to the expiration of the following congressional session, the House passed a resolution disapproving the granting of permanent resident status to Chadha on the grounds that he had not demonstrated sufficient hardship.[12]

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6 *Id.*

7 8 U.S.C. § 1254(a)(1) (1982).

8 Chadha is of East Indian ancestry but he has never visited India. He was born in Kenya when it was still part of the British Empire. He asserted at his suspension hearing that none of these countries would permit him to immigrate. *See* Joint Appendix to Briefs at 13-14, Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983).

9 *Chadha,* 103 S. Ct. at 2770.

10 8 U.S.C. § 1254(c)(1) (1982) ("If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension.").

11 8 U.S.C. § 1254(c)(2) (1982).

12 121 CONG. REC. 40,800 (1975) (statement of Rep. Eilberg). The statutory period, *see* 8 U.S.C. § 1254(c)(2) (1982), for congressional review of the Attorney General's suspension order in Chadha's case was due to expire at the end of the first session of the 94th Congress. That session ended on December 19, 1975. 121 CONG. REC. 42,104, 42,277 (1975). On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing the orders suspending deportation in several cases, including Chadha's. The House Judiciary Committee discharged the resolution to the full House on December 16, 1975. The printed copy of the resolution was not available to the representatives at the time of the vote. *Chadha,* 103 S. Ct. at 2771. Instead, Representative Eilberg, without reciting any specific facts, related to the House that the Committee felt the aliens had not demonstrated sufficient hardship to meet

After the House vetoed the order suspending deportation proceedings, the immigration judge, in accordance with the Act, ordered Chadha deported. Chadha filed a petition for review with the Court of Appeals for the Ninth Circuit, arguing that the legislative veto was unconstitutional.[13] The court invited both the House and the Senate to submit briefs amicus curiae. The court held that the House's action was unconstitutional and directed the Attorney General not to deport Chadha.[14] The INS appealed, and both the House and Senate filed petitions for a writ of certiorari.

B. Constitutionality of the Legislative Veto

In *Chadha,* the Court held that the House's veto of the order suspending the deportation proceedings against Chadha was a legislative act and, as such, that it violated the Constitution's requirement that the Congress submit all legislation to the President for his approval.[15] The Court employed a two-step analysis in reaching this conclusion. First, the Court found that the language and history of the Constitution require Congress to present all legislative acts to the President.[16] Second, the Court found that the legislative veto of the suspension order affected

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the requirements of 8 U.S.C. § 1254(a)(1) (1982). 121 CONG. REC. 40,800 (1975). The House then passed the resolution without debate or a recorded vote. *Chadha,* 103 S. Ct. at 2771.

13 *See Chadha,* 103 S. Ct. at 2772. The INS agreed with Chadha's contention that the legislative veto was unconstitutional. Despite its agreement with Chadha's position on the unconstitutionality of the legislative veto, the INS intended to comply with the House's veto. Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 411 (9th Cir. 1980). Both the court of appeals, *see id.* at 419, and the Supreme Court, *see* 103 S. Ct. at 2778, found sufficient adversity between the INS and Chadha to present a justiciable case or controversy.

14 Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 435-36 (9th Cir. 1980). The court of appeals decision has already received attention in the literature and is not further considered in this Note. *See* Comment, *Limiting the Legislative Veto:* Chadha v. Immigration and Naturalization Service, 81 COLUM. L. REV. 1721 (1981) [hereinafter cited as *Limiting the Legislative Veto*]; Comment, *Legislative Veto-One House Veto of I.N.S. Action Held Invalid,* 5 SUFFOLK TRANSNAT'L L.J. 285 (1981); Comment, *The Constitutionality of the Legislative Veto,* 23 WM. & MARY L. REV. 123 (1981).

15 *Chadha,* 103 S. Ct. at 2786-87. The Court also held that the one-house veto of a suspension of deportation violated the requirement of article I, sections 1 and 7, which require that both houses pass all legislation. *Id.* at 2783-84, 2786-87.

The Court also discussed the concept of separation of powers, the ground on which the court of appeals invalidated the legislative veto provision. The Court noted that the doctrine of separation of powers is "woven" into the Constitution, *id.* at 2781 (quoting Buckley v. Valeo, 424 U.S. 1, 124 (1975)), and that the Court relied on the doctrine in Buckley v. Valeo, 424 U.S. 1, 120-24 (1976). In *Buckley,* the Court invalidated a scheme under which congressional leaders would appoint certain members of the Federal Election Commission. *See Buckley,* 424 U.S. at 143. The Court in *Buckley* did not, however, rest its holding solely on the doctrine of separation of powers, but held that that appointment procedure violated the appointment power given to the President in article II, section 2, clause 2. 424 U.S. at 124-36. Similarly, the Court in *Chadha* recognized that the case involved separation of powers issues, but found that the presentment clauses in article I, section 7 and the bicameral requirement for passing legislation adequately vindicated those concerns in this case. 103 S. Ct. at 2781.

16 *See infra* notes 18-25 and accompanying text.

the rights of persons outside the legislature and was, therefore, a legislative act.[17]

The majority began its analysis by looking at the language of the Constitution.[18] The Constitution contains two clauses requiring the Congress to present all bills that have passed both houses to the President for his approval. Article I, section 7, clause 2 requires Congress to submit "Every Bill" to the President[19] and article I, section 7, clause 3 requires Congress to submit "Every Order, Resolution, or Vote" to the President.[20]

The Court concluded that the framers drafted the presentment clauses as part of their scheme of separation of powers. The Court asserted that the framers intended those clauses to establish the President's power to veto all congressional actions. In effect, the veto was the President's defense against the Congress.[21] The majority supported these conclusions by noting that at the Philadelphia convention, the framers revised the text of article I, section 7 to ensure that the Congress could not circumvent the President's veto power. The original draft of section 7 contained only the first presentment clause requiring Congress to submit to the President "Every Bill."[22] At the convention, James Madison observed that Congress might avoid the presentment provision of section 7 simply by calling a proposed law a "resolution" or a "vote" rather than a "bill."[23] The next day the convention added the second presentment clause—the present clause 3—in an attempt to ensure that Congress could not circumvent the possibility of the President's veto merely by relabeling its actions.[24] Thus, the majority's reading of the express language of article I, section 7 and its analysis of the proceedings at the

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17 *See infra* notes 29-30 and accompanying text.

18 *See Chadha,* 103 S. Ct. at 2782-83.

19 U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States.").

20 U.S. CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary . . . shall be presented to the President of the United States.").

21 "If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense. . . . The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself. . . ."

Chadha, 103 S. Ct. at 2782 (quoting THE FEDERALIST NO. 73, at 457-58 (A. Hamilton) (H. Lodge ed. 1888)). The framers apparently were uniformly in agreement that Congress should have to present all legislation to the President before it became law. *Id.*

22 *Id.*

23 *Id.* (citing 2 M. FARRAND, THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 301-02 (1966)).

24 *Id.* The Court cited two cases in its discussion of the President's veto power, but the cases are only tangentially related to the question at hand. *See* The Pocket Veto Case, 279 U.S. 655 (1928) (bill not signed by President does not become law even if Congress adjourns

Constitutional Convention convinced it that Congress may enact legislation only "in accord with a single, finely wrought . . . procedure."[25]

In his dissenting opinion, Justice White took issue with the majority's interpretation of the framers' intent.[26] Justice White argued that the delegates at the Philadelphia convention gave only brief consideration to the second presentment clause and that they did not contemplate that it impose any broad restraints on congressional authority.[27] Justice White argued that, in any event, determination of the framers' intent in drafting the presentment clauses was not dispositive. In his view, the crucial issue before the Court was whether congressional exercise of the legislative veto constitutes a legislative act.[28]

The majority agreed with Justice White that article I and the framers' intent in drafting the presentment clause were not the central concerns in the case. They merely viewed this as an appropriate starting point for the analysis, recognizing that a conclusion at this stage could not be determinative. Not every congressional action is subject to the requirements of the presentment clauses. Thus, the majority moved to the second level of their analysis and considered whether the House's veto of the order suspending Chadha's deportation was an act of legislation, or a matter internal to Congress—such as the refusal of a committee to report legislation to the floor of the House—to which the presentment clauses do not apply. The majority asserted that "[w]hether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' "[29]

The crux of the majority's argument that the veto provision in the Act was legislative in character and effect was that application of the veto affected the rights of persons outside the Congress.[30] The immigration judge's order suspending the deportation proceedings against Chadha gave him the legal right to stay in the United States. The House's resolution vetoing the suspension order thus altered Chadha's rights because after the veto, the Act required the Attorney General to deport Chadha.[31] In addition, the majority asserted that the House veto of the suspension order constituted a partial revocation of the authority

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before President returns bill); Myers v. United States, 272 U.S. 52 (1926) (held President has power to remove appointed officials).

25 *Chadha,* 103 S. Ct. at 2784.

26 *Id.* at 2792 (White, J., dissenting).

27 *Id.* at 2800.

28 *Id.* at 2799.

29 *Id.* at 2784 (citation omitted).

30 *See id.*

31 *Id.* at 2784-85.

that Congress had previously delegated to the Attorney General.[32] The majority contended that absent the Act's legislative veto provision, neither house of Congress, acting alone, could have altered the Attorney General's power to suspend deportation proceedings against specific persons.[33] Thus, the majority reasoned that Congress must abide by the delegations it makes unless it revokes or alters them through the formal legislative process.[34]

Justice White disputed the majority's conclusion that the House's action was a legislative act, arguing that the House did not affect Chadha's or the Attorney General's rights when it disapproved the suspension order. Justice White contended that Congress did not, in the Act, delegate authority to the Attorney General to suspend deportations, reasoning that a suspension of deportation authorized by the Attorney General takes effect only if both houses of Congress acquiesce. Because, in Justice White's view, all deportation cases are subject to congressional review, a resolution by one house disapproving an order suspending deportation does not change a deportable alien's status. He concluded that disapproval by one house of a suspension merely left an alien deportable and Congress would not, therefore, have changed the status quo.[35]

In his separate opinion concurring in the judgment,[36] Justice Powell did not address the question of whether the legislative veto constituted a legislative act within the meaning of article I, section 7. Rather, he argued that Congress usurped a judicial power when it vetoed the suspension of deportation, reasoning that the determination of whether Chadha and the other aliens met the statutory criteria for permanent residence is a "function ordinarily entrusted to the federal courts."[37]

C. Severability and Standing

One of the reasons that *Immigration & Naturalization Service v. Chadha*

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32 *Id.* at 2785.

33 *Id.*

34 *Id.* at 2786. The Court also asserted that the fact that the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (1982), replaced a scheme in which Congress dealt with these cases by private bills that suspended deportation provided additional proof of the legislative nature of the veto. 103 S. Ct. at 2786. For additional support, the majority noted that the Constitution explicitly lists two types of actions that each house may take unilaterally, thus indicating that neither house possesses general powers of unilateral action. *Id.*

35 *Id.* at 2807 (White, J., dissenting). Justice White also emphasized the usefulness of the legislative veto in the modern administrative state in view of the dilemma Congress faces when it must choose between delegating large amounts of authority or undertaking "a hopeless task of writing laws . . . to cover endless special circumstances." *Id.* at 2793. The majority, on the other hand, stated that "the fact that a given law or procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution." *Id.* at 2780-81 (majority opinion).

36 *Id.* at 2788 (Powell, J., concurring).

37 *Id.* at 2791 (Powell, J., concurring).

is the first case in which the Supreme Court has reviewed the constitutionality of the legislative veto is that plaintiffs have had problems establishing standing to challenge the veto's constitutionality. In *Chadha,* for example, Congress attempted to prevent the Court from reaching the constitutional question on the ground that Chadha lacked standing to maintain his suit.[38] The Court, however, rejected the challenge to Chadha's standing.[39]

Congress grounded its argument that Chadha lacked standing to challenge the constitutionality of the legislative veto on severability analysis. Congress contended that the provisions of the Act that delegated authority to the Attorney General were not severable from the legislative veto provision in the Act.[40] It argued that the two provisions were inextricably linked. Thus, if the legislative veto clause was invalid, so too was the clause that granted the Attorney General the authority to suspend deportation proceedings. Under this analysis, even if the Court agreed with Chadha's argument that the legislative veto clause was unconstitutional, the Court would be unable to reinstate the Attorney General's suspension order. The relief provisions of the Act would fall along with the legislative veto clause.[41] It is, of course, well-settled that to satisfy the requirements of standing, a plaintiff must allege an injury that is within the court's power to redress.[42] The residency rights of aliens are governed by federal statutes and, thus, a federal court has no general federal common law authority to grant relief to an alien. The Court, in invalidating the legislative veto provision in the Act, would at the same time invalidate the inseverable provision authorizing the Attorney General to suspend deportation. The plaintiff, therefore, would have no basis for relief. Congress argued that because Chadha was thereby denied any basis for relief, he lacked standing. Lower courts had accepted this reasoning in prior cases,[43] and the Supreme Court

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38 *Id.* at 2774 (majority opinion).

39 *Id.* at 2774-76. In addition to rejecting Congress's inseverability argument, the Court also rejected contentions that Chadha lacked standing because his claim would advance the interests of the executive branch, *id.* at 2776, that there was insufficient adverseness between Chadha and the INS, *id.* at 2778, and that the matter was a political question, *id.* at 2778-79.

40 *See id.* at 2774-76.

41 *See id.*

42 *See, e.g.,* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1983) ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to [have an injury that] 'is likely to be redressed by a favorable decision' ") (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 79 (1978) (article III requires litigant to show "substantial likelihood that the judicial relief requested will prevent or redress the claimed injury").

43 *See* McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1976), *cert. denied,* 434 U.S. 1011 (1978). In *McCorkle,* federal employees challenged a pay act under which the President made salary proposals that would become effective if not vetoed by Congress. The Court held that Congress would not have delegated the authority to set salaries to the President without the veto power. The *McCorkle* court reasoned that because the congressional veto was not

apparently concurred.[44] It avoided the full ramifications of the argument in this case by finding the legislative veto provision severable from the rest of the Act.[45]

In finding that Chadha had standing to challenge the legislative veto provision of the Act, the majority relied on the statement of the severability test announced in *Champlin Refining Co. v. Corporation Commission.*[46] The *Champlin* test provides that provisions in a statute are severable "[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."[47] The majority concluded that Congress would have enacted the provision delegating suspension authority to the Attorney General even if it had known that it could not constitutionally retain veto power over his actions.[48]

The majority listed three reasons why Congress would have enacted

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severable from the part of the statute granting the President the authority to fix salaries, the court would have to invalidate the entire statute if it concluded that the legislative veto was unconstitutional. Because invalidating the statute would eliminate the plaintiff's basis for relief, the court refused to consider the constitutionality of the legislative veto and dismissed the case for lack of standing. 559 F.2d at 1261-62. *See also* Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 441 & n.48 (D.C. Cir.) (refusing to decide whether inseverability was complete barrier to standing because legislative veto provisions found to be severable), *aff'd mem. and cert. denied,* 103 S. Ct. 3556 (1983); Atkins v. United States, 556 F.2d 1038, 1082 (Ct. Cl. 1977) (Skelton, J., dissenting) (arguing that pay raises proposed by President are effective immediately, rather than after Congress acquiesces, and therefore "are enforceable, provided [the veto] is severable from the remainder of the [Act]").

44 In discussing Congress's assertion that Chadha lacked standing because his claim would advance the interests of the executive, the Court stated: "If the veto provision violates the Constitution, and is severable, the deportation order against Chadha will be cancelled." *Chadha,* 103 S. Ct. at 2776. The Court did not, however, discuss the matter further, or cite any authority in support of its standing argument. Although Justice Rehnquist dissented on the severability issue, *id.* at 2816, he did not discuss the standing issue. Thus, although the courts apparently accept the standing/severability argument, they have not yet addressed the anomaly that now exists where the probability that the courts will review a veto of executive action is inversely related to the importance of the veto provision in a particular statutory scheme.

45 *See id.* at 2775-76 (majority opinion).

46 286 U.S. 210 (1932). *Champlin* and the other severability cases relied on by the majority involved standing issues different from those in *Chadha.* In *Champlin,* petitioners challenged the validity of several provisions of a state law regulating the production of crude oil. The Court would not, however, consider the validity of a section under which no orders had been issued because, even if invalid, the provision was severable. 286 U.S. at 234-35. In Buckley v. Valeo, 424 U.S. 1, 108-09 (1976), the Court invalidated certain spending limits in the Federal Election Campaign Act, but held that the public financing provisions of the act were valid and severable. In United States v. Jackson, 390 U.S. 570, 586 (1968), the Court struck down the death penalty provision in a federal kidnapping statute, but held that convictions under the statute could stand because the death penalty provision was severable. In none of the cases, however, would a finding of inseverability have led to the situation in which a statutory provision would apply to a party and yet be unreviewable because in none of these cases would the court have simultaneously eliminated the plaintiff's remedy when it invalidated the challenged statutory provision.

47 *Champlin,* 286 U.S. at 234.

48 *Chadha,* 103 S. Ct. at 2775-76.

the suspension of deportation procedure even without retaining a legislative veto. The majority first noted that the Act contained a severability clause,[49] giving rise to a presumption of severability.[50] Second, the majority turned to the legislative history of the Act, and asserted that it demonstrated that Congress found the private bill approach to deportations so cumbersome[51] that it would not have maintained the private bill system even had it known that the legislative veto was unconstitutional.[52] Finally, the majority observed that the suspension system would remain workable even without the legislative veto[53] and that Congress would retain review of suspensions under the provisions of the Act that require the Attorney General to report each suspension of deportation to Congress.[54] The only difference in congressional review of suspension orders in the absence of the legislative veto is that Congress must pass legislation,[55] using the procedure prescribed in article I, section 7, instead of a veto resolution, to reverse the Attorney General's suspension order.[56]

Justice Rehnquist dissented on the ground that the legislative veto provision was not severable from the provision of the Act granting to the Attorney General the authority to suspend deportation orders.[57] Justice Rehnquist first eschewed reliance on the Act's severability clause, arguing that the presence of the severability clause did not conclusively

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49 8 U.S.C. § 1101 note (1982) ("If any particular provision of this Act [this chapter], or the application thereof to any person or circumstance, is held invalid, the remainder of the Act [this chapter] and the application of such provision to other persons or circumstances shall not be affected thereby.").

50 *Chadha,* 103 S. Ct. at 2774.

51 *Id.* at 2775.

52 *Id.*

53 *Id.* This criterion is also derived from *Champlin,* 286 U.S. at 234.

54 *Chadha,* 103 S. Ct. at 2775-76. *Chadha* reaffirmed the laying system, originally approved in Sibbach v. Wilson, 312 U.S. 1, 7-8 (1941), in which new regulations do not take effect until Congress has had an opportunity to review them and pass legislation rejecting them. *Chadha,* 103 S. Ct. at 2776 n.9.

Senator Javits argued that the laying procedure is not an effective means of congressional oversight of administrative agencies because it involves new legislation which entails the "full panoply of Congressional action." Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis,* 52 N.Y.U. L. REV. 455, 462, 463-64 (1977). Senator Javits's argument ignores the fact that although the bicameral and presentment procedures for enacting legislation are constitutionally required, the Constitution does not require the cumbersome procedures of committee review, floor consideration, and conference. Congress could easily adopt special rules for expedited consideration of administrative actions. The alternatives to the legislative veto are discussed in Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the Legislative Veto,* 32 AD. L. REV. 667 (1980). *See also Chadha,* 103 S. Ct. at 2786 n.19; *Senate Legislative Veto Hearings, supra* note 3, at 3 (statement of Sen. Grassley); *id.* at 5 (statement of Sen. Heflin).

55 The Court explicitly declined to consider whether the passage of legislation ordering the deportation of specific individuals would constitute a bill of attainder thereby running afoul of the Constitution in a different manner. *Chadha,* 103 S. Ct. at 2785 n.17.

56 *Id.* at 2775-76.

57 *Id.* at 2816 (Rehnquist, J., dissenting).

demonstrate a congressional intent to render the legislative veto provision severable from the remainder of the Act.[58] He argued that the Court should have examined the entire legislative history and background of the statute.[59] He emphasized that the veto restricts administrative authority by subjecting administrative actions to congressional review. Justice Rehnquist argued that when a court invalidates such a restriction, it creates a broader delegation of power than Congress intended.[60] Finally, Justice Rehnquist asserted that because Congress had retained the power to veto suspension orders over many years, it never indicated, and the Court had no evidence from which to infer, that it would have delegated the suspension power to the Attorney General without retaining a veto power.[61]

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58 Indeed, during the House and Senate Hearings held in the wake of the *Chadha* decision in July of 1983, several witnesses testified that the insertion of severability clauses into statutes is not always the result of reasoned thinking and legislative compromise but is often a "Pavlovian" response in polishing up legislation, similar to the inclusion of legal boilerplate in contracts. *See, e.g., Senate Legislative Veto Hearings, supra* note 3, at 41 (exchange between Michael Davidson, Counsel to the Senate, and Stanley Brand, Counsel to the House Clerk); *id.* at 103 (testimony of Brand before the House); *id.* at 123 (exchange between Louis Fisher and Norman Ornstein). In view of the discretion that a severability clause gives a court to "rewrite" legislation, these witnesses urged Congress to include a severability clause only when it clearly reflects the congressional intent.

Even if Congress takes that track, it may still go for naught. The judicial presumption in favor of severability is very strong. In the *Consumer Energy Council* case, the D.C. Circuit held a veto provision in the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. §§ 33-34 (1982)), unconstitutional and severable from the rest of the statute despite the lack of severability clause. Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. and cert. denied*, 103 S. Ct. 3556 (1983).

59 103 S. Ct. at 2816.

60 *Id.* at 2817.

61 *Id.* Justice Rehnquist's dissent on the severability issue is unconvincing. He did not adequately explain his refusal to rely on the severability clause in the statute. He also failed to provide a convincing analysis of legislative intent with respect to the Immigration and Nationality Act. Justice Rehnquist cited two cases to justify his refusal to follow the severability clause in the Act, but they do not support his position. *See* United States v. Jackson, 390 U.S. 570, 585 n.27 (1968); Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936). Both cases merely state that a severability clause does not conclusively demonstrate legislative intent; neither case holds that severability clauses are irrelevant, nor that severability clauses do not raise a presumption of severability. *Jackson* actually involved a statute that did not have a severability clause: the Court merely stated that the legislative intent was still the determining factor. 390 U.S. at 585 n.27. Justice Rehnquist's view on the effect of the severability clause is novel. *See* 2 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 44.08 (rev. 3d ed. 1973) ("Because a separability clause purports to be an expression of the legislative intent, it is logical to view the inquiry when a separability clause is present in an act as being concerned . . . with determining only whether the valid portion is sufficiently independent [to enforce]."). In addition, Justice Rehnquist does not refute the majority's argument that Congress would have enacted the suspension procedure even if it knew it could not constitutionally retain the veto power. Justice Rehnquist's argument that the mere fact that Congress retained the veto provision over a period of years demonstrated that Congress would not have delegated the authority to suspend deportations without it lacks merit. Prior to the Court's decision in *Chadha,* Congress was unaware that the Court would hold the veto invalid and,

II
ANALYSIS: CAN CONGRESS AVOID THE EFFECT OF *CHADHA*?

Congressional use of the legislative veto to oversee the activities of administrative agencies has proliferated in the last few decades.[62] Notwithstanding the Court's decision in *Chadha,* Congress has continued to veto agency actions.[63] Furthermore, Congress has not yet amended the statutes that contain legislative veto provisions to remove those provisions.[64] This Note focuses, therefore, on two questions: whether *Chadha* invalidates all legislative vetoes and, if so, whether all vetoes are subject to attack through the courts.

A. Breadth of the Court's Decision

The majority's opinion in *Chadha* is of a breadth seldom seen in Supreme Court opinions. The opinion appears to leave few questions unanswered. First, Congress will be unable to evade the Court's conclusion that a legislative veto is a legislative act that the Constitution requires be presented to the President for approval.[65] Second, because the Court invalidated the legislative veto on the ground that it was a legislative act, it will be of no significance in future litigation whether the chal-

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therefore, never faced the crucial choice of whether to delegate that authority without having a veto power or to retain the private bill system.

Justice White also asserted that the severability clause did not conclusively demonstrate a congressional intent to delegate the suspension authority regardless of the constitutionality of the veto provision. He argued that the severability clause relates only to the divisibility of the major provisions of the Act, "not [to] different provisions within a single section." 103 S. Ct. at 2798 n.16 (White, J., dissenting). Justice White did not explain why he chose to ignore the clear wording of the severability clause: "If *any* particular *provision* of this Act [this chapter] . . . is held invalid, the remainder . . . shall not be affected thereby." 8 U.S.C. § 1101 note (1982) (emphasis added). *See also* 2 C. SANDS, *supra,* § 44.08 ("In absence of statements to the contrary, a separability clause refers to every provision of an act.").

62 *See supra* note 3.

63 *See, e.g.,* National Wildlife Fed'n v. Watt, 571 F. Supp. 1145 (D.D.C. 1983) (litigation involving committee suspension of lease of federal land by Department of Interior); N.Y. Times, Jan. 27, 1984, at A27, col. 4 (noting introduction of resolution to veto action of District of Columbia government). The continuing congressional use of the legislative veto has not gone unchallenged, however. More litigation is percolating up through the courts seeking to define the outer parameters of the *Chadha* decision and permissible use of the veto. For example, Congress pressed a petition for a writ of certiorari in Consumer Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. and cert. denied,* 103 S. Ct. 3556 (1983). In National Wildlife Fed'n v. Watt, 571 F. Supp. 1145 (D.D.C. 1983), congressional intervenors argued that committee suspension of leases made by the Secretary of the Interior did not constitute a legislative veto. The court rejected this contention, *id.* at 1155-56, but enjoined the sale on other grounds. *Id.* at 1157-58. Congress continues to press its position, which it argued in *Chadha,* that the veto matter is a political question not amenable to judicial review.

64 *See, e.g.,* N.Y. Times, Jan. 27, 1984, at A27, col. 4 (noting that Congress has not enacted a new Home Rule Act for the District of Columbia).

65 *See* 103 S. Ct. at 2782-83; *supra* notes 15-20 and accompanying text.

lenged provision permits a one-house or a two-house legislative veto.[66] Finally, because the majority chose not to draw a functional distinction between administrative rulemaking and administrative adjudicatory actions,[67] in future cases, the Court will strike down legislative vetoes of administrative rulemaking as well as vetoes of adjudicatory decisions such as that involved in *Chadha*. Thus, *Chadha* apparently invalidates all forms of the legislative veto.

The Court began with an analysis of the presentment clauses. It concluded that the history and text of the presentment clauses indicate that the framers' objective in drafting article I, section 7 was to prevent Congress from evading the President's veto by developing new procedural devices to enact laws that would not be governed by the same restrictions as those placed on "bills," "orders," and "resolutions."[68] Although Justice White argued that the mere existence of the presentment clauses does not answer the ultimate question of whether a legislative veto is legislation subject to the restrictions of article I, section 7,[69] the inclusive nature of those clauses serves as a guide in determining whether a veto constitutes legislation.

The majority stated a broad but simple test to determine whether a legislative veto constitutes legislation. The test it proposed is a functional one: any exercise of power by Congress that affects the "legal rights, duties and relations of persons . . . outside the legislat[ure]"[70] is an exercise of legislative power subject to all the requirements for legislation, including presentment to the President.

Justice White in his dissenting opinion did not persuasively refute the Court's conclusion that the veto of the suspension of deportation order constituted legislation. He argued that because Congress retained the veto power, in section 244(c)(2), over suspension of deportation or-

66 *See* 103 S. Ct. at 2783-88.

67 *But see id.* at 2790-92 (Powell, J., concurring); *id.* at 2796 (White, J., dissenting).

68 Justice White's argument that the framers intended no major role for the second presentment clause, *see supra* note 27 and accompanying text, is without merit. The majority's analysis follows an accepted approach to legislative history. The framers considered an original text consisting of article I, section 7, clause 2 standing alone, but discerned a problem with it, namely the possibility noted earlier that the Congress might circumvent the veto power. The convention then adopted additional text. The logical conclusion is that the framers intended the added text to address the possibility of congressional circumvention. *See* 2 C. SANDS, *supra* note 61, § 48.18 ("Adoption of an amendment is evidence that the legislature intended to change the provisions of the original bill.").

Notwithstanding this analysis, there is some support for Justice White's position; some commentators have previously argued that the intent of the framers in adding the third clause is ambiguous. *See, e.g.*, Javits & Klein, *supra* note 54, at 480-81; *cf.* Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 380 (1977) (arguing that lack of guidance from framers suggests that presentment clauses should be interpreted strictly).

69 *See* 103 S. Ct. at 2798-99 (White, J., dissenting).

70 *Id.* at 2784 (majority opinion).

ders, it never effectively delegated suspension authority to the Attorney General.[71] Therefore, he concluded, the House resolution disapproving the suspension of deportation did not upset the status quo. The facts in *Chadha* illustrate the weakness of the argument. If the House had not adopted the disapproval resolution, Chadha would have remained in the United States as a permanent resident. Once the House passed the veto resolution, however, the INS was forced, under the statutory scheme, to deport Chadha,[72] thereby altering his legal status. Even if one accepts Justice White's analysis of what authority Congress actually delegated to the Attorney General and what that meant for an alien's status, it does not, under the peculiar statutory scheme involved in *Chadha,* avoid the majority's conclusion that the legislative veto mechanism allows Congress to change legal rights without passing legislation. Justice White noted that an alien remains deportable even after the Attorney General grants relief. If Congress does not act within the period specified in the Act, however, the alien achieves resident status. Under Justice White's analysis, then, it is not congressional action but rather congressional inaction that confers new legal rights. The statute does, therefore, contemplate a change in legal status in which Congress plays a role, a change which, under the majority's test, is subject to the requirements of the presentment clauses.

Justice White's argument that Congress never delegated suspension authority to the Attorney General because it reserved the veto power is really nothing more than a declaration that the veto provision is not severable from the rest of the Act. His argument essentially is that the veto was a crucial component of a complete legislative mechanism that never granted power to the Attorney General to make final decisions on residency. Again, however, the majority seems to have the better argument. It persuasively marshaled evidence indicating that Congress had tired of the private bill relief approach and would have delegated the suspension power to the Attorney General even if it had known it could not retain a veto power.[73]

The sweeping reasoning of the majority opinion has two other important consequences. Although the veto provision invalidated in *Chadha* was a one-house veto, the majority's reasoning is broad enough to invalidate two-house vetoes as well. Although the Court held that the one-house veto violated the requirement that legislation be passed by both chambers,[74] it placed its greatest reliance on the circumvention of the President's veto power.[75] Thus, a two-house legislative veto, by

71 *See id.* at 2803-04 (White, J.,dissenting).

72 *See supra* note 11 and accompanying text.

73 *See supra* notes 49-56 and accompanying text.

74 *See supra* note 15.

75 *See supra* notes 18-25 and accompanying text.

avoiding presentment to the President, still falls short of meeting all of the requirements for legislation set forth in article I, section 7. The majority's opinion clearly requires that all legislation meet all the requirements.

Finally, the majority opinion, unlike Justice Powell's concurring opinion, leaves no room for a distinction between a legislative veto of an administrative rulemaking and a veto of an administrative adjudication.[76] In *Chadha,* the Attorney General made a determination of the rights of a single individual based upon criteria set forth in a statute. The Court could have distinguished between legislative vetoes of the results of rulemaking and of adjudication, as Justice Powell urged, on the ground that rulemaking is legislative in nature. Therefore, Congress arguably invades no prerogative of the executive or judiciary when it prevents promulgation of a new regulation by veto. Congressional vetoes of decisions made in an administrative adjudication, on the other hand, interfere with a process that determines the rights of individuals; a process that requires procedural due process safeguards and the availability of judicial review.[77]

The majority, however, chose not to draw this distinction. It found that all legislative actions that affect persons outside the legislative branch must be accomplished according to the procedures prescribed by article I.[78] In applying the test to the facts of *Chadha,* the Court noted that the veto affected not only the rights of Chadha, but also of persons in the executive branch.[79] Accordingly, when a congressional veto prevents an agency official from promulgating a regulation he would otherwise have issued, it affects the rights and duties of that official. *Chadha* indicates that the legislature can only effect such changes in rights through exercise of legislative authority as conceived under article I.[80]

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76 The court of appeals, which decided the case on the grounds of separation of powers, see *supra* note 17 for a more detailed discussion, also left room for such a distinction. Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 432 (9th Cir. 1980); *see also* Nathanson, *Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the "Independent Agencies,"* 75 NW. U.L. REV. 1064, 1086-87 (arguing that intervention in agency proceedings is clearly unconstitutional, but that quasi-adjudicative and quasi-legislative proceedings may be difficult to distinguish in current administrative practice); Comment, *Limiting the Legislative Veto, supra* note 14, at 1730 (noting that court of appeals decision if upheld, would preclude use of legislative veto in adjudicatory context); Comment, *The Constitutionality of the Legislative Veto, supra* note 14, at 133-34 (arguing that legislative veto of adjudicatory actions should be treated as presumptively unconstitutional).

77 It is well established that due process requires that Congress not interfere with ongoing agency adjudications. *See, e.g.,* Pillsbury v. FTC, 354 F.2d 952 (5th Cir. 1966). In *Pillsbury,* the chairman of the FTC was questioned extensively at a Senate subcommittee hearing about an ongoing case. The appellate court subsequently rescinded a divestiture order that the FTC had issued in the case. *Id.* at 965.

78 *See Chadha,* 103 S. Ct. at 2784; *supra* notes 15-34 and accompanying text.

79 103 S. Ct. at 2784.

80 Prior to the Supreme Court's decision in *Chadha,* the Court of Appeals for the District of Columbia Circuit had overturned a legislative veto of administrative regulations. *See* Con-

B. Severability and Standing after *Chadha*

Although the Court in *Chahda* in effect held that all legislative veto provisions are unconstitutional, some statutes that contain legislative veto provisions may, nevertheless, be invulnerable to judicial attack if the veto provision is not severable from the rest of the statute. Under severability analysis no judicial remedy exists where the invalid or unconstitutional provision is deemed inseverable from the rest of the statute. A remedy is absent because invalidating the veto provision necessarily entails invalidating the remainder of the enabling legislation thereby eliminating the statutory basis on which a court could grant relief. For purposes of this severability analysis, it is necessary to distinguish between statutes that seek to confer benefits, such as the Immigration and Nationality Act, and statutes that regulate behavior and require governmental enforcement.[81] A finding that the legislative veto provision is severable eliminates the standing problems with respect to either type of statute. Although the broad severability analysis in *Chadha* suggests that most legislative veto provisions will be severable, certain legislative veto provisions cannot be severed. Standing problems will not prevent judicial invalidation of legislative veto provisions deemed inseverable in statutes that regulate behavior and require governmental enforcement. Standing problems, however, will allow Congress to continue to exercise legislative vetoes in statutes that merely confer benefits and contain inseverable veto provisions.

There are three reasons why, in the wake of *Chadha,* courts will find most legislative vetoes severable. First, the *Champlin* test, which the Court relied on in *Chadha,* creates a presumption in favor of severability, even in cases where the statute does not contain an explicit severability clause.[82] The *Champlin* test requires a court to treat specific provisions in a statute as severable unless the legislature clearly would not have enacted the statute without those provisions. The burden of proof in the test accords a virtual presumption of severability.

Second, the Court, in *Chadha,* effected a subtle change in the severability issue that strengthened the presumption of severability. The question is no longer merely what the legislature intended, but what Congress would have done had it known the veto provision would be

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sumer Energy Council of Am. v. Federal Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. and cert. denied,* 103 S. Ct. 3556 (1983).

81 *E.g.,* The National Gas Policy Act of 1978, Pub. L. No. 95-621, §§ 122(c), 202(c), 206(d)(2), 507, 92 Stat. 3350, 3370-72, 3380, 3406 (codified at 15 U.S.C. §§ 3332, 3342(c), 3346(d)(2), 3417 (1982)) (veto by concurrent resolution over reimposition of natural gas price controls by President).

82 The rule embraced by the Court in *Champlin* is that invalid portions of a statute should be severed "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1931).

held invalid.[83] The revised formulation forces courts to answer a hypothetical question. In *Chadha,* however, the Court managed a convincing answer. The Court's severability formulation will lead courts to find most legislative veto provisions severable because of the burdensome nature of the duties Congress has delegated to the executive branch and agencies in many of the statutes that contain legislative vetoes. When Congress enacted the statutes that contain legislative vetoes, it faced a choice between retaining legislative authority or delegating. Congress presumably chose to delegate to the agencies in many of these situations because it faced pressing matters of greater national import and would have found it difficult to conduct the detailed investigations, hearings, and rulemaking proceedings that prudent lawmaking requires and that administrative agencies are able to conduct.[84]

The Court in *Chadha* focused on the burdensome nature of this technical, time-consuming, detailed work and argued that "Congress' desire to retain a veto in this area cannot be considered in isolation but must be viewed in the context of Congress' irritation with the burden."[85] This "irritation" is not unique to immigration cases; it extends to most of the areas in which Congress has chosen to delegate. Thus, with respect to most statutes, if Congress had faced a choice of delegating without the veto or retaining complete legislative control, it would normally have elected to delegate.

The third reason that most legislative provisions will be severable after *Chadha*[86] is that most statutes that contain legislative vetoes will remain workable without the legislative veto. Because the legislative veto provisions pertain only to review of administrative action, agencies can continue to perform the work delegated to them even after a court invalidates the legislative veto provisions of the authorizing legislation.

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83 The Court determined that the veto provision in the Act was severable on the grounds that "there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that § 244(c)(2) would be held unconstitutional." *Chadha,* 103 S. Ct. at 2775.

84 The sloppy performance of the House in reviewing the suspension of deportation orders from which the *Chadha* case arose suggests that Congress is incapable of effectively reviewing administrative actions through the legislative veto system. The last minute, hastily considered House vote, unaccompanied by any statement of findings and supporting rationale was far less thorough than the proceeding conducted by the INS. The INS proceedings consisted of an investigation, hearings, and filings by Chadha, culminating in a written report. Because of the time-consuming nature of conducting such detailed proceedings on a wide variety of individual petitions, Congress would, as Justice White noted, face a "hopeless task" if it could not delegate such chores to the executive. *Id.* at 2793 (White, J., dissenting).

85 *Id.* at 2775.

86 Most lower court decisions prior to *Chadha* held legislative veto provisions severable. *See, e.g.,* Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. and cert. denied,* 103 S. Ct. 3556 (1983); Chadha v. Immigration & Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), *aff'd,* 103 S. Ct. 2764 (1983). *But see* American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982); McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978).

The Court, in *Chadha,* considered in particular the consequences that invalidating the legislative veto would have on agencies. The Court noted that the provisions of the Act that require the Attorney General to report all suspensions of deportation to Congress would remain valid and Congress could still review the Attorney General's actions before they took effect. The only difference is in the form of action taken pursuant to such review; Congress must now enact legislation and present it to the President for his approval rather than merely passing a resolution to reverse the Attorney General's decision.[87]

Even under the majority's analysis, which favors severability, certain legislative vetoes that are contained in statutes that delegate extraordinary authority[88] are not severable because Congress probably would not have delegated the authority without the veto. As *Chadha* indicates, such inseverable legislative vetoes may be immune from judicial attack because of standing problems.[89]

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87 *See supra* notes 54-56 and accompanying text.

88 An example is the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) [hereinafter cited as the Home Rule Act], in which Congress established a home rule government for the District, but retained a legislative veto over District actions. Despite the showing of an intent to delegate, the Home Rule Act is notable for its retention of congressional authority over the District. Congress, in fact, dedicated an entire title to reservation of its veto power. Home Rule Act §§ 601-604. The Home Rule Act contains three separate legislative vetoes: a one house veto over any change in the criminal code, Home Rule Act, § 602(c)(2); a veto over any nonemergency district council action by concurrent resolution, Home Rule Act § 602(c)(1); and a veto over any charter amendments if not affirmatively approved by concurrent resolution, Home Rule Act § 303(b).

The legislative history of the Home Rule Act supports the inseverability of the veto provisions from the delegation of authority sections. Both the Senate and House reports emphasized that one of the purposes of the legislation was retention of Congress's authority over the District. The House Report stated that the purpose of the legislation is "to relieve the Congress of the burden of legislating on essentially local matters, but to provide a mechanism to prevent any excesses in the exercise of local governmental authority with respect to the Federal interest." H.R. REP. NO. 482, 93d Cong., 1st Sess. 2 (1973). The Senate report states that: "The constitutional power of Congress over the affairs of the District of Columbia would be retained and the Charter Act provides for a Congressional veto by either the House of Representatives or the Senate of any act of the city Council." S. REP. NO. 219, 93d Cong., 1st Sess. 1 (1973).

The legislative history, together with the provisions of the Home Rule Act, provide convincing evidence that Congress would not have granted home rule to the District of Columbia without the legislative veto. Accordingly, because the unconstitutional legislative veto provisions cannot be severed from the remainder of the Home Rule Act, the entire scheme of home rule for the District as it now stands is invalid. Another example of a delegation of extraordinary authority in which the legislative veto provision is inseverable is the Federal Salary Act, 2 U.S.C. §§ 351-361 (1982), under which Congress delegated to the President the authority to adjust civil service pay scales subject to a legislative veto. *See* 2 U.S.C. § 359 (1982). Prior to *Chadha,* a lower court found the legislative veto in the Federal Salary Act inseverable and, therefore, denied a challenge to the veto of a pay increase. McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1976), *cert. denied,* 434 U.S. 1011 (1978). In light of the extraordinary authority delegated under the Act, the decision was correct.

89 *See supra* notes 40-45 and accompanying text.

Whether a particular legislative veto can be challenged after *Chadha* will depend on the nature of the statute containing the veto provision. The following discussion of standing and its relationship to severability uses two criteria to classify legislative veto statutes and to determine which statutes will remain safe from a *Chadha* challenge because of standing defects. The first criterion is whether the legislative veto provision in the statute is severable. The second criterion is whether the statute operates only to confer benefits, such as the Immigration and Nationality Act, or whether the statute also regulates behavior and, therefore, requires governmental enforcement actions. The matrix of these two criteria determines whether severability and standing considerations will preclude judicial review of legislative veto provisions.

1. *Severable Benefit Statutes*

A party will have standing to challenge a legislative veto provision if the provision is severable and contained in a statute that operates only to confer benefits. This, of course, was the precise nature of the statute involved in *Chadha*. The plaintiff sought a benefit conferred by the statute, namely the suspension of a deportation order, and the Court found the legislative veto in the statute severable. Because the statutory provisions that allowed the Attorney General to grant relief remained valid after the veto provision was severed, Chadha had standing to challenge the House veto and enforce the benefits he had obtained from the Attorney General's order suspending deportation.

2. *Severable Regulatory Statutes*

Regulatory statutes that contain severable legislative vetoes will also be subject to attack after *Chadha*. Normally, when Congress vetoes a regulatory action, it has acted at the behest of the regulated parties, who thus have no reason to challenge the legislative veto.[90] Parties interested in rigorous regulatory action such as consumer and environmental groups, however, may desire to challenge the veto. These groups have a judicially cognizable interest in rigorous enforcement of regulatory statutes,[91] and will have standing to challenge a legislative veto because the statutory authority for the regulatory action they seek to vindicate is severable from the legislative veto. In *Consumer Energy Council of America*

90 Used car dealers, for example, persuaded Congress to veto an FTC regulation requiring certain disclosures in the sales of used cars. *See* Consumers Union of U.S. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

91 *See* Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. and cert. denied,* 103 S. Ct. 3556 (1983); *see also* Consumers Union of U.S. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd mem. and cert. denied,* 103 S. Ct. 3556 (1983).

v. Federal Energy Regulatory Commission,[92] for example, Congress vetoed a new natural gas price regulation that the Federal Energy Regulatory Commission (FERC) had promulgated, and the FERC complied with the veto by withdrawing the regulation. Consumer groups that favored the regulation challenged the legislative veto. The court found the legislative veto invalid and severable, and reinstated the regulation.[93]

Because severability permits a court to strike out an invalid provision such as the legislative veto without requiring Congress to enact new legislation, its impact on both regulatory statutes and statutes that confer benefits extends beyond the standing issue. Given that the authority delegated to an agency will generally be found severable from the legislative veto, the agencies can continue to exercise the authority delegated and will be able to enforce regulatory actions even if Congress attempts to veto the action. A defendant to such an action could not rely on a congressional veto because the veto would be invalid and the agency authority for the regulatory action is severable from the veto. Administrative agencies could obviate the need for litigation to challenge future legislative vetoes and concern over potential standing challenges if they simply refused to comply with future legislative vetoes.[94]

3. *Inseverable Regulatory Statutes*

When a regulatory statute contains an inseverable legislative veto, a party favoring a regulatory action under the statute will not have standing to challenge a legislative veto of that action. In contrast, a defendant to an enforcement action based on regulatory action Congress does not veto should have standing to assert a *Chadha* challenge against a regulatory statute containing an inseverable legislative veto.

A congressional veto of a new regulatory action authorized by a

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92 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. and cert. denied*, 103 S. Ct. 3556 (1983).

93 FERC had contended that the groups could not challenge the veto because it had withdrawn the regulation, thereby making the veto of the regulation moot. The court rejected this assertion and allowed the Consumer Energy Council to challenge the veto. 673 F.2d at 445.

94 The preferable course is for administrative agencies to disregard future legislative vetoes. Despite the absence of standing difficulties, litigation to force an agency to pursue a regulatory course may prove difficult. In *Chadha*, it was a simple matter for the Court to order the Attorney General not to deport Chadha. It is more difficult for a court to order an agency to enforce a set of regulations. In *Consumer Energy Council*, for example, the court found the legislative veto invalid and ordered the withdrawn regulations reinstated on the narrow ground that FERC's withdrawal of the regulations did not comply with the Administrative Procedure Act. 673 F.2d at 445. The court did not address the question of whether FERC could have complied with the legislative veto if its withdrawal of the regulations had been in accordance with the Administrative Procedure Act. *Id.* Courts should adopt a rule that agencies cannot comply with legislative vetoes. Such a rule is necessary to make the Court's decision in *Chadha* completely effective. In Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983), a court invalidated regulations an agency promulgated after making several revisions in response to legislative vetoes.

statute from which the veto provision is inseverable cannot be challenged by a group that favored the action. A successful attack on the veto provision will necessarily invalidate the statutory authority for the action. Because the interested group could not hope to reinstate the vetoed regulatory action, it would not have standing to challenge the veto. For example, a party that favored an action of the District of Columbia's government subsequently vetoed by Congress under the Home Rule Act would not have standing to challenge that veto. The authority for the local District government to legislate on local matters is not severable from Congress's legislative veto of its actions.[95] Thus, invalidating the legislative veto would also invalidate the District's authority and preempt the basis upon which a party favoring a local government action could seek relief.

Courts, however, can enforce the *Chadha* decision in the case of inseverable regulatory statues by blocking any governmental enforcement actions under the statute. For example, consider a case in which the District of Columbia council passes a law authorizing certain condemnations. A defendant resisting a condemnation proceeding could argue that the legislative veto provisions are invalid and inseverable from the enabling provisions in the Home Rule Act.[96] Because the entire Home Rule Act would be invalid if the defendant prevailed on that point, the District would have no authority to condemn, and the court would have to decline to enforce the condemnation.[97] If courts decline to enforce District council actions on this ground, Congress will be forced to enact a new District charter.

Courts might hesitate to allow a *Chadha* challenge to a governmental action, such as that in the above hypothetical, when Congress has not even exercised the veto power.[98] Courts should hear such chal-

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95 *See supra* note 88.

96 *See id.*

97 *See* Equal Employment Opportunity Comm'n v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed for want of jurisdiction,* 52 U.S.L.W. 3889 (1984). In *Allstate,* the EEOC filed suit under authority that had been granted through a reorganization plan. The act authorizing the reorganization contained a legislative veto. The court found the veto invalid and inseverable and, therefore, invalidated the reorganization. Accordingly, the EEOC was without authority to conduct the suit, and the defendant obtained summary judgment. Another district court refused to follow *Allstate,* arguing that the legislative veto in the reorganization plan is severable. Muller Optical Co. v. Equal Employment Opportunity Comm'n, 574 F. Supp. 946, 953 (W.D. Tenn. 1983).

98 Prior to *Chadha,* two courts had refused to consider such a challenge. *See* Clark v. Valeo, 559 F.2d 642, 649 & n.8 (D.C. Cir.) (en banc), *aff'd sub nom.* Clark v. Kimmett, 431 U.S. 950 (1977); Pacific Legal Found. v. Department of Transp., 593 F.2d 1338, 1349 (D.C. Cir. 1979) (refusing to address constitutionality of legislative veto where Congress has not exercised veto). The court of appeals in *Clark* argued that it should not decide the question of the constitutionality of the legislative veto except in a concrete case where Congress had actually exercised the procedure. 559 F.2d at 649. The court noted, however, that if the veto were patently unconstituitonal, it might consider invalidating a statute even where Congress had not exercised the veto. *Id.* at 649 n.8.

lenges, however, because the veto has a "two-edged" effect that taints all actions taken under the authority of a statute that contains an inseverable legislative veto.[99] One effect, of course, is when Congress actually vetoes an agency decision. In addition, the mere possibility of a veto, also allows Congress to influence administrative decisions even when it ultimately does not exercise the power. The "two-edged" effect will be most profound if Congress continues to exercise the power. The strongest case for a *Chadha* challenge would occur if Congress vetoes a set of regulations and the agency responds with new regulations. A defendant to an enforcement action could convincingly argue that the new regulations were tainted by unconstitutional influence, and are therefore invalid.[100]

4. *Inseverable Statutes that Confer Benefits*

In the case of inseverable statutes that only confer benefits, standing considerations will completely bar judicial review of legislative veto provisions. If, for example, the Court in *Chadha,* had found the legislative veto inseverable from the remainder of the Act, Chadha could not have challenged the House's veto resolution. The Attorney General's authority to suspend deportation proceedings would have been struck down along with the legislative veto. Without that authority in the Attorney General, Chadha could not have obtained the statutory benefit he sought and, therefore, would not have had a redressable injury. Furthermore, the analysis suggested above for challenging inseverable regulatory statutes is not applicable to statutes that confer benefits: because the government has no reason to pursue enforcement actions with regard to statutes that only confer benefits, no opportunity is provided to assert such a defense. Ultimately, no party stands to gain relief or escape injury by invalidating such a statute in its entirety and, thus, no party has standing to challenge inseverable legislative vetoes contained within the statute.[101]

The Federal Salary Act illustrates this situation.[102] In the Salary

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99 *See* Clark v. Valeo, 559 F.2d 642; 667 (D.C. Cir.) (en banc) (opinion of Robinson, J., dissenting), *aff'd sub nom.* Clark v. Kimmett, 431 U.S. 950 (1977); *see also* Nathanson, *supra* note 76, at 1091 ("The threat of veto may also deflect the administrative agencies away from objective consideration of . . . issues toward bargaining processes with congressional committee staffs who may or may not reflect the majority views of the Congress.").

100 In Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983), the court invalidated regulations that controlled public access to Watergate materials. Congress had vetoed four prior sets of regulations and the court therefore found the fifth set irreparably tainted by improper congressional interference. 578 F. Supp. at 969.

101 The INS brief in *Chadha* pointed out the danger of denying standing on this ground. "[T]he reasoning . . . is not limited to Section 244; following their logic, a legislature could insulate *any* unconstitutional aspect of a benefit program from challenge simply by specifying that the constitutionally dubious aspect is not severable from the remainder of the program." Brief for INS at 75, Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983).

102 *See supra* note 88.

Act, Congress delegated to the President the authority to adjust the civil service pay scales, subject to a legislative veto.[103] In light of the extraordinary authority delegated under the Act, the legislative veto probably is not severable from the delegation.[104] Accordingly, if Congress vetoed a proposed salary increase, a civil servant aggrieved by the veto could not challenge the veto in court without also challenging the President's authority to propose pay increases. Without the statutory basis upon which to base the remedy, the court could not order the pay increase to take effect.

Because no party will have standing to challenge legislative vetoes deemed inseverable from statutes that confer benefits, the future of those legislative vetoes is a matter for the political branches to resolve. If Congress remains stalwart, these legislative vetoes may survive. Congress should, however, comply with *Chadha* by enacting new legislation to replace statutes conferring benefits that contain inseverable legislative vetoes.

CONCLUSION

In *Chadha* the Court invalidated a congressional action that was poorly considered and unfair to Chadha, a resident alien. The Court characterized the legislative veto as a short cut around the constitutional requirements for legislation.

The effect of the Court's decision may be muted, however, if Congress continues to contest the validity of the legislative veto. Nevertheless, the Court's approach to severability should reduce the possibility that future litigation over the legislative veto will become mired in arguments over the presence or absence of standing. Courts should continue to view severability and standing issues flexibly so that future legislative vetoes do not evade judicial review.

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103 2 U.S.C. § 359 (1982).

104 *See supra* note 88.