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Severing the Legislative Veto Provision: The Aftermath of *Chada*

INTRODUCTION

On June 23, 1983, the Supreme Court ruled that congressional veto provisions violate the Constitution because they fail to meet the requirements of presentment and bicameralism set forth in Article 1, Section 7 of the United States Constitution.¹ That decision swept aside a fifty year old device found in more than two hundred statutes.² In one fell swoop, the Supreme Court's decision struck down provisions in more laws enacted by Congress than the Court had cumulatively invalidated in its history.³ Unless Congress acts to amend these statutes, courts will be asked to determine whether a congressional veto provision is severable from its framework.⁴

A congressional veto provision, hereinafter referred to as a veto provision, is a mechanism employed by Congress to control the exercise of certain authority it delegates to the executive branch.⁵ The veto provision has allowed Congress to delegate extensive and sweeping powers to the executive, thus facilitating the administration of complex and pervasive laws.⁶ One example of veto provision can be found in the Congressional Budget and Impoundment Control Act of 1974.⁷ This Act provides that any proposed deferral of budget authority, which was provided for a specific project or purpose, may be disapproved or vetoed by an impoundment resolution

1. *Immigration and Naturalization Serv. v. Chada*, 103 S. Ct. 2764 (1983). In *Chada*, the Supreme Court ruled on the constitutionality of the congressional veto. For a discussion of the congressional veto, see Schwartz, *Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978).

2. Smith & Struve, *Aftershock of the Fall of the Legislative Veto*, 69 A.B.A.J. 1258 (1983) [hereinafter cited as Smith].

3. *Chada*, 103 S. Ct. at 2792-93 (White, J., dissenting).

4. See Smith, *supra* note 2, at 1261.

5. *Id.*

6. Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 462, 462 (1977) [hereinafter cited as Javits].

7. 31 U.S.C. § 1403 (1976). The following is the test of the veto provision in the Budget Impoundment Control Act:

Disapproval of proposed deferrals of budget authority

(a) Transmittal of special message.

Whenever the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States or any officer or employee of the United States proposes to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message specifying—

- (1) the amount of the budget authority proposed to be deferred;
- (2) any account, department, or establishment of the Government to

of either house.⁸

The issue whether a veto provision is severable is extremely important because it will determine whether the remainder of the statute is valid after it is excised.⁹ If a veto provision is severable, the remainder of the statute may remain intact as law.¹⁰ If, however, it is not severable, the remainder of the statute would also be declared unconstitutional.¹¹ As a result, the tests used to determine severability will affect the validity of over two hundred statutes.¹²

Because the issue of severability of veto provisions is so important, and its effects will be so wide-spread, the tests applied to determine whether a veto provision is severable should be closely scrutinized. As veto provisions are challenged by private parties and governmental agencies, the courts will have to determine whether those provisions can be severed, and if their statutory framework is constitutional without the veto provision. This Comment is divided into three sections. First, it will provide a background and history of the veto provision. Second, it will assert that

which such budget authority is available for obligation, and the specific projects or governmental functions involved;

(3) the period of time during which the budget authority is proposed to be deferred;

(4) the reasons for the proposed deferral, including any legal authority invoked by him to justify the proposed deferral;

(5) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed deferral; and

(6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, and considerations in terms of their application to any legal authority and specific elements of legal authority invoked by him to justify such proposed deferral, and to the maximum extent practicable, the estimated effect of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

A special message may include one or more proposed deferrals of budget authority. A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate.

(b) Requirement to make available for obligation.

Any amount of budget authority proposed to be deferred, as set forth in a special message transmitted under section (a) of this section, shall be made available for obligation if either House of Congress passes an impoundment resolution disapproving such proposed deferral.

(c) Exception

The provisions of this section do not apply to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message required to be transmitted under Section 1402 of this title.

8. *Id.*

9. *See generally* Smith, *supra* note 2. If an unconstitutional provision of a statute cannot be severed the entire statute must fail.

10. *Id.*

11. *Id.*

12. *Id.*

the test recently applied by three courts¹³ to determine the severability of veto provisions is inadequate to make a proper determination of the issue. Third, this Comment will propose an alternative test which is better suited to adequately determine whether a veto provision should be severed. It should be noted that this Comment will not address the issue of the constitutionality of veto provisions.¹⁴

I. BACKGROUND

In 1932, the first veto provision was used by Congress. Since that time, 320 veto provisions have been inserted in 210 different statutes.¹⁵ Congress has progressively increased its use of the congressional veto since its first application. The following table will give some indication of the increasing frequency with which Congress has employed veto provisions.

<i>Years</i>	<i>Statutes Affected</i>
1932 - 1939	5
1940 - 1949	19
1950 - 1951	34
1960 - 1969	49
1970 - 1975	163 ¹⁶

In 1983, the Supreme Court declared one form of the congressional veto unconstitutional in *INS v. Chada*.¹⁷ In *Chada*, the Supreme Court affirmed a decision of the Ninth Circuit¹⁸ which held Section 244(c)(2) of the Immigration and Naturalization Act (INA)¹⁹ unconstitutional. In its decision, the Supreme Court em-

13. The three courts used as examples in this Comment (1) *Chada*, 103 S. Ct. 2764 (1983); (2) *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (1982); and (3) *30 Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425 (1982) were chosen for two reasons: (1) They represent the current test which is being applied by the courts to determine severability, and (2) because they provide a clear indication of why the test they used to determine severability are inadequate.

14. *Chada*, 103 S. Ct. 2764 (1983). The issue of the constitutionality of veto provisions has already been decided.

15. See generally Smith, *supra* note 2.

16. *Chada*, 103 S. Ct. at 2781. This table provides an indication of how Congress has increasingly relied on the legislative veto. It has become one of the most important legislative tools used by Congress to control the implementation of statutes.

17. *Chada*, 103 S. Ct. 2764.

18. *Chada v. Immigration and Naturalization Serv.*, 634 F.2d 408 (1980). The Ninth Circuit Court of Appeals declared § 244(c)(2) of the Immigration and Naturalization Act, unconstitutional and severable from the rest of the statute. See *infra* note 19 for an explanation of the I.N.A.

19. Immigration and Naturalization Act, 8 U.S.C. § 244(c)(2) (1979). The Immigration and Naturalization Act established rules and regulations to regulate immigration. The statute gave the Attorney General the authority to suspend the deportation of an alien. However, § 244(c)(2) provided that the decision of the Attorney General could be vetoed by a resolution of one house of Congress:

(c) Fulfillment of requirements of subsection (a); report to Congress.

phasized that the "congressional veto" constituted legislative action.²⁰ The Court stated that the veto provision in Section 244(c)(2) of the INA was a mechanism used by Congress to compel an official of the executive branch to act.²¹ The Court further argued that the only way Congress could compel such action is to pass legislation.²² Since the veto provision performed the function of legislation it had to meet the requirements of Article I, Section 7 of the Constitution,²³ which requires that "every bill which shall have passed the House of Representatives and the Senate shall, before it becomes law be presented to the President of the United States" ²⁴ Thus, Court ruled that the veto provision in the INA was unconstitutional. It is important to note that the Court also declared that since the veto provision did not comply with the requirements of

(1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. 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. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the 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 or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(3) In the case of an alien specified in paragraph (2) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the House Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

20. *Chada*, 103 S. Ct. 2764 at 2785. The Court stated that a veto provision constituted legislative action since it served to compel an executive officer to act in a certain way. Since this could only be done by legislation the veto provision assured the function of legislation.

21. *Id.*

22. *Id.*

23. *Id.*

24. U.S. CONST. art. I, § 7, cl. 2. This section is popularly known as the presentment clause. It requires that all legislation passed by Congress be presented to the President for his approval or veto. In order for a statute to take effect it must comply with the requirement of Article I, Section 7.

Article I, Section 7, the provision was unconstitutional because it violated the requirements of bicameralism and separation of powers.²⁵

The invalidation of the veto provision in *Chada*²⁶ will probably reach similar veto provisions in other statutes, since by their nature all veto provisions would have to meet the requirements of Article I, Section 7.²⁷ Since the veto provisions have “the purpose and effect of altering the legal rights and duties of persons” by compelling or restricting action, they constitute legislation and as such must meet the requirements of Article I, Section 7.²⁸

In *Consumer Energy Council of America v. Federal Energy Regulatory Commission, (CECA)*²⁹ the constitutionality of the veto provision in the Natural Gas Policy Act of 1978³⁰ was challenged. The court of appeals held that the provision did not require the concurrence of the Senate or the approval of the President.³¹

In *American Federation of Government Employees v. Pierce, (AFGE)*³² the same court which decided *CECA*³³ ruled that a veto provision in the Housing and Urban Development Appropriation Act³⁴ was unconstitutional.³⁵ The court cited their opinion in *CECA*³⁶ and stated the veto provision failed to meet the presentment requirements of Article I, Section 7,³⁷ and was unconstitutional.³⁸

As a result of the Supreme Court’s decision in *Chada* and the court of appeals decisions in *CECA*³⁹ and *AFGE*,⁴⁰ executive agencies and private parties will challenge other statutes containing veto provisions when the exercise of a veto provision adversely affects their interests. The federal courts may be called upon to rule on the

25. *Chada*, 103 S. Ct. 2764 at 2786-87.

26. *Chada*, 103 S. Ct. 2764.

27. *Id.* at 2784-85; *see also* Smith, *supra* note 2, at 1260. It can be asserted that the decision in *Chada* could be applied to other forms of congressional vetoes. None of the congressional vetoes used requires that the veto action taken by Congress be presented to the President. As a result, they will probably be ruled unconstitutional.

28. *Chada*, 103 S. Ct. at 2764; *see also* Smith, *supra* note 2, at 1260.

29. 673 F.2d 425 (1982).

30. 15 U.S.C. §§ 3301-3342 (1976). The NGPA directs the Federal Energy Regulatory Commission to implement pricing programs relating to natural gas.

31. *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm’n*, 673 F.2d 425, 448 (1982).

32. 697 F.2d 303 (1982).

33. 673 F.2d 425 (1982).

34. Housing and Urban Development Act, 96 Stat. 1160 (1983).

35. *AFGE*, 697 F.2d 303, 306 (1982).

36. 673 F.2d 425 (1982).

37. *AFGE*, 697 F.2d at 306.

38. *Id.*

39. 373 F.2d 425 (1982).

40. 697 F.2d 303 (1982).

constitutionality of a wide variety of statutes⁴¹ which contain veto provisions, including the War Powers Act⁴² and the Congressional Budget and Impoundment Control Act of 1974.⁴³

Once a veto provision is found to be unconstitutional, the issue of severability must be addressed to determine whether the remainder of the statute is valid without it.⁴⁴ The tests applied by a court to make this decision are of paramount importance since they will determine the approach of the court and the outcome of its decision.

This Comment will now turn to examine the origin of the test applied by the three courts⁴⁵ mentioned above, in determining whether a veto provision could be severed. It will then examine the tests applied by the three courts to determine the severability of their respective veto provisions.

II. ORIGINS OF TESTS TO DETERMINE THE SEVERABILITY OF A STATUTORY PROVISION

The tests⁴⁶ adopted by the courts in *Chada*,⁴⁷ *AFGE*,⁴⁸ and *CECA*⁴⁹ to determine the severability of veto provisions were derived from a line of cases which created rules for determining the severability of a statutory provision.⁵⁰ These rules applied to the severability of unconstitutional provisions in general.⁵¹

In *Champlaine Refining Co. v. Corporation Commission*,⁵² the Supreme Court established the rule that an unconstitutional provision of a statute could be severed unless: (1) it was evident that the legislature would not have enacted the constitutional provisions independently from the unconstitutional provisions, and (2) the remaining portions of the statute, after the excise of the unconstitutional provision, would be fully operative as law.⁵³ In

41. See 103 S. Ct. 2764 for a list.

42. 50 U.S.C. § 2367 (1976). Commonly known as the War Powers Act, this statute allows Congress to control the President's actions regarding the use of United States troops in foreign military operations absent a declaration of war.

43. 31 U.S.C. § 1403 (1976).

44. See *supra* notes 10-13 and accompanying text.

45. *Chada*, 103 S. Ct. 2764 (1983); *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (1982); *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425 (1982).

46. See *infra* notes 69-108 and accompanying text.

47. *Chada*, 103 S. Ct. 2764.

48. 697 F.2d 303 (1982).

49. 673 F.2d 425 (1982).

50. See *infra* notes 52-65 and accompanying text.

51. The rules discussed here refer to the tests applied by courts to sever unconstitutional provisions of statutes. Veto provisions were not considered unconstitutional until *Chada*, 103 S. Ct. 2764.

52. 286 U.S. 210 (1932). In *Champlaine*, the court was concerned with severing a provision of a statute which they found unconstitutional.

53. *Id.* at 233-35.

Carter v. Carter Coal,⁵⁴ the Supreme Court refined the test applied in *Champlaine*.⁵⁵ The Court stated that legislative intent should be the governing factor used to determine severability.⁵⁶ The Court defined the test by stating that the statutory construction and legislative intent should be used to determine whether an unconstitutional provision of a statute must fall.⁵⁷ The tests for severability were further developed in *Electric Bond and Share Co. v. S.E.C.*⁵⁸ In *Electric Bond*, the Court stated that the test applied to determine if an unconstitutional provision of a statute should be severed must perform two functions. First, it should examine whether the unconstitutional provision and the remainder of the Act are so interwoven with each other that their separation would be inherently difficult.⁵⁹ Second, the test should look to the statute to see if it contains a severability clause.⁶⁰

According to *Electric Bond*, there is a presumption against severability of statute, if it does not contain a severability clause.⁶¹ Thus, the presence or absence of such a clause would be a significant factor in determining whether a provision of a statute is severable.⁶²

In 1976, the Supreme Court in *Buckley v. Valeo*,⁶³ interpreted the rules which had previously been established regarding the severability of unconstitutional provisions.⁶⁴ The Court emphasized that legislative intent is the key test which should be used to determine if a provision of statute may be severed.⁶⁵

All of the above-mentioned tests cite legislative intent as the key element in determining whether a provision of a statute may be severed. This Comment will now examine how these tests were applied to decide the issue of whether a veto provision is severable, and why they are inadequate to make that determination. It is important to note that until the Ninth Circuit decided *Chada*, no court had ever dealt with the problem of whether a veto provision was severable.

54. 298 U.S. 238 (1936). In *Carter*, the court further refined the tests for severability. They clarified the test used in *Champlaine*.

55. 286 U.S. 210 (1932).

56. 298 U.S. 238 (1936).

57. *Id.*

58. 303 U.S. 419 (1938). In *Electric Bond*, the court decided on the severability of a provision of the Public Utility Holding Co. Act of 1935, 15 U.S.C.A. § 79 (1982).

59. *Id.* at 434-35.

60. *Id.*

61. *Id.*

62. *Id.*

63. 424 U.S. 1 (1976). *Buckley* reaffirmed the rules in *Electric Bond*, *Champlaine*, and *Carter*.

64. *Id.* at 75.

65. *Id.*

III. TESTS APPLIED BY THE THREE COURTS TO DETERMINE THE SEVERABILITY OF A CONGRESSIONAL VETO

In *Chada*, the Supreme Court had to decide whether Section 244(c)(2) of the INA⁶⁶ was severable. Section 244(c)(2) provided that Congress could “veto” the decision of the Attorney General not to deport an alien.⁶⁷ After applying a multi-faceted test the Court held that section 244(c)(2) was severable and that the remainder of the statute was valid.⁶⁸

The first part of the test established by the Court stated that there is a presumption in favor of severability if a statute contains a severability clause.⁶⁹ Citing *Buckley v. Valeo*,⁷⁰ the Court stated that “invalid portions of statutes are to be severed unless it is evident that the legislature would not have enacted those provisions which are constitutional, independently from those which are not.”⁷¹ The Court then cited the presence of section 406, a severability provision in the INA⁷² to show that Congress clearly intended the remainder of the act to be valid if any particular provisions were held invalid.⁷³ The question as to what the Court would do when there was no severability clause was not addressed.

In the second part of the test the Court looked at the legislative history of the INA,⁷⁴ in an attempt to derive the legislative intent.⁷⁵ After reviewing the legislative history of the INA,⁷⁶ the Court concluded that any evidence present in that history tending to show that the veto provision should not be severed was insufficient to rebut the presumption created by the presence of section 406.⁷⁷ This is indicative of the great weight the Court gave to the presence of a severability clause.

66. 8 U.S.C. § 244(c)(2) (1976). Section 244(c)(2) is the veto provision of the INA. It provides that Congress could veto a decision of the Attorney General to suspend the deportation of an alien by passing a resolution in the House. *See supra* note 19 for copy of § 244(c)(2).

67. 8 U.S.C. § 244(c)(2).

68. *Chada*, 103 S. Ct. 2764.

69. *Id.* at 2774.

70. 424 U.S. 1 (1976).

71. *Chada*, 103 S. Ct. 2764, 2774 (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)).

72. 8 U.S.C. § 406. This provision which is popularly known as a severability clause, stated that if any section of the INA was declared unconstitutional it should be severed. The Court used the presence of this provision to show that Congress intended the INA to be severable.

73. *Chada*, 103 S. Ct. at 2774. The Court emphasized the importance of the presence of the severability clause.

74. 8 U.S.C. 244(c)(2).

75. *Chada*, 103 S. Ct. at 2775. The Court looked to the comments of members of the House of Representatives and to committee hearings to gain insight into legislative intent.

76. The Court in *Chada* discussed the legislative history of the INA at length.

77. 8 U.S.C. § 406.

The final facet of the test used in *Chada* inquired into whether the statute, absent the veto provision, is "fully operative as law."⁷⁸ It is important to note that in applying this test, the Court inquired into whether the remainder of the statute, absent the excised portion⁷⁹ would be a workable administrative mechanism.⁸⁰ The Court did not look at whether the remainder of the statute was constitutional⁸¹ on its own absent the veto provision. It should be emphasized that the Court in *Chada* relied heavily on the presence of a severability clause in making their decision.⁸² They did not provide guidance in how to deal with a statute which did not contain such a clause.

In *Consumer Energy Council of America v. Federal Energy Regulatory Commission*,⁸³ the court of appeals looked to the legislative history and intent behind the Natural Gas Policy Act.⁸⁴ They then applied the test found in *United States v. Jackson*,⁸⁵ to determine if "Congress would have enacted the remainder of a statute without the unconstitutional provision."⁸⁶ After recognizing the existence of conflicting views as to what the actual legislative history and intent behind the Natural Gas Policy Act of 1978 were, the court ruled that Congress would have enacted the rest of the statute absent the "veto" provision,⁸⁷ and as a result the provision was ruled to be severable.

The Natural Gas Policy Act,⁸⁸ unlike the Immigration and Naturalization Act⁸⁹ dealt with in *Chada*,⁹⁰ did not contain a severability clause.⁹¹ Its presence indicates congressional intent that invalid parts should be excised and the remainder enforced.⁹² As evidenced by the Natural Gas Policy Act,⁹³ not all statutes contain a severabil-

78. *Chada*, 103 S. Ct. at 2775.

79. *Id.* at 2775-76. In looking at the question whether the remainder of the INA was fully operative, the Court centered its argument around whether the remaining portion of the statute could survive as an administrative mechanism. The analysis did not examine the question of the constitutionality of the surviving portions of the statute.

80. *Id.* at 2775.

81. *Id.*

82. *Id.* at 2775.

83. 673 F.2d 425 (1982).

84. 15 U.S.C. §§ 3301-3342 (1976).

85. 390 U.S. 570, 585 n.27 (1967).

86. *CECA*, 673 F.2d 425, 442 (1982). The court applied this test to determine legislative intent. It is the same test found in *Champline*.

87. *Id.* The Natural Gas Policy Act did not contain a severability clause.

88. 15 U.S.C. §§ 3301-42 (1976).

89. 8 U.S.C. § 224(c)(2) (1979).

90. 103 S. Ct. 2764 (1983).

91. A severability clause is a provision of a statute through which Congress creates a presumption that the statute is not an integrated whole which must be either sustained in its entirety or held invalid.

92. *Electric Bond and Share Co. v. S.E.C.*, 303 U.S. 683 (1938).

93. 15 U.S.C. §§ 3301-42 (1976).

ity clause.

The court in *Consumer Energy Council of America v. Federal Energy Regulatory Commission*⁹⁴ argued that absent a severability clause there is a presumption against severability.⁹⁵ However, after wrestling with the issue of where the presumption lies, the court disposed of the problem by stating that a presumption for or against severability is not a crucial element in an inquiry to determine legislative intent.⁹⁶ This seems to be in contradiction with the great importance placed on the severability clause in *Chada*.

In *American Federation of Government Employees v. Pierce*,⁹⁷ the same court that decided *CECA*⁹⁸ held that a veto provision in the Housing and Urban Development Appropriations Act⁹⁹ could not be severed from its statutory framework.¹⁰⁰ The court once again looked to the legislative history and intent to determine if Congress would have enacted the remainder of the statute without the unconstitutional provision.¹⁰¹ Although the court applied the same test it used in *CECA*,¹⁰² it arrived at a different result and declared the veto provision of the Housing and Urban Development Appropriations Act¹⁰³ unseverable.¹⁰⁴

The Act empowered the Secretary of Housing and Urban Development to reorganize the department subject to the congressional veto provision.¹⁰⁵ When the Secretary attempted to carry out a reduction in force Congress exercised its veto power to prevent the action.¹⁰⁶ After examining the legislative history and intent of the Act the court determined that Congress would have agreed to the reorganization provisions without the authority to veto the Secretary's actions.¹⁰⁷ The court reasoned that since Congress would not have conferred the power to reorganize the department to the Secretary without the veto provision, the veto provision was not severable from the remainder of the Act.¹⁰⁸

94. 673 F.2d 425 (1982).

95. *Id.* at 488.

96. *Id.*

97. 697 F.2d 303 (1982).

98. 673 F.2d 425 (1982).

99. Housing and Urban Development Act, 96 Stat. 1160 (1983).

100. *AFGE*, 697 F.2d 303, 307 (1982).

101. *Id.* at 307 (1982).

102. 673 F.2d 425 (1982).

103. Housing and Urban Development Act, 96 Stat. 1160 (1983).

104. *AFGE*, 697 F.2d 303, 307 (1982).

105. *Id.* This reorganization provision allowed the executive branch to restructure the department. The court felt that Congress would not have consented to that provision without the veto provision.

106. *Id.* at 307.

107. *Id.*

108. *Id.*

The tests used by these three courts to determine whether a veto provision is severable are not adequate to make a proper determination of whether a veto provision should be severed. By using legislative intent and history to determine if a veto provision is severable, the courts fail to address three significant problems in their analysis.

IV. PROBLEMS WITH APPLYING THE GENERAL RULES OF SEVERABILITY TO CONGRESSIONAL VETO PROVISIONS

There are three main problems with applying the general rules of severability to congressional veto provisions. First, systematic determination of legislative intent is impossible when dealing with a veto provision.¹⁰⁹ Second, a congressional veto provision can be considered a proviso¹¹⁰ and as such will not lend itself to the application of the standard test.¹¹¹ Finally, absent a veto provision, a statute may be void as an unconstitutional delegation of legislative power to the executive.¹¹² These problems are further explained below.

1) The tests used by the courts in *Chada*, *CECA*, and *AFGE* are all based on the general test for severability: the "intent of the legislature."¹¹³ The determination whether a provision of the statute is severable, will depend on how the court interprets the intent of the legislature,¹¹⁴ and more specifically, "[I]f the legislature would have enacted the remaining portion of the statute without the unconstitutional provision."¹¹⁵

One of the inadequacies of this test is the difficulty of determining legislative intent.¹¹⁶ Always a difficult task, the determination of legislative intent is especially hard when dealing with a veto provision because it is not a substantial part of the statute.¹¹⁷ As a result

109. See *supra* notes 83-101 and accompanying text.

110. A proviso is a clause engrafted on an enactment to restrain and modify the enacting clause or to except from its operation something which otherwise would have been included, see *infra* note 140.

111. See *supra* notes 69-108 and accompanying text. All three courts centered their determination around legislative intent.

112. *Id.*

113. See *supra* notes 69-108 and accompanying text.

114. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Electric Bond & Share Co. v. S.E.C.*, 303 U.S. 419 (1937); *Carter v. Carter Coal*, 298 U.S. 238 (1936); *Champline Refining Co. v. Corp. Comm'n*, 286 U.S. 210 (1932).

115. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Electric Bond & Share Co. v. S.E.C.*, 303 U.S. 419 (1937); *Carter v. Carter Coal*, 298 U.S. 238, 242 (1936); *Champline Refining Co. v. Corp. Comm'n*, 286 U.S. 210 (1932).

116. *AFGE*, 697 F.2d 303 (1982). The court recognized the problems with ascertaining legislative intent.

117. A veto provision is not an enacting clause. It does not by itself confer authority. Its function is to allow Congress to control the application of the statute.

there is often a lack of evidence in the legislative history, pertaining to the importance of veto provision.¹¹⁸

In *CECA*,¹¹⁹ the court was faced with two remarkably different interpretations of legislative history and intent of the veto provision in Section 202 of the Natural Gas Policy Act.¹²⁰ In its analysis, the court noted that "legislative history almost always contains contradictory comments about the importance of the section which may be subject to severability."¹²¹ Since the Natural Gas Policy Act¹²² did not contain a severability clause, the court was left without one of the key tools at its disposal to determine legislative intent.¹²³ The presence of a severability clause would have provided the court with an indication that the legislature might have passed the bill without a veto provision.¹²⁴ It is important to note that even if there was a severability clause, it would not provide conclusive evidence of severability.¹²⁵ The court in *CECA*, after examining the facts, determined that the veto provision¹²⁶ was severable.¹²⁷ The presence of conflicting or incomplete information regarding legislative history makes an accurate determination of legislative intent almost impossible. Thus, its effectiveness as a test to determine severability of veto provisions is diminished significantly.

In *Chada*, the Supreme Court also faced the problem of having to determine legislative intent.¹²⁸ Unlike the Natural Gas Policy Act¹²⁹ in the *CECA*¹³⁰ case, the statute in *Chada*¹³¹ did contain a severability clause.¹³² The presence of that clause played a vital role in assisting the majority in deciding that the legislature intended to allow any unconstitutional provision of the INA¹³³ to be severed.¹³⁴

118. There is not a great deal of information regarding the importance of a veto provision in the legislative history. Most of the testimony is usually concerned with the substantive issues of the statutes.

119. 673 F.2d 425, 442 (1982).

120. *Id.*

121. *CECA*, 673 F.2d 425 (1982).

122. 15 U.S.C. §§ 3301-42 (1976).

123. Without a severability clause the court was forced to make a determination of legislative intent without any express language in the statute.

124. *AFGE*, 697 F.2d 303 (1982); *CECA*, 673 F.2d 425 (1982).

125. *AFGE*, 697 F.2d 303 (1982); *CECA*, 673 F.2d 425 (1982). The courts stated that the presence of a severability clause would not be conclusive evidence that a statute should be served.

126. 15 U.S.C. § 202 (1976). The veto provision of the Natural Gas Policy Act was determined to be severable from the rest of the statutes.

127. *CECA*, 673 F.2d at 442-43.

128. *Id.* at 2774.

129. 15 U.S.C. §§ 3303-42 (1976).

130. 673 F.2d 425.

131. 103 S. Ct. 2764 (1983).

132. *Id.* 8 U.S.C. § 406 is the severability clause of the INA. It states that if one section of the statute is declared invalid the rest of the statute should stand.

133. 8 U.S.C. § 406 (1976).

Despite the presence of a severability clause, Justices Rehnquist and White dissented on the grounds that Congress did not intend to allow the veto provision¹³⁵ of the INA to be severed.¹³⁶ In his dissent, Justice Rehnquist stated that “the excepting provision was in the statute when it was enacted, and there can be *no doubt* that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly.”¹³⁷

The problems both the *Chada* and *CECA* courts faced in an attempt to ascertain legislative intent, exemplify the possibility of inconsistency which can result from the application of the legislative intent test in determining the severability of a congressional veto provision. Application of the legislative intent test could result in the creation of a statute which Congress never intended to enact.¹³⁸ Because of the possibility of misinterpretation, and the absence of a clear indication of legislative intent, the court should be wary in applying the legislative intent test to determine if a veto provision is severable.

2) The second problem with the standard tests for severability should not be applied to veto provisions is that a veto provision can be considered as a proviso.¹³⁹ As such, they should be an exception to the general rules for severability.

A proviso is a clause engrafted on an enactment to restrain or modify the enacting clause or to except from its operation something which otherwise would have been within it. It also acts to exclude or prevent possible grounds of misinterpretation. It is designed to prevent an interpretation which extends that statute to cases not intended by the legislature to be brought within its purview.¹⁴⁰ By its very nature a veto provision can be considered as a proviso to the rest of the statute. The function of a veto provision is to allow Congress to exercise post enactment control over the executive.¹⁴¹ It allows them to prevent officials of the executive branch from implementing a statute in a way which is inconsistent with the intent of the legislature.¹⁴² By “vetoing” an act of the executive branch, Congress could insure that any implementation of a statute

134. *Chada*, 103 S. Ct. at 2774-75.

135. 8 U.S.C. § 244(c)(2) (1976).

136. *Chada*, 103 S. Ct. at 2816 (Rehnquist, J., dissenting).

137. *Id.* at 2817, 2764 (emphasis added).

138. *Sprague v. Thompson*, 11 U.S. 90, 95 (1886). Severing a portion of a statute could result in changing that statute to such an extent that the resulting law does not conform to what the legislature originally intended. The legislative intent is so difficult to ascertain that any attempted analysis may give rise to misinterpretation.

139. *See supra* note 110 and accompanying text.

140. *United States v. Morrow*, 226 U.S. 531 (1912); *Minis v. United States*, 40 U.S. 423 (1841).

141. *See Javits, supra* note 6, at 445.

142. *Id.* at 460.

was consistent with the purview of that statute.¹⁴³ The Department of Education Organization Act¹⁴⁴ authorized the Secretary of Education, an executive official, to prescribe rules and regulations as he determines are necessary to administer and manage the functions of the department.¹⁴⁵ The statute also contained a veto provision which stated that rules and regulations promulgated under the Act could be disapproved by a concurrent resolution of Congress.¹⁴⁶ As this example indicates, veto provisions act as provisos to the main body of a statute by allowing Congress to retain control over the implementation of the statute by the executive branch.

Since a veto provision can qualify as a proviso, the rule in *Davis v. Wallace*¹⁴⁷ and *Frost v. Corporation Commission*¹⁴⁸ can be applied to show that the legislative intent test is inadequate to determine if a veto provision should be severed. In *Davis* and *Frost*, the Supreme Court ruled that a proviso could not be severed if it was originally written into the statute.¹⁴⁹ The Court reasoned that severing such a provision would result in an extension of the scope of the statute.¹⁵⁰ Such an extension would be contrary to the legislative intent of a statute by including subject matter which the legislature expressly chose to exclude.¹⁵¹ The *Davis* and *Frost* analysis can be applied to the "congressional veto" because (1) the veto provision can be considered a proviso¹⁵² and (2) severing a veto provision will expand the scope of the statute contrary to legislative intent.¹⁵³ By severing a veto provision the executive branch would be free to expand or limit the scope of a statute through its implementation. Such an expansion or limitation would constitute a defacto contradiction of legislative intent by altering the purview of the statute.¹⁵⁴ A veto provision is a control mechanism.¹⁵⁵ Its mere presence in a statute indicates the legislature's desire to restrict the scope of that stat-

143. *Id.*

144. 2 U.S.C.S. § 3347 (1979).

145. *Id.*

146. *Id.*

147. 257 U.S. 478, 484-85 (1922).

148. 278 U.S. 515 (1929).

149. *Id.* at 525-26.

150. *Id.* at 525, 527. By removing a provision, especially a veto provision, a statute may be altered to such an extent that its scope may be enlarged to include subject matter not intended to be covered.

151. *Id.*

152. *AFGE*, 697 F.2d 303 (1982). In *AFGE* the court classified a veto provision as a proviso. Since a veto provision can be labeled a proviso, the *Frost* analysis can be applied.

153. *Chada*, 103 S. Ct. 2764, 2716-17 (Rehnquist, J., dissenting).

154. *Frost*, 278 U.S. 515 (1929).

155. The veto provision is used as a means to control the implementation of a statute. As a result it is referred to as a control mechanism. Smith & Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A.J. 1258 (1983).

ute.¹⁵⁶ By removing it, the court would affect a fundamental change in the nature of the statute, which was not accounted for when the legislature enacted the law.¹⁵⁷ Because a veto provision is a proviso, its excise from a statute would contradict legislative intent. A test which uses legislative intent to determine if a veto provision is severable could only find that the provision is not severable. Thus, when literally applied, the legislative intent test is not adequate to determine if a veto provision should be severed from its statutory framework.

3) A third problem with the legislative intent test is that it does not address the issue of the constitutionality of the remaining provisions of the statute.

Congress has used the congressional veto as a means to retain control over authority it had broadly delegated to the executive branch.¹⁵⁸ In the past forty years Congress has delegated enormous amounts of legislative authority to the executive branch.¹⁵⁹ The complexities of modern government have led Congress to legislate by declaring broad policy goals and general standards, leaving policy options to the discretion of executive officers.¹⁶⁰ Congress has used the veto provision as a means to ensure its policies are implemented in accordance with legislative intent.¹⁶¹ In the event that a veto provision is severed, the issue whether what remains constitutes an unconstitutional delegation of legislative power must be addressed.

The general rule governing the delegation of legislative power to the executive branch states that: the legislature may not, unless otherwise expressed by the Constitution, delegate legislative functions to the executive officers or bodies.¹⁶² Having established standards, or rules for their guidance it may leave to them matters of administrative detail, including the making of regulations and the determination of fact. Legislative functions include the making of policy as well as the establishment of rules.¹⁶³

Beginning with *Schechter Poultry Corporation v. United States*,¹⁶⁴

156. *Frost*, 278 U.S. 525 (1929). The presence of a proviso in a statute is indicative of the legislature's intent to restrict the scope of the statute. Since a veto provision can be considered a proviso, its presence in a statute is evidence of the legislature's intent to restrict the purview of that statute.

157. *Id.* By changing the statute, the court creates a different law. This new law was not the result which the legislature intended. If a law is changed, the full intent of the legislature could not be followed.

158. See Javits, *supra* note 6, at 463.

159. *Id.* at 459.

160. *Id.*

161. *Id.* at 461-62.

162. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-21 (1935).

163. *Id.*

164. 295 U.S. 495 (1934).

a series of cases established and defined the rules which govern what constitutes an unconstitutional delegation of legislative power. In *Schechter*, the Court stated that Congress is not permitted to abdicate or transfer to others the essential legislative functions with which it was vested.¹⁶⁵ *Panama Refining Co. v. Ryan*¹⁶⁶ stated that Article I, Section 1¹⁶⁷ of the Constitution vests all legislative powers in the Congress.¹⁶⁸ The Court then ruled that Congress could not abdicate or transfer to others essential legislative functions with which it was vested. In 1980, the Supreme Court rulings in *Schechter* and *Panama* were cited in *Industrial Union v. American Petroleum Institute*.¹⁶⁹ In *Industrial Union*, the Court ruled that a statute would be unconstitutional if it made a broad and sweeping delegation of legislative power.¹⁷⁰

The above-mentioned cases established the parameters of what would create an unconstitutional delegation of legislative power. They set out the criteria by which a statute could be tested to see if it in fact did create an unconstitutional delegation of power. If a statute, absent its veto provision delegates power to the executive, which is sweeping or essentially legislative in nature, that statute would be unconstitutional.

The congressional veto has allowed Congress to delegate authority without adopting rules or guidelines for the executive to follow, while still allowing it to retain control over the implementation of the statute.¹⁷¹ As long as Congress maintains control over the actions of the executive branch concerning the promulgation of a statute, it can be argued that there is no sweeping delegation of power or a delegation of an essential legislative function. Absent sufficient congressional control over the implementation of a statute, any delegation of authority which gives the executive branch a free hand to form policies and establish rules may be considered to be a sweeping delegation of fundamental power, and thus unconstitutional. Without the "veto" provision as a control mechanism, Congress may be delegating authority without the required rules or guidelines to make such a delegation constitutional.¹⁷² There are other means

165. *Id.* at 529-30.

166. 293 U.S. 388 (1935).

167. U.S. CONST. art. I, § 1.

168. *Id.* "All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

169. 448 U.S. 607 (1980).

170. *Id.* at 646.

171. See Javits, *supra* note 6. See also Smith, *supra* note 2, at 1258-59.

172. *Panama Refining Co.*, 293 U.S. 388, 420-21 (1935); *Schechter*, 295 U.S. 495 (1934). If Congress cannot retain control over the executive's implementation of a statute through a veto provision, they would have to establish rules and guidelines sufficient enough to allow a delegation of power to be constitutional. If a statute gives the executive branch too much leeway in implementing a law, then they could be considered to

which Congress can employ to control executive action. Congress could use supplemental legislation to restrict an executive interpretation of a statute.¹⁷³ This, however, would be an ineffective method of control. "Legislative power is slower to exercise than executive power. There are inherent delays while the ponderous machinery of committee hearings and debates is put into motion."¹⁷⁴ Since Congress would not be able to legislate fast enough, the executive would be allowed to exercise authority which Congress had no power to delegate to it. As a result, the statute which conveyed such power to the executive branch would constitute an unconstitutional delegation of legislative power.

Had Congress retained the power to "veto" executive actions, *Schechter* and *Panama* may have been decided differently.¹⁷⁵ Absent a veto provision many statutes which had employed the device, when subjected to the tests applied in *Schechter* and *Panama*, may be found unconstitutional.

For the three reasons outlined above the tests applied to determine the severability of a veto provision are inadequate. Legislative intent is hard to determine and can often be misinterpreted. In addition, a congressional veto provision by its nature is a proviso and, as such, was intended by Congress to limit the scope of statutes. Its removal from a statute would result in a change of its purview and, as such, contradict the intent of the legislature. Finally, the legislative intent test does not take into account whether the remainder of a statute absent its veto provision would be an unconstitutional delegation of power to the executive since it would delegate authority without allowing the Congress to retain control.¹⁷⁶

The following is a proposal for an alternative test which would be more appropriate to determine if a veto provision is severable. It would be able to account for the shortcomings of the legislative in-

have assumed functions which are legislative in nature. The presence of rules and guidelines prevents the transfer of legislative power to the executive branch by restricting their freedom of implementation. It also assures that the intent of Congress is followed.

173. *Chada*, 103 S. Ct. 2764, 2785 (1983). The Court is considering whether the veto provision violated the presentment clause stating that Congress could control executive action by passing legislation instead of using the veto provision. They noticed that the Congress could pass additional legislation to prevent or change actions of the executive which did not conform to the legislative intent.

174. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952). The court here commented on the inefficiency of the legislative process.

175. See *Javits*, *supra* note 6. The Court in *Schechter* and *Panama* could have reached different results if the statutes those cases dealt with had contained a veto provision. Applying a reverse analysis it could be argued that a statute absent the veto provision could be considered unconstitutional if it failed to pass the tests established by *Schechter* and *Panama*.

176. See *supra* notes 165-71 and accompanying text.

tent test, and provide a more stable and practical guideline for courts.

V. PROPOSED TEST

The following is a two part test to determine if a veto provision should be severed from its statutory framework. The first part of the test determines whether a statute, absent its veto provision, contains sufficient guidelines to insure that it would not create an unconstitutional delegation of legislative power to the executive branch. This could be accomplished by applying the analysis¹⁷⁷ set forth in *Schechter* and *Panama* to the remaining portions of a statute after a veto provision has been severed. In *Schechter* and *Panama* the Court was able to look at the statutes directly to determine whether there were sufficient guidelines present to allow Congress to delegate authority.¹⁷⁸ If the guidelines in the statute were extensive enough to limit the discretion of the executive and allow Congress to control the policy and intent of the statute, it would be constitutional.¹⁷⁹ A veto provision is an obvious means of overt control, its only function is to insure that the legislature can maintain control over the promulgation of the statute.¹⁸⁰ There may, however, be other guidelines and safeguards present which would be sufficient enough to insure that any delegation of authority by the statute is constitutional.

In *Chada*, part of the test used by the Court to determine severability inquired into whether the remaining portion of the statute would be fully operative as law.¹⁸¹ However, when the Court applied that part of the test, they did not inquire into whether the remainder of the statute would be constitutional. Instead, it centered its analysis on whether the remainder of the statute was a workable administrative mechanism without the veto provision.¹⁸²

177. This refers to the tests applied by those courts to decide what is unconstitutional in delegation of legislative power.

178. *Schechter*, 295 U.S. 495, 541-42 (1934). The Court in these cases looked at the statutes with which they were confronted and decided if there were sufficient guidelines present to warrant the delegation of power by the statute. The benefit of this is that it created an objective test which the courts could apply.

179. *Id.* at 537. The Court stated that if there are sufficient guidelines in a statute to prevent the executive from acquiring unfettered control, the statutes could make a constitutional delegation of legislative power.

180. *See Javits, supra* note 6.

181. *Chada*, 103 S. Ct. 2764, 2775 (1983).

182. *Id.* at 2776. When the Court discussed the part of the test for severability which stated that the statute would have to be fully operative as law absent the veto provision, they did not deal with the issue of constitutionality. The Court's analysis centered around whether the procedures involved would be a practical method for the administration of the statute. The Court noted that since the Attorney General would still have to report to Congress on the suspension of the deportation of an alien, congressional oversight would be preserved. This analysis, however, assumes that Congress

The question whether the statute absent the veto provision was an unconstitutional delegation of legislative power was not addressed.

The application of this part of the test would protect the interests of Congress by restoring to them power and authority they could not surrender or abdicate to the executive. It would also insure that the requirements of Article I, Section 1 of the Constitution are followed.¹⁸³ If the statute does contain sufficient guidelines and restrictions to control its implementation absent the veto provision, the veto provision should be severable. If the statute did not contain such guidelines, the entire statute would have to fail.

If applied, this part of the test would compensate for the shortcomings¹⁸⁴ of the legislative intent test. It would provide the courts with a more lucid and practical test which could be applied with some consistency. If the analysis presented here is applied to the determination whether to sever a veto provision, a more uniform approach would be created for the courts to apply.

The second part of the test should inquire into whether there is another *reasonable* method available to Congress to control the executive's use of the power and authority which Congress delegated to them, absent a veto provision. Since a congressional veto provision is in essence a control mechanism,¹⁸⁵ its removal would create a power vacuum which would be filled de facto by the executive.¹⁸⁶ If the veto provision is to be severed, Congress should be allowed to retain the control it provided for in the statute. The availability of an alternative control measure is essential to allow Congress to exercise its full legislative function.¹⁸⁷

One example of such an alternative would be what has been called the *laying procedure*.¹⁸⁸ This procedure requires that before regulations take effect they must be submitted to Congress to lay on the table for a specified period of time during which Congress may

is able to effectively enforce its intent. The Court failed to present an analysis as to whether the result of severing the veto provision would be an unconstitutional delegation of legislative power.

183. See *supra* notes 164 and 166.

184. See *supra* notes 13-19 and accompanying text.

185. *Frost*, 278 U.S. 525, 526 (1929). A veto provision is a control mechanism, and as such can be considered to be a proviso.

186. If a provision of a statute which limits the discretion of the executive is removed, the executive would be able to expand its control over the implementation of that statute and as such assume power that Congress never intended it should have.

187. See *Javits*, *supra* note 6, at 463. Although Congress cannot abdicate its power, it must be allowed to exercise its authority to its fullest extent. By delegating some authority, Congress is able to increase legislative efficiency and effectiveness.

188. For a discussion on the laying procedure see Boisvert, *A Legislative Tool for the Supervision of Administrative Agencies: The Laying System*, 25 *FORDHAM L. REV.*, 683 (1956) and *Sibbach v. Wilson and Co.*, 312 U.S. 1, 15 (1941).

reject the proposals only by formal legislative enactment.¹⁸⁹ This procedure primarily serves as an information device, which gives Congress time to correct gross violations of congressional intent.¹⁹⁰

It would seem that Congress is in a better position to find alternative means of control. If there is no reasonable alternative means for Congress to maintain control over the implementation of a statute the veto provision should not be severed.¹⁹¹ In such a case the statute would no longer be a workable administrative mechanism since the control exercised by Congress would no longer be present.

The two part test proposed above would provide the courts with a practical guideline to determine if a veto provision is severable, as well as insure that Congress is able to retain adequate control over the authority it delegates.

CONCLUSION

For fifty-one years Congress used the congressional veto as a means to hold executive agencies accountable.¹⁹² In the aftermath of the *Chada* decision, the courts will be faced with deciding if the veto provisions in over two hundred statutes can be severed.

This Comment has shown that the courts in *Chada*, *CECA* and *AFGE* adopted the general tests¹⁹³ for severability to determine whether the veto provision those cases dealt with were severable. Those tests were asserted to be inadequate to properly decide the issue of severability because (1) systematic determination of legislative intent is impossible when dealing with a legislative veto;¹⁹⁴ (2) a congressional veto provision can be considered a proviso and as such will not lend itself to the application of the legislative intent test;¹⁹⁵ and (3) absent a veto provision, a statute may be void as an unconstitutional delegation of legislative power to the executive

189. *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 15 (1941). The laying system would allow executive rules and actions to be presented to Congress and laid on the table for a period of time. If Congress opposed such action, they would then be able to pass legislation to stop it.

190. *See Javits*, *supra* note 6, at 463. It is more efficient in cases of gross error since the passing of corrective legislation would take a great deal of time and effort. As a result, this method may not be applied if the acts of the executive which are disapproved of are not considered to be gross enough to warrant such extensive action.

191. *Chada*, 103 S. Ct. 2764, 2781 (1983). This argument is derived from the *Chada* Court's emphasis on the statute absent its veto provision being a workable administrative mechanism. If Congress has no other reasonable means available to it to control the actions of the executive, then the statute should not be considered a workable administrative mechanism.

192. *See supra* note 16 and accompanying text. The use of the veto provision has steadily increased since its inception in 1932.

193. *See supra* notes 52-78 and accompanying text.

194. *See supra* notes 110-20 and accompanying text.

195. *See supra* notes 142-49 and accompanying text.

branch. The standard test does not address itself to this consideration.¹⁹⁶

The two part test proposed¹⁹⁷ would account for the shortcomings of the test currently applied by the courts.¹⁹⁸ It would inquire into two issues. First, it would look to the statute, absent its veto provision to see if it creates an unconstitutional delegation of legislative power.¹⁹⁹ Second, it would look to see if there was another available method of control which Congress could employ to ensure that the scope of a statute is not expanded.²⁰⁰ This two part test would provide a clear and systematic rule which can be used to determine if a veto provision is severable.

As statutes containing the veto provisions are challenged, the courts will have to deal with a new set of facts and circumstances in their analysis of a severability provision. A practical and uniform rule would aid the courts in deciding on the severability of veto provisions. Without such a rule, Congress would be without guidance on how to proceed with remedial and future legislation.

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196. *See supra* notes 142-49 and accompanying text.

197. *See supra* notes 177-91 and accompanying text.

198. *See supra* notes 66-108 and accompanying text.

199. *See supra* notes 172-91 and accompanying text.

200. *See supra* notes 183-91 and accompanying text.

* This publication is dedicated to Mr. & Mrs. Philip Garubo, who have shown me that all things are possible.