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## THE NUCLEAR WASTE POLICY ACT OF 1982: DOES *IMMIGRATION & NATURALIZATION* *SERVICE v. CHADHA* VETO THE CONGRESSIONAL OVERRIDE?

### I. INTRODUCTION

Congress has used the legislative veto as a procedural device for over fifty years.<sup>1</sup> The veto is a tool used to delegate broad powers through the enactment of legislation while retaining an oversight or review function over the exercise of such delegated power.<sup>2</sup>

In 1983, the Supreme Court held in *Immigration & Naturalization Service v. Chadha*<sup>3</sup> that the legislative veto in the Immigration and Nationality Act (INA)<sup>4</sup> was unconstitutional.<sup>5</sup> It constituted legislative activity; as such, it failed to satisfy the bicameralism and presentment requirements of article I of the United States Constitution.<sup>6</sup>

A multitude of different statutes contain legislative veto provisions.<sup>7</sup> The *Chadha* decision does not necessarily destroy their constitutionality in all cases. Whether a given legislative veto will be held unconstitutional under *Chadha* will depend upon the circumstances and procedures under which it is exercised as enacted in the statute.<sup>8</sup> A court will also have to decide whether the *Chadha* decision should be retroactively applied to the challenged statute.<sup>9</sup> If the legislative veto of a statute is found unconstitutional, the remainder of the statute may be saved if the veto can be severed from the rest of the statute.<sup>10</sup>

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1. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 968 (1983)(White, J., dissenting).

2. See *infra* notes 15-28 and accompanying text.

3. 462 U.S. 919 (1983).

4. 8 U.S.C. § 1254(c)(2) (1982).

5. *Chadha*, 462 U.S. at 959.

6. See *infra* notes 34-35 and accompanying text.

7. Legislative veto provisions are found in statutes dealing with reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 1003 app. (1983)(appendix to opinion of White, J., dissenting) for a list of specific statutes in these areas.

8. See *infra* notes 78-104 and accompanying text.

9. See *infra* notes 46-58 and accompanying text.

10. See *infra* notes 116-157 and accompanying text.

The Nuclear Waste Policy Act (NWPA)<sup>11</sup> was enacted in 1982 to establish programs for the development of safe, permanent disposal repositories for high-level nuclear waste.<sup>12</sup> There is a legislative veto within the NWPA whereby Congress may nullify a host state or Indian tribe's disapproval of their land being recommended for a repository.<sup>13</sup> The question of whether *Chadha* would render this veto provision of the NWPA unconstitutional has never been addressed. It can be argued that *Chadha* does not apply because the Court in *Chadha* interpreted the constitutionality of the veto in the context of delegated authority to the executive branch whereas the NWPA delegates authority to state government and Indian tribes.<sup>14</sup>

This Comment will discuss the legislative veto and its constitutionality following the *Chadha* decision. The NWPA will then be examined to determine whether its legislative veto provision would be constitutional under *Chadha*, whether retroactive application of *Chadha* to the NWPA would be appropriate, and if held unconstitutional, whether the veto provision may be severed from the rest of the NWPA to prevent the entire NWPA's demise.

## II. THE LEGISLATIVE VETO

A legislative veto is a provision in a statute which provides that a particular delegated action will take effect only if Congress does not nullify it<sup>15</sup> by resolution<sup>16</sup> within a specified period of time.<sup>17</sup> Veto provi-

11. 42 U.S.C. §§ 10101-10226 (1982).

12. See Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201, 2201 (codified at 42 U.S.C. §§ 10101-10226 (1982)).

13. See 42 U.S.C. § 10135(c) (1982). "If any notice of disapproval of a repository site designation has been submitted to the Congress . . . such site shall be disapproved unless . . . the Congress passes a resolution of repository siting approval . . ." *Id.*

14. See *infra* notes 78-88 and accompanying text.

15. See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982) [hereinafter cited as INA]. The INA establishes rules and regulations to regulate immigration. See *id.* §§ 1101-1503. The statute gives the Attorney General the authority to suspend the deportation of an alien. See *id.* 1254(a)(1). But, § 1254(c)(2) provides that the decision of the Attorney General can be vetoed by a resolution of one house of Congress. See *id.* § 1254(c)(2).

16. A resolution is the formal expression of the opinion or will of an official body adopted by a vote. A resolution is distinguished from a law in that the former is used whenever the legislative body passing it wishes to express an opinion as to something and is to have only a temporary effect whereas the latter is intended to permanently direct and control matters applying to persons or things in general. See BLACK'S LAW DICTIONARY 1178 (5th ed. 1979). A joint resolution requires the approval of the President while a concurrent resolution does not. See *id.*

17. Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 785 (1984). Under the legislative veto provision of the NWPA, Congress must pass a resolution nullifying disapproval of a repository site "during the first period of 90 calendar days of continuous session of the Congress." 42 U.S.C. § 10135(c) (1982).

sions differ in that they may require a resolution to be passed by one house of Congress, by both houses of Congress, or by congressional committee.<sup>18</sup> Typically, three characteristics are present in statutes containing legislative veto provisions:<sup>19</sup> (1) a statutory delegation of power, usually to the executive branch;<sup>20</sup> (2) the exercise of that power by the delegatee;<sup>21</sup> and (3) a reservation of authority by Congress to nullify that exercise of power by the delegatee.<sup>22</sup>

Legislative veto provisions have become the most direct and effective guarantee that broad delegations of power will not siphon congressional power.<sup>23</sup> For this reason, legislative veto provisions frequently appear in statutes which delegate broad powers to the regulatory agencies of the executive branch.<sup>24</sup> In essence, veto provisions serve as legislative compromises in battles for delegated power in three general situations.<sup>25</sup> First, a veto may serve as a compromise between important substantive conflicts within the Constitution.<sup>26</sup> Second, a veto may serve as a compromise of conflicts within Congress itself because of the scarcity of legislative time.<sup>27</sup> Third, a veto may serve as a compromise of

18. One commentator posits that legislative veto power (even in the form of one-house or two-house vetoes) in reality centers in congressional subcommittees and can be a method for concentrating power in the hands of a few legislators, rather than a "grand democratic device for controlling the bureaucracy." Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 446 (1978).

19. Breyer, *supra* note 17, at 786.

20. See, e.g., *supra* notes 16-19 and accompanying text and *infra* notes 21-28 and accompanying text.

21. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 923-24 & 924 n.1 (1983)(Attorney General delegated enforcement responsibilities of the INA; responsibility discharged through the INS; INS held deportation hearing and suspended deportation of applicant).

22. Breyer, *supra* note 17, at 786.

23. In 1932, Congress enacted its first statute which contained a veto provision, the Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414. This Act gave President Hoover the authority to reorganize executive departments subject to a one-house veto. See *id.* §§ 403, 407, 47 Stat. at 413-14.

Since 1932, veto provisions have proliferated. Justice White, dissenting in *Immigration & Naturalization Serv. v. Chadha*, specifically listed in an appendix fifty-six statutes that now contain veto provisions, *Chadha*, 462 U.S. 919, 1003-13 (1983)(White, J., dissenting), while he estimated that these devices have appeared in about two hundred laws enacted over the last fifty years. See *id.* at 968.

24. See, e.g., *Natural Gas Policy Act of 1978*, 15 U.S.C. § 3342(c)(1)-(2) (1982); *Omnibus Budget Reconciliation Act of 1981*, 15 U.S.C. §§ 1204, 1276, 2083 (1982); *Magnuson-Moss Warranty-Federal Trade Commission Improvement Act*, 15 U.S.C. § 57a (1976).

25. Breyer, *supra* note 17, at 786.

26. The veto provision in the War Powers Resolution, 50 U.S.C. § 1544(b) (1982), reconciles the potential conflict between the constitutional grant to Congress of the power to declare war, U.S. CONST. art. I, § 8, cl. 2, and the constitutional grant to the President of authority over the Armed Forces as their Commander in Chief, U.S. CONST. art. II, § 2, cl. 1. Under the War Powers Resolution, the President cannot maintain an armed conflict for longer than ninety days if both houses of Congress enact a resolution of disapproval. See *War Powers Resolution*, 50 U.S.C. § 1544(b) (1982).

27. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 990-94

conflict in the administrative state between the political accountability of Congress and the inherent complexity of regulatory decision-making.<sup>28</sup>

### III. CONSTITUTIONAL CHALLENGES TO THE LEGISLATIVE VETO

Historically, presidential attitude toward the legislative veto has been generally ambivalent.<sup>29</sup> Congressional use of the legislative veto for fifty years prior to *Chadha* is evidence of its constitutionality.<sup>30</sup> There has also been extensive commentary on the legislative veto, though largely split as to its constitutionality.<sup>31</sup>

It was not until 1980 that a legislative veto provision was held unconstitutional.<sup>32</sup> The Supreme Court resolved the uncertainty of the constitutional status of the legislative veto when, in *Chadha*, it affirmed the decision of the Ninth Circuit Court which held the veto provision of the

(1983)(White, J., dissenting)(reviewing history behind legislative veto provision of the INA). The following immigration and deportation issues, dealt with in *Chadha*, exemplify this conflict. Traditionally an illegal alien, seeking to escape deportation on grounds of special hardship, had to ask Congress for relief. See Breyer, *supra* note 17, at 787. Congress would then have to pass a private bill on each of these highly individual matters. *Id.* Congress, due to scarcity of legislative time, finally decided to change the matter to one of administrative discretion. See *Chadha*, 462 U.S. at 990-94 (White, J., dissenting). Yet, in granting the executive the authority to grant hardship exceptions under the INA, 8 U.S.C. § 1254(c)(1982), Congress compromised by retaining the right to veto a deportation suspension it believed unwarranted. See *Chadha*, 462 U.S. at 990-94.

28. See Breyer, *supra* note 17, at 787-88. Under the Constitution, Congress generally cannot delegate any part of its legislative power unless limited by a prescribed standard. *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 282 U.S. 311, 324 (1931)(citing *Union Bridge Co. v. United States*, 204 U.S. 364, 384-85 (1907)). But, the complexity of regulatory problems makes specific legislation practically and politically difficult. This complexity leads Congress to enact statutes delegating broad powers to the regulatory agencies while using the legislative veto to protect its political accountability. For instance, the Federal Trade Commission has the power to prevent business practices that are "unfair," 15 U.S.C. § 45(a)(1)-(2) (1982); the Federal Communications Commission simply acts to serve "public convenience, interest, or necessity," 47 U.S.C. § 303 (1982); and the Interstate Commerce Commission sets rates that are adequate to cover total operating expenses plus a reasonable and economic profit on capital. See 49 U.S.C. § 10704 (1982).

29. See *supra* note 18. There has been executive criticism of the legislative veto in principle and questions about its constitutionality. See Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1002-29 (1975). Many presidents, however, have signed into law bills containing vetoes, have defended their constitutionality, and have even proposed them. See *Chadha*, 462 U.S. 919, 969-70 nn.4-5 (White, J., dissenting).

30. The Supreme Court has indicated that congressional judgments as to the constitutionality of a statute are entitled to some weight. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61 (1982) (congressional choice to vest broad jurisdiction in the bankruptcy courts, after substantial consideration of the constitutional questions involved, was reason to respect the congressional conclusion of constitutionality)(citing *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980)).

31. Justice White in his *Chadha* dissent cites the extensive commentary, both favorable and unfavorable, to the legislative veto. See *Chadha*, 462 U.S. at 976 n.12 (White, J., dissenting).

32. The first federal court to decide the question upheld the constitutionality of the legislative veto before it. See *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978). The Ninth Circuit Court then held that the legislative veto provision of the INA was unconstitutional in *Immigration & Naturalization Serv. v. Chadha*, 634 F.2d 408 (9th Cir. 1980).

INA unconstitutional.<sup>33</sup>

In *Chadha* the Court conceptualized the legislative veto as legislative activity.<sup>34</sup> As such, it had to meet the constitutional requirements of bicameralism and presentment under article I of the United States Constitution.<sup>35</sup> Defining legislative activity as "action that [has] the purpose and effect of altering the legal rights, duties, and relations of persons . . . all outside the Legislative Branch,"<sup>36</sup> the Court found the legislative character of the veto was "confirmed by the character of the congressional action it supplant[ed]."<sup>37</sup>

The Court reasoned that without the veto, either house or both acting together, could not effectively require the Attorney General to deport an alien once he had suspended deportation pursuant to his authority under the INA unless they enacted legislation to that end, satisfying article I requirements of the Constitution.<sup>38</sup> This definition of legislative activity seems to permit congressional invalidation of delegated action only through a statute passed by both houses of Congress and signed by the President.<sup>39</sup> The *Chadha* Court also rejected the idea that legislative vetoes might be exempt from the bicameralism and presentment requirements if construed as amendments or repeals of the original legislation, since such actions also have to conform with article I.<sup>40</sup>

The Court pointed out that not all congressional actions have to fulfill the article I requirements of bicameralism and presentment.<sup>41</sup> It discussed at length the express exemptions to article I requirements and emphasized: "These exceptions are narrow, explicit, and separately justified . . . [T]hey provide further support for the conclusion that congres-

33. *Chadha*, 462 U.S. 919 (1983). See *infra* note 105 for reference to a number of cases where lower courts invalidated legislative vetoes pursuant to *Chadha* and the Supreme Court summarily affirmed them.

34. See *Chadha*, 462 U.S. at 956-57.

35. *Id.* These constitutional requirements are that "[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . ." U.S. CONST. art. I, § 7, cl. 2. This clause embodies both the bicameral and presentment requirements. Bicameralism requires that both houses of Congress pass a bill. See *Chadha*, 462 U.S. at 948. Presentment requires that all legislation passed by Congress be presented to the President for his approval or veto. See *id.* at 946. In order for a statute to take effect, it must comply with the requirements of article I, section 7 of the Constitution. *Id.* at 951.

36. *Chadha*, 462 U.S. at 952.

37. *Id.*

38. *Id.* at 952-54.

39. For an informative discussion of the drawbacks inherent in retroactive responses like corrective legislation once the executive has acted, see Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 464 (1977).

40. *Chadha*, 462 U.S. at 954.

41. *Id.* at 955.

sional authority is not to be implied . . . ."<sup>42</sup>

The effect of the holding in *Chadha* apparently did not escape the majority's awareness. It quoted a portion of a commentator's article which described the 295 veto provisions that had appeared in 196 different statutes since 1932.<sup>43</sup> Though the Court did not challenge Justice White's assertion in his dissent, regarding the usefulness of the legislative veto as a "political invention,"<sup>44</sup> it concluded that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."<sup>45</sup>

#### IV. RETROACTIVITY

Retroactivity is an extremely important issue in the wake of *Chadha* because, at the time of the decision, there were literally hundreds of statutes that (potentially) now could be challenged under the *Chadha* holding. In *Chevron Oil Co. v. Huson*,<sup>46</sup> the Supreme Court developed the following three-part test for the determination of when a holding in a civil case should be applied retroactively:<sup>47</sup>

(1) Does the decision establish a new rule of law, either by overruling clear past precedent upon which litigants may have relied or by deciding a question of first impression whose resolution was not clearly foreshadowed?<sup>48</sup>

(2) Will retroactive application of the new rule further or retard the operation of the purpose and effect of the rule?<sup>49</sup>

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42. *Id.* at 956.

There are four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

(a) The House of Representatives alone was given the power to initiate impeachments. [U.S. CONST. art. I, § 2, cl. 6];

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. [U.S. CONST. art I, § 3, cl. 6];

(c) The Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments. [U.S. CONST. art II, § 2, cl. 2]; [and]

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. [U.S. CONST. art II, § 2, cl. 2].

*Id.* at 955.

43. *Chadha*, 462 U.S. at 944-45 (quoting Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977)).

44. *Id.* at 945.

45. *Id.* at 944.

46. 404 U.S. 97 (1971).

47. *See id.* at 106-08.

48. *See id.* at 106.

49. *See id.* at 107-08. The Supreme Court has indicated that the most important criterion for

(3) Will application of the new rule produce substantial inequitable results?<sup>50</sup>

In most situations, when analyzing whether to apply a change of law retroactively, the Supreme Court makes a general determination of its applicability to all relevant situations.<sup>51</sup> But, a general determination of whether to apply *Chadha* retroactively would require evaluating its impact on approximately 200 legislative veto provisions.<sup>52</sup>

The Supreme Court was silent on the issue of retroactivity when it rendered its decision in *Chadha*. In light of the Court's recognition of the far-reaching effects of its holding,<sup>53</sup> one court has interpreted this silence as persuasive evidence that the Supreme Court desired retroactive application of the *Chadha* decision.<sup>54</sup> But, it has been more common for the Supreme Court to decide the retroactivity issue in a later case rather than in the law-changing case itself.<sup>55</sup> Therefore, the mere fact that the Court did not specifically address the question of retroactive application of the *Chadha* holding is not conclusive evidence that it should be applied retroactively.

Immediately following the *Chadha* decision, the Supreme Court summarily affirmed a number of lower court cases which had invalidated legislative vetoes pursuant to the *Chadha* holding.<sup>56</sup> In so doing, the Court implicitly applied the holding retroactively.<sup>57</sup> But, this summary affirmation does not preclude the Court from later deciding against retro-

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determining the retroactivity question is whether the history, purpose, and effect of the new rule would be better served by prospective only or prospective and retroactive application. See *Desist v. United States*, 394 U.S. 244, 249 (1969).

50. See *Huson*, 404 U.S. at 108.

51. See, e.g., *Brown v. Louisiana*, 447 U.S. 323 (1980).

52. See *Chadha*, 462 U.S. at 967 (White, J., dissenting). It has been suggested that the difficulty involved in formulating a uniform rule for *Chadha* should yield to a case-by-case analysis. See *EEOC v. Chrysler Corp.*, 595 F. Supp. 344, 350 n.4 (E.D. Mich. 1984).

53. See *supra* notes 43-45 & 105 and accompanying text.

54. See *EEOC v. Allstate Ins. Co.* 570 F. Supp. 1224, 1233 (S.D. Miss. 1983).

55. See, e.g., *Chevron Oil Co. v. Huson*, 404 U.S. 97, 100 (1971) (denying retroactive application of *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352 (1969)); *Stovall v. Denno*, 388 U.S. 293, 296 (1967) (denying retroactive application of *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967)); *Johnson v. New Jersey*, 384 U.S. 719, 721 (1966) (denying retroactive application of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964)). *But cf.* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (Supreme Court decided the retroactivity question within the law-changing decision itself).

56. See *infra* note 105.

57. Lower federal courts that have addressed the issue of retroactive application of *Chadha* have reached opposite results. Compare *Allen v. Carmen*, 578 F. Supp. 951, 966-68 (D.D.C. 1983) (*Chadha* applied retrospectively to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (1982)) with *EEOC v. Chrysler Corp.*, 595 F. Supp. 344, 351 (E.D. Mich. 1984) (denied retroactive application of *Chadha* to the Reorganization Act of 1977, 5 U.S.C. § 906 (1982)).



active application of *Chada* because, in the lower court cases, the issue of retroactivity was not specifically addressed.<sup>58</sup>

If the Court were to decide the retroactivity question regarding *Chadha*, it would have to analyze the question in terms of the three-part test announced in *Huson*.<sup>59</sup> The *Chadha* decision did establish a new rule of law, thus fulfilling the first prong of the *Huson* test;<sup>60</sup> the Court had not previously ruled on the constitutionality of the legislative veto.<sup>61</sup> The *Chadha* Court clearly delineated the purposes of the rule it formulated, thus the second prong of the *Huson* test can be determined.<sup>62</sup> The Court stressed that the article I process for enacting legislation serves important purposes in maintaining the balance of powers and separation of powers doctrines which underlie our system of government.<sup>63</sup> Citing its own prior decisions, and writings of the framers of the Constitution, the Court in *Chadha* noted that the presentment clauses, in clauses two

58. See *infra* note 105; see, e.g., *United States v. Peltier*, 422 U.S. 531, 535 n.5 (1975) (Supreme Court's application of one of its law-changing decisions to other cases before it on direct review, with no discussion of retroactivity principles, does not preclude it from later refusing retroactive application of that law-changing decision).

59. See *Huson*, 404 U.S. at 106-08; see also *supra* notes 48-50 and accompanying text (*Huson* test set out in full).

60. See *supra* note 48 and accompanying text.

61. Even though a lower court had found the legislative veto constitutional, see *Atkins v. United States*, 556 F.2d 1028, 1057-71 (Ct. Cl. 1977), the Supreme Court has indicated that when it invalidates the prevailing statutory norm, as it did in *Chadha*, the "new rule of law" requirement is satisfied. See, e.g., *United States v. Peltier*, 422 U.S. 531, 542-43 (1975); see also *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 498-99 (1968) (new principle of law announced when there is "such an abrupt and fundamental shift in doctrine so as to constitute an entirely new rule which in effect replaced an older one"). *But cf.* *Allen v. Carmen*, 578 F. Supp. 951, 967 (D.D.C. 1983) (*Chadha* not new rule of law because unconstitutionality of legislative veto "clearly foreshadowed" prior to decision).

62. See *supra* note 49 and accompanying text for the statement of the second prong of the *Huson* test.

63. See *Chadha*, 462 U.S. at 956-59. Despite the fact that the separation of powers doctrine is a cornerstone of our constitutional system, there is no clear statement or definition of this doctrine. While Alexander Hamilton made reference to the "important and well-established maxim which requires a separation between the different departments of power," THE FEDERALIST NO. 78, at 413 (A. Hamilton) (H. Lodge ed. 1895), there is no explicit textual reference to the separation of powers doctrine in the Constitution itself. The closest thing to an explicit statement of separation of powers in the Constitution is the allocation of powers among the three branches in three articles. See U.S. CONST. art. I, § 1, cl. 1; U.S. CONST. art. II, § 1, cl. 1; U.S. CONST. art III, § 1, cl. 1.

The balance of powers doctrine is equally as elusive. It may be viewed as a necessary corollary to the separation of powers doctrine in that the latter, as illustrated by the separate powers given to the three branches of the federal government, yields no clear delineation between the branches' functions. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 136-37 (2d ed. 1983). Instead, a system of checks and balances between the three branches of government was established to ensure the political independence of each branch and to prevent the accumulation of power in any single branch. See *id.* This system of checks and balances comprises the balance of powers doctrine.

In *Chadha*, the Court stated that legislative activity must comply with article I to ensure that the checks and balances envisioned by the Constitution are not eroded. *Chadha*, 462 U.S. at 957-58.

and three of article I, are to serve the following three purposes: (1) carefully circumscribe Congress' power and provide the President with the power to defend his or her rights from invasion by Congress' power; (2) provide the President with the power to "check" whatever propensity Congress might have to enact oppressive, improvident, or ill-considered measures; and (3) assure that a "national" perspective—the President, representing the people—is a part of the legislative process.<sup>64</sup>

The purpose of the presentment clauses are interdependent with the purposes of the bicameralism requirements, which are to: (1) re-emphasize the second purpose of the presentment clauses; namely, to encourage that legislation be carefully and fully considered before passage; (2) restrain the legislature in order to avert the threat of despotism; and (3) ensure that neither larger nor smaller states impose their will on the others.<sup>65</sup>

Retroactive application of the *Chadha* holding has to be analyzed in terms of its potential inequitable effects on any involved parties.<sup>66</sup> Retroactive application of the *Chadha* holding would constitute a profound disruption of the existing statutory scheme in the United States,<sup>67</sup> whereas strictly prospective application of *Chadha* would further the purpose and effect of its holding by ensuring future compliance with the requirements of article I of the Constitution.<sup>68</sup>

## V. THE NUCLEAR WASTE POLICY ACT

The Nuclear Waste Policy Act of 1982 (NWPA) was enacted to establish programs for the development of repositories for safe, permanent disposal of high-level nuclear waste and spent fuel, and to provide for the safe stabilization and long-term protection of sites for disposal of low-level radioactive wastes.<sup>69</sup> There is no mention in the statement of purpose for the NWPA of congressional control or state participation.<sup>70</sup> But, within a house report pertaining to the NWPA, there is the follow-

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64. See *Chadha*, 462 U.S. at 946-48.

65. See *id.* at 948-51. See *supra* note 63 for a discussion of these two doctrines.

66. See *supra* note 50 and accompanying text.

67. See *supra* note 43 and accompanying text.

68. See Note, *The Status of Statutes Containing Legislative Veto Provisions After Chadha—Does the EEOC Have the Authority to Enforce the Equal Pay Act and the Age Discrimination in Employment Act?*, 59 WASH. L. REV. 549, 561 (1984).

69. See Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, § 111(b), 96 Stat. 2201, 2207 (codified at 42 U.S.C. § 10131 (b) (1982)); see also H.R. REP. NO. 491, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3792, 3792 [hereinafter cited as NWPA, H.R. REP. NO. 491].

70. See 42 U.S.C. § 10131(b) (1982).

ing language indicating legislative intent regarding federal and state roles within the disposal program:

Scientific reviews . . . repeatedly show that in principle the hazards of nuclear waste disposal are small. In practice . . . management of nuclear wastes has been inadequate to guarantee that the risks will be small in fact. *It is necessary, therefore, to provide close Congressional control and public and state participation in the program to assure that the political and programmatic errors of our past experience will not be repeated.*<sup>71</sup>

The house report describes a “cooperative and concurrence role in the Federal program for States and Indian tribes where repository sites are studied or developed, including an opportunity for such governments to veto development of such sites if they so desire.”<sup>72</sup> The report also states that the host state or Indian tribe on whose territory a site is located is considered the “primary governmental participant” in the repository program.<sup>73</sup> This language implies an intent to permit vast state participation, but the report provides that “[a] state or tribal rejection [of a site selection] can only be overridden by a joint resolution of the Congress.”<sup>74</sup> Therefore, it appears from this house report that, although

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71. NWPA, H.R. REP. NO. 491, *supra* note 69, at 3796 (emphasis added).

[I]n the 1960's increasing environmental awareness and decreasing confidence in the Federal government resulted in growing public attention to the potential problems associated with nuclear power. The Atomic Energy Commission, predecessor to the Department of Energy and the Nuclear Regulatory Commission, reacted with a rush to develop a pilot permanent high level waste disposal facility.

*Id.* at 3793. A potential site in Lyons, Kansas was rejected after an intense political attack on the program. Subsequently, it was discovered that there were serious technical flaws in the site. *See id.*

Federal credibility in nuclear waste management practices was undermined by widely publicized and massive leaks of radioactive liquids from [storage] tanks at the Federal Hanford reservation. A release of 115,000 gallons of liquid from one Hanford tank in 1973 has been said to have been a major factor in a successful public referendum in California prohibiting the construction of new nuclear power plants in the state until a solution to the waste disposal problem is demonstrated.

Increased pressure to resolve the problem sent the Federal nuclear establishment in 1976 — then the Department of Energy Research and Development Administration (ERDA) — looking for a [disposal] site in Michigan, where political uproar quickly brought the program to defeat again, this time even before enough drilling could be accomplished to determine whether technical flaws in the site existed.

*Id.*

72. NWPA, H.R. REP. NO. 491, *supra* note 69, at 3796; *see also* NWPA, 42 U.S.C. § 10135(b) (1982) (authorizes the governor and legislature of the state, or the governing body of an Indian tribe within the state, in which the site is located to submit a notice of disapproval to Congress).

73. NWPA, H.R. REP. NO. 491, *supra* note 69, at 3812.

74. *Id.* at 3813; *see also infra* note 77. In the chronology of procedural steps of the NWPA, the joint resolution by Congress to override the disapproval of a state or Indian tribe is not presented to the President for approval. The President's approval of the site comes earlier in the chronology, after the Secretary of Energy recommends the site to the President. *See* NWPA, 42 U.S.C. 10132(b) (1982); *see also* NWPA, H.R. REP. NO. 491, *supra* note 69, at 3797 (proposed repository development program and the proposed schedule for implementation of the program; set out in chronological table); Appendix, *infra* p. 717.

Congress intended for the states and Indian tribes to have the power to disapprove of a repository site, Congress would still retain ultimate control in the form of an override provision.<sup>75</sup>

The central feature of the NWPA is its procedure for developing the first permanent repository for high-level nuclear waste.<sup>76</sup> The NWPA provides a specific schedule for various steps in the procedure to prevent any longer delays than are absolutely necessary.<sup>77</sup>

#### A. *Relationship Between Chadha and the NWPA*

Constitutional challenges to the legislative veto under *Chadha* and its progeny have essentially arisen in situations where Congress has enacted a statute delegating authority to the executive branch of the federal government.<sup>78</sup> It does not appear that the use of a legislative veto within a statute delegating authority to a state government, as in the NWPA statute, has been the subject of a constitutional challenge.<sup>79</sup> One might argue that *Chadha* only applies within the context of delegations of power among the three branches of the federal government; however, the broadness of the holding in *Chadha* in effect destroys the validity of this argument.<sup>80</sup> In fact, Justice Powell in his concurring opinion in *Chadha* expressed the opinion that the Court by its broad reasoning had invalidated *all* legislative veto provisions.<sup>81</sup> Both Justice Powell and Justice White believed that the Court's decision should have been based upon the separation of powers theory, a narrower basis.<sup>82</sup>

75. See NWPA, 42 U.S.C. § 10135(c) (1982). This "override provision" of the NWPA is essentially a two-house legislative veto provision.

76. See *id.* §§ 10132-10138.

77. See NWPA, H.R. REP. NO. 491, *supra* note 69, at 3797 (chronology of NWPA's procedural steps). The chronological table is reprinted in Appendix, *infra* p. 717.

78. See *supra* note 33.

79. This author has not located one case regarding the constitutionality of the legislative veto either prior to or following *Chadha* where the challenged statutory provision was related to a delegation of power to a state. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 987 (1983) (White, J., dissenting) for a discussion of constitutional delegations to private individuals.

80. In constitutional law, a federalism issue is one in which there is a conflict between power of the federal government and power of a state government. See BLACK'S LAW DICTIONARY 551 (5th ed. 1979); see also *supra* notes 43-45 and accompanying text; *Chadha*, 462 U.S. at 974-79 (White, J., dissenting) (Court's determination to invalidate all legislative vetoes). There is considerable controversy as to whether *Chadha* would apply to unexercised veto provisions. Compare *Muller Optical Co. v. EEOC*, 743 F.2d 380, 388 (6th Cir. 1984) (unexercised veto in Reorganization Act of 1977 does not represent an unconstitutional exercise of legislative power) with *EEOC v. Columbia Broadcasting Sys.*, 743 F.2d 969, 971 (2nd Cir. 1984) (unexercised veto in Reorganization Act of 1977 unconstitutional).

81. *Chadha*, 462 U.S. at 955 (Powell, J., concurring). Justice White agreed that the Court "sounds the death knell for nearly 200 other statutory provisions." *Id.* at 967 (White, J., dissenting).

82. *Id.* at 966 (Powell, J., concurring); *id.* at 967 (White, J., dissenting).

According to Justice Powell, the legislative veto of the INA was nonlegislative and constituted a judicial act, thereby violating separation of powers principles.<sup>83</sup> Once this constitutional violation was discovered, Justice Powell argued that there was then no need to reach the broader question of whether legislative vetoes unconstitutionally violate the presentment clauses.<sup>84</sup>

The majority of the Court, however, found the legislative veto unconstitutional on the broader ground of article I requirements.<sup>85</sup> It relied on strict construction of the Constitution,<sup>86</sup> and as such, any veto provision which fails to satisfy article I requirements would be unconstitutional on its face.<sup>87</sup> The broad nature of the *Chadha* holding indicates that it would likely be applicable to the legislative veto provision of the NWPA.<sup>88</sup>

Under *Chadha*, a legislative veto provision has to conform to the requirements under article I of the Constitution to be valid—it has to be passed by both houses of Congress and be presented to the President for his approval or disapproval.<sup>89</sup> The language of subsection 10135(c) of the NWPA—its veto provision—is vague: “Congress passes a resolution of repository siting approval in accordance with this subsection approving such site, and *such resolution thereafter becomes law.*”<sup>90</sup>

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83. *Id.* at 960 (Powell, J., concurring). The characterization of any congressional action as nonlegislative indicates a violation of the separation of powers doctrine. *Id.* at 964-66 (Powell, J., concurring). This doctrine may be violated in two ways: (1) One branch of government may interfere impermissibly with the performance of another branch's duties, or (2) one branch of government may assume a function that is more properly entrusted to another branch. *See id.* at 963 (Powell, J., concurring).

For an analysis of legislative vetoes as being consonant with separation of powers principles as well as due process concerns, see Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715 (1984).

84. *Chadha*, 462 U.S. at 967 (Powell, J., concurring). *But cf. id.* at 946 (bicameral and presentment clauses “are integral parts of the constitutional design for separation of powers”).

The distinction that Justice Powell makes between a narrow holding based on separation of powers theory, on the one hand, and a broad holding based on the legislative veto and the requirements of article I, on the other hand, becomes somewhat confusing due to the majority opinion's extensive discussion of separation of powers principles. *See id.* at 944-54. One commentator has pointed out that the holding in *Chadha* is confusing and erroneous because the Court concentrated on the effects of an *exercise* of the power created by the veto rather than focusing on the *nature* of the power itself. *See Comment, Characterization of the Legislative Veto: Courts Should Focus on the Power Itself*, 22 DUQ. L. REV. 927, 928 (1984).

85. *See supra* notes 34-45 and accompanying text.

86. *See infra* notes 105-106.

87. *See Chadha*, 464 U.S. at 974-77 (White, J., dissenting).

88. *See NWPA*, 42 U.S.C. § 10135(c) (1982).

89. *See supra* notes 32-42 and accompanying text.

90. NWPA, 42 U.S.C. § 10135(c) (1982)(emphasis added).

The bicameralism requirements of article I are met because the legislative veto provision in the NWPA is a two-house veto. *See U.S. CONST.* art. I, § 7, cl. 2. The legislative veto provision declared

There are three possible ways to determine whether the legislative veto provision of the NWPA meets the presentment requirements of article I.<sup>91</sup> First, the lack of express presentment language in subsection 10135(c) fails to meet article I requirements and is therefore unconstitutional under *Chadha*.<sup>92</sup> Second, the language in subsection 10135(c)—“such resolution thereafter becomes law”—constitutes an implied presentment satisfying article I requirements and is therefore constitutional under *Chadha*.<sup>93</sup> Third, there is a constructive presentment built into the procedural scheme of the statute because the President must approve the site prior to Congress’ approval.<sup>94</sup>

It is not clear under *Chadha* or the Constitution itself whether the bicameralism and presentment requirements for valid legislation have to occur in a specific order, namely bicameralism and then presentment. From the strict constructionalist view, the actual language of article I seems to imply a particular order.<sup>95</sup> Yet, that same language would also seem to require that every bill first be passed by the House of Representatives and then by the Senate. Such a literal construction would be erroneous.<sup>96</sup> Justice White implied in his dissent in *Chadha* that the order of the language of article I was not the central concern of the presentment and bicameralism requirements—what was important was to satisfy the purposes of the article I requirements: “The central concern . . . is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress . . . .”<sup>97</sup> Ac-

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unconstitutional in *Chadha* is a one-house veto which failed to meet the bicameralism requirement under article I. See *Chadha*, 462 U.S. at 944-59.

91. These constitutional requirements are that “[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . .” U.S. CONST. art. I, § 7, cl. 2. This clause embodies both the bicameral and presentment requirements. Bicameralism requires that both houses of Congress pass a bill. See *Chadha*, 462 U.S. at 948. Presentment requires that all legislation passed by Congress be presented to the President for his approval or veto. *Id.* at 946. For a statute to take effect, it must comply with the requirements of article I, section 7 of the Constitution. *Id.* at 951.

92. See *Chadha*, 462 U.S. at 958.

93. See *id.* The Court’s opinion in *Chadha* does not expressly discuss the possibility of satisfying article I, section 7 requirements by implication; however, the author of this Comment believes this manner of satisfaction logically follows from the opinion.

94. See NWPA, 42 U.S.C. § 10134(a)(2)(A) (1982). But, the “constructive presentment” argument probably would not be upheld under the requirements found necessary in *Chadha* because such reasoning could be used with any executive proposal for legislation.

95. See 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 . . . .”).

96. Constitutional construction requires that language be given a reasonable construction so as to avoid absurd consequences. See C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION 14 (1982). Literal interpretation of language is improper if it yields unacceptable conclusions. See *id.* at 16.

97. *Chadha*, 462 U.S. at 994 (White, J., dissenting).

ording to Justice White, the Attorney General's action—recommending suspension of the deportation order—is deemed to be presidential or executive approval;<sup>98</sup> and, the approval of both houses is found in the failure of both houses to pass a resolution of disapproval within the statutory period.<sup>99</sup>

Using Justice White's reasoning, there is a stronger case for finding that the legislative veto provision of the NWPA satisfies the concerns of article I requirements. The repository site's original approval begins with the President,<sup>100</sup> followed by his recommendation of the site to Congress.<sup>101</sup> The site then becomes effective unless a petition of disapproval is filed by the host state or Indian tribe.<sup>102</sup> If a petition of disapproval is filed, then Congress can override the petition of disapproval by joint resolution within the specified statutory period.<sup>103</sup> Congress is essentially reapproving what has already been approved by the President and both houses of Congress, thereby fulfilling both bicameralism and presentment requirements under article I.<sup>104</sup>

A strict reading of *Chadha*, however, would lead to a holding declaring the legislative veto provision of the NWPA unconstitutional as failing to meet the presentment requirements of article I. The broad scope of the *Chadha* holding<sup>105</sup> and its emphasis on strict construction of

98. *Id.*

99. *See id.* at 994-95.

100. *See* NWPA, 42 U.S.C. § 10134(2)(A) (1982).

101. *Id.*

102. *Id.* § 10135(b).

103. *Id.* § 10135(c).

104. *See supra* note 35.

105. *See Chadha*, 462 U.S. at 944-105 (quoting commentary on the 295 veto provisions that had appeared in 196 different statutes since 1932); *see also* notes 43-45 and accompanying text. This acknowledgement by the Court is indicative of the Court's desire to invalidate, generally, the legislative veto. On July, 6, 1983, the Court refused to hear the following cases involving the legislative veto which had been pending on its docket: *Process Gas Consumers Group v. CECA*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983); *Interstate Nat'l Gas Ass'n v. CECA*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983); *Petrochemical Energy Group v. CECA*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983); *American Gas Ass'n v. CECA*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983); *United States Senate v. CECA*, 673 F.2d 575 (D.C. Cir. 1982), *cert. denied*, 463 U.S. 1216 (1983); *United States House of Representatives v. CECA*, 673 F.2d 575 (D.C. Cir. 1982), *cert. denied*, 463 U.S. 1216 (1983); *United States Senate v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983); *United States House of Representatives v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983). The Court was able to reaffirm its decision in *Chadha* by summarily disposing of these other legislative veto cases. Justice White, along with Justice Rehnquist, had voted to hear the cases. In a short dissent, Justice White states that the Court's action in refusing to hear the cases illustrated the "constitutional myopia" of the earlier holding in *Chadha*. *Process Gas*, 463 U.S. at 1217-18 (White, J., dissenting).

article I<sup>106</sup> would necessitate the President's overriding the petition of disapproval by the host state or Indian tribe.<sup>107</sup>

#### B. *Retroactive Application of Chadha to the NWPA?*

Currently, the Supreme Court has not announced any definitive decision regarding the retroactive application of the holding in *Chadha*. In addition, the Constitution neither prohibits nor requires retroactive application of Supreme Court decisions.<sup>108</sup> Therefore, any court faced with a challenge to a legislative veto provision under *Chadha* will have to decide the retroactivity issue on the basis of the facts of the case before it and the relevant statute being challenged. The NWPA contains a legislative veto provision; thus, it will probably be subject to such a challenge. The following discussion will analyze the NWPA separately, determining whether its veto provision will be subject to retroactive application of the holding in *Chadha*.

The Supreme Court test for retroactive application formulated in *Huson*,<sup>109</sup> when applied to the issue of the applicability of *Chadha* to the NWPA, should yield a denial of retroactive application. In rendering its decision in *Chadha*, the Court emphasized the purposes of the bicameralism and presentment requirements of the Constitution.<sup>110</sup> It stressed the importance of maintaining the balance of power and separation of power doctrines underlying our system of government.<sup>111</sup>

The power struggle in *Chadha* clearly involved two branches of the federal government — the legislative branch and the executive branch. It was reasonable to suspect that the legislative veto, and the way it would operate under the INA, would possibly have an adverse effect on the purposes the article I requirements were designed to ensure. But, analyzing the NWPA, the effect of the legislative veto in it would not negate

106. See *Chadha*, 462 U.S. at 946-54. The Court stated: "Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process . . . . [T]he precise terms . . . are critical to the resolution of this case." *Id.* at 945 (emphasis added).

107. Even though both houses of Congress and the President have approved the site, the procedures contained within the veto provision must meet article I requirements. "Amendment and repeal of statutes, no less than enactment, must conform with [article] I." *Id.* at 954. "Disagreement with the Attorney General's decision [in *Chadha*] no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President." *Id.* at 954-55.

108. See *Linkletter v. Walker*, 381 U.S. 618, 629 (1965).

109. 404 U.S. at 106-08 (1971); see *supra* notes 47-50 and accompanying text.

110. See *supra* notes 62-65 and accompanying text.

111. See *supra* note 65 and accompanying text.



any of the article I purposes. Both houses of Congress and the President play a large role throughout the whole process of developing repository sites.<sup>112</sup> Therefore, under the second prong of the retroactivity test,<sup>113</sup> arguably retroactive application of the *Chadha* holding to the NWPA would not further the purpose and effect of the Court's decision.

Under the third prong of the retroactivity test,<sup>114</sup> the retroactive application of *Chadha* to the NWPA could produce substantial inequitable results. If the legislative veto provision of the NWPA were held to be unconstitutional, and if it were possible to sever it from the rest of the Act,<sup>115</sup> it is unlikely that Congress would leave the Act intact without the veto provision. Severed, the NWPA would provide the host state or Indian tribe with the absolute power to disapprove of a possible repository site. Through either repeal or amendment, Congress would probably decrease or withdraw this power in the site selection process. If the NWPA were to be left as is, i.e., with the legislative veto provision, at least the states would play a role in the selection process. They would have the opportunity to disapprove of a recommended site, and perhaps could effectively, with legitimate justifications for disapproval, eliminate their own boundaries as a choice for a disposal site.

### C. *Severability of the Legislative Veto of the NWPA?*

Once a court has ruled that a statutory provision is unconstitutional, it must address the issue of severability to determine whether the remainder of the statute is valid without the unconstitutional provision.<sup>116</sup> If an unconstitutional statutory provision is severable, the remainder of the statute is valid without the unconstitutional provision.<sup>117</sup> But, if the provision is not severable, the entire statute must be declared unconstitutional.<sup>118</sup>

The traditional test for severability was formulated in 1902. In *Connolly v. Union Sewer Pipe Co.*,<sup>119</sup> the Supreme Court stated:

If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may

112. See *supra* note 95-104 and accompanying text.

113. See *supra* note 49 and accompanying text.

114. See *supra* note 50 and accompanying text.

115. See *infra* notes 161-167 and accompanying text.

116. See generally Smith & Struve, *Aftershock of the Fall of the Legislative Veto*, 69 A.B.A.J. 1258 (1983) (discussion of the severability of legislative veto provision).

117. *Id.*

118. *Id.*

119. 184 U.S. 540 (1902), *overruled on other grounds*, *Tigner v. Texas*, 310 U.S. 141 (1940).

stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.<sup>120</sup>

This traditional inquiry focused on two issues: (1) Would the remainder of the statute, once the unconstitutional portions were excised, be "fully operative as a law"?<sup>121</sup> and (2) Would the legislature have enacted the constitutional provisions of the statute without the unconstitutional provisions?<sup>122</sup>

The Supreme Court has consistently declared that the determination of legislative intent regarding the unconstitutional provision of a statute should be the key test in determining severability.<sup>123</sup> The difficulty of this "elusive inquiry"<sup>124</sup> into legislative intent has in some cases yielded to the Court's reliance on the presence or absence of a "severability clause"<sup>125</sup> in the statute to determine whether a given unconstitutional provision is severable.<sup>126</sup> But, the Court's attitude towards the significance of severability clauses can only be described as ambivalent. In some cases, the Court has almost entirely relied on a presumption regarding severability clauses— i.e., presence of a severability clause created a presumption of severability while the absence of a clause created a presumption that the provision in question was not severable.<sup>127</sup> In other

120. *Connolly*, 184 U.S. at 565.

121. *See Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932).

122. *Id.* at 234-35.

123. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 108 (1976)(legislative intent is the key test in determining severability); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936)(legislative intent should be governing factor to determine severability).

124. *Chadha*, 462 U.S. at 932.

125. An example of a severability clause is found in section 10102 of the NGPA, where it is provided that:

If any provision of this chapter, or the application of such provision to any person or circumstance, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

NWPA, 42 U.S.C. § 10102 (1982).

126. *See, e.g., Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938). In deciding on the severability of a provision of the Public Utility Holding Act of 1935, 15 U.S.C. § 79 (1982), the Court held that the test applied to determine severability must perform two functions: (1) examine whether the unconstitutional provision and the remainder of the statute are so interwoven with each other that their separation would be inherently difficult, and (2) examine the statute to see if it contains a severability clause. *See Electric Bond*, 303 U.S. at 434-35. The Court, in *Electric Bond*, stated that there is a presumption against severability if there is no severability clause. *See id.*

127. *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 932, (1983) ("elusive inquiry" into legislative intent need not be carried out because the severability clause in the INA was Congress' answer to the severability question); *see also Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434-35 (1938)(presumption against severability if statute does not contain severability clause); *Williams v. Standard Oil Co.*, 278 U.S. 235, 241 (1929) ("In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety.").

cases the Court has retreated from the presumption approach.<sup>128</sup> One commentator has suggested that the proliferation of severability clauses should dissuade the courts from considering the presence of one to be dispositive of the severability issue because the clause may be “mere boiler plate”<sup>129</sup> and thus an unreliable indicator of legislative intent.<sup>130</sup>

In *Chadha*, the Supreme Court applied a multifaceted test<sup>131</sup> for severability and held that the legislative veto provision of the INA was severable and therefore the rest of the Act was valid.<sup>132</sup> Applying the first part of the test, the Court cited the presence of a severability clause<sup>133</sup> in the INA and found that the “language [was] unambiguous and [gave] rise to a presumption that Congress did not intend the validity of the Act as a whole . . . to depend upon whether the veto clause . . . was invalid.”<sup>134</sup>

As its second focus for the test, the Court looked at the legislative history of the Act in an attempt to determine legislative intent. It found the history of the Act was consistent with an interpretation favoring severability.<sup>135</sup> The Court contradicted itself, however, by stating that its presumption of severability was supported by the history and then concluding that the history regarding congressional reluctance to delegate final authority to the Attorney General was insufficient to rebut this presumption created by the presence of the severability clause.<sup>136</sup>

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128. See *CECA v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982) (Court called the question of presumptions “mostly irrelevant”), *aff’d mem.*, 463 U.S. 1216 (1983); see also *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) (“ultimate determination of severability will rarely turn on the presence or absence of such a [severability] clause”); *Dorchy v. Kansas* 264 U.S. 286, 290 (1924) (severability clause provides a rule of construction which may sometimes aid “but [it will not] be an inexorable command”).

129. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 79-81 (1937).

130. *Id.*

131. The Court applied a three-part test for determining whether the legislative veto provision of the INA was severable:

- (1) presence of a severability clause leads to a presumption in favor of severability;
- (2) assess legislative history of the statute to derive legislative intent regarding severability; and
- (3) whether the statute, absent the veto provision, is “fully operative as a law,” including inquiry into whether the statute is a “workable administrative mechanism.”

See *Chadha*, 462 U.S. at 931-35.

132. *Id.* at 959.

133. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 406, 66 Stat. 166, 281, *cited in Chadha*, 462 U.S. at 932.

134. *Chadha*, 462 U.S. at 932.

135. See *id.*

136. See *id.* This is indicative of the great weight the Court gave to the presence of the severability clause. But, it also underscores the difficulty of determining legislative intent regarding a legislative veto provision from the legislative history. Generally, testimony relates to the substantive issues of a statute, thus the veto provision is rarely a subject for debate. For a general discussion of the

The third part of the test was whether the statute, absent the veto provision, would be "fully operative as a law";<sup>137</sup> i.e., whether the remainder of the statute, absent the excised portion, would be a workable administrative mechanism.<sup>138</sup> The Attorney General's authority to suspend an alien's deportation is entirely independent of the veto provision.<sup>139</sup> Even without the veto provision, congressional supervision is preserved because all suspensions of deportation must be reported to Congress.<sup>140</sup> Therefore, Congress can still enact a law in accordance with article I requirements mandating an alien's deportation;<sup>141</sup> if not, deportation proceedings are cancelled pursuant to the Act.<sup>142</sup> Because the delegated power may be fully exercised without the veto provision while Congress still retains some oversight power, the Court found the INA to be "fully operative as a law" without the legislative veto provision.<sup>143</sup>

One dissenting opinion in *Chadha*,<sup>144</sup> quoting from an earlier case, argued strongly against the severability of the legislative veto provision: "[T]he 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."<sup>145</sup> This dissenting opinion in *Chadha* argued that the veto provision should be seen as an exception to the general delegation of authority to the Attorney General to suspend deportation proceedings unless Congress sees the suspension as inappropriate:<sup>146</sup> "[B]y rejecting the exceptions intended by the legislature . . . the statute is made to enact what confessedly the legislature never meant."<sup>147</sup> This can result in the broadening or extension of the scope of the statute in ways contrary to legislative intent.<sup>148</sup>

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problems of applying general rules of severability to legislative veto provisions see Note, *Severing the Legislative Veto Provision: The Aftermath of Chadha*, 21 CAL. W.L. REV. 174, 184-91 (1984).

137. *Chadha*, 462 U.S. at 934 (citing *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

138. See *id.* The Court did not examine the constitutionality of the surviving portions of the statute. See *id.* at 934-35.

139. See *id.* at 934-35.

140. See INA, 8 U.S.C. § 1254(c)(1) (1982).

141. See *id.*

142. *Id.* § 1254(c)(2); cf. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941) ("report and wait" provision approved whereby Congress was given the opportunity to review newly promulgated Federal Rules of Civil Procedure before they became effective and pass legislation barring their effectiveness if found objectionable), noted in *Chadha* 462 U.S. at 935 n.9.

143. *Chadha*, 462 U.S. at 934-35.

144. *Id.* at 1013-16 (Rehnquist & White, JJ., dissenting).

145. *Id.* at 1015 (citing *Davis v. Wallace*, 257 U.S. 478, 484-85 (1922)).

146. See *id.* at 1014.

147. *Id.* at 1014 (citing *Sprague v. Thompson*, 118 U.S. 90, 95 (1886)).

148. The legislative veto may be seen as a proviso to the rest of the statute. "A proviso is a clause engrafted on an enactment to restrain or modify the enacting clause or to except from its

This reasoning could lead one to conclude that all legislative veto provisions are prima facie inseverable.<sup>149</sup>

Traditional severability analysis is anything but consistent. Perhaps this is a legitimate attempt by the courts to keep the test flexible enough to take into account the complexity and individuality of the statutes that have been challenged. Certainly, after *Chadha*, in the case of the legislative veto provisions, application of rigid rules of severability could dismantle a large portion of the administrative law system.<sup>150</sup>

The administrative bureaucracy has not been dismantled following *Chadha* because most courts have found the veto provision severable from the remaining statute.<sup>151</sup> Determining whether a statute can function once severed requires examination of the practical consequences of, for example, the invalidation of the entire statute.<sup>152</sup> A determination of

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operation something which otherwise would have been within it." Note, *Severing the Legislative Veto Provision: The Aftermath of Chadha*, 21 CALIF. W.L. REV. 174, 186 (1984). The Supreme Court has found that the mere presence of a proviso in a statute is indicative of the legislature's intent to restrict the scope of the statute. See, e.g., *Frost v. Corporation Comm'n*, 278 U.S. 515, 525-26 (1929). If the legislative veto provision is seen as a proviso, any attempts to sever it from the rest of the statute could be seen as contrary to legislative intent.

149. This position was rejected by the Circuit Court of Appeals for the District of Columbia in a case challenging the constitutionality of the legislative veto provision of the Natural Gas Policy Act of 1978. The court stated:

We decline to adopt this as a general principle that would make all veto provisions prima facie inseverable. We think this statement does no more than restate the basic test that a court should determine whether the provision was so essential to the legislative purpose that the statute would not have been enacted without it.

*CECA v. FERC*, 673 F.2d 425, 445 n.70 (D.C. Cir. 1982)(construing NGPA, 15 U.S.C. § 3342 (c) (1982)), *aff'd mem.*, 463 U.S. 1216 (1983).

The Fourth Circuit Court, however, used this reasoning and found the legislative veto provision of the Federal Salary Act of 1967 inseverable from the rest of that Act. The court reasoned that Congress would not have empowered the President to raise salaries without reserving to itself the power to veto increases. See *McCorkle v. United States*, 559 F.2d 1258, 1262 (4th Cir. 1977)(construing provision of Fed. Salary Act of 1967, 2 U.S.C. § 359 (1982)), *cert. denied*, 434 U.S. 1011 (1978)). After concluding that the veto provision was inseverable, the court avoided the constitutional challenge to the veto by resorting to the doctrine of standing. See *id.* at 1262-63. The use of standing as a substitute for severability had its origin in early cases in which litigants affected by certain statutes challenged the constitutionality of particular provisions that did not affect them directly, in the hope that the entire law would be struck. See Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1189 (1984). The Supreme Court would frequently respond by finding that the challenged provisions were severable or were unrelated to the litigation. Litigants would not be able to obtain relief if those provisions were invalidated; consequently, they would lack standing to challenge those sections. See, e.g., *Chicago Bd. of Trade v. Olsen*, 262 U.S. 1, 42 (1923).

150. See *Chadha*, 462 U.S. at 967-68 (White, J., dissenting).

151. See, e.g., *Consumer's Union of the United States v. FTC*, 691 F.2d 575 (D.C. Cir. 1982)(en banc) (per curiam)(striking the legislative veto provision of the FTC Improvement Act of 1980 but leaving intact the remainder of the Act), *aff'd mem.*, 463 U.S. 1216 (1983); *CECA v. FERC*, 673 F.2d 425 (D.C. Cir. 1982)(striking the legislative veto provision of the NGPA of 1978 but leaving intact the rest of the Act), *aff'd mem.*, 463 U.S. 1216 (1983).

152. See Note, *supra* note 149, at 1194.

legislative intent necessarily involves the legislature's evaluation of the feasibility and usefulness of the entire statute.<sup>153</sup> A legislative veto should be analyzed from the standpoint of the entire statute's purposes and policies;<sup>154</sup> the veto should be found inseverable, thereby invalidating the entire statute, only when severing the veto would defeat the statute's "essential purpose."<sup>155</sup> The veto represents a control mechanism and not a substantive purpose of the statute.<sup>156</sup> If Congress decides the statute should not survive without the legislative veto, it is free to repeal or amend the statute.<sup>157</sup>

If *Chadha* were retroactively applied to the NWPA<sup>158</sup> and the legislative veto provision<sup>159</sup> were held to be unconstitutional,<sup>160</sup> a court would have to determine whether the veto could be severed from the rest of the Act. Under the test used in *Chadha*,<sup>161</sup> the legislative veto provision of the NWPA would be held severable. The first factor pursuant to the test set forth in the *Chadha* decision is that the NWPA contains a "separability clause."<sup>162</sup> This can be construed as a presumption in favor of severability as the Court construed the severability clause of the INA.<sup>163</sup> The second factor is that, although the legislative history seems to imply the importance of ultimate congressional control over the development and implementation of the high-level nuclear waste disposal program,<sup>164</sup> merely rebutting the presumption created by the separability clause is probably insufficient.

The third factor is that the NWPA would probably be seen as "fully operative as a law."<sup>165</sup> The authority of the state or Indian tribe to file a petition of disapproval of a repository site is independent of the legislative veto provision. Congress would still have the specified statutory period within which it could enact a law in accordance with article I requirements that would approve of the recommended site. Absent such an enactment, the petition of disapproval would become effective once

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153. *See id.*

154. *See id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *See supra* notes 47-68 and 108-15 and accompanying text.

159. NWPA, 42 U.S.C. § 10135(c) (1982).

160. *See supra* notes 78-107 and accompanying text.

161. *See supra* notes 131-43 and accompanying text.

162. NWPA, 42 U.S.C. § 10102 (1982); *see also supra* note 125 (section 10102 set out in full).

163. *See supra* notes 133-34 and accompanying text.

164. *See supra* notes 71-75 and accompanying text.

165. *See supra* notes 137-43 and accompanying text.

the statutory period had expired. Therefore, as was the case in *Chadha*,<sup>166</sup> the NWPA may be “fully operative as a law” without the legislative veto.

One argument against severability under the *Chadha* test is that, even though the NWPA may literally remain “fully operative as a law” without the veto provision, its utility as a “workable administrative mechanism” may be seriously undermined. Assuming that the host state or Indian tribe would still have the power to disapprove of recommended repository sites once the veto had been excised, the probability that any site selected would face a petition of disapproval from its host is great. This possible deluge of petitions might delay or permanently stymie the program from ever being implemented, effectively emasculating the entire statute.

If the “exception to the general rule” test voiced by the dissent in *Chadha*<sup>167</sup> were to be applied to the veto provision of the NWPA, it would probably *not* be severable because it was present in the statute at enactment and it obviously serves as a restraint on the power delegated to the states. It is highly unlikely that Congress ever would have enacted the Act without the veto provision, given the power of disapproval of site selection that would be left to the states.

## VI. CONCLUSION

The future of the legislative veto provision as an efficient means of government delegation of power is not necessarily darkened by the *Chadha* decision. The Court’s use of flexible and responsible decision-making strategies in determining retroactive application of the *Chadha* decision and severability questions regarding unconstitutional veto provisions can yield results that are consistent with the spirit of the Constitution *and* responsive to the needs of a complex and technical governmental system.

If the legislative veto provision of the NWPA were challenged on constitutional grounds under *Chadha*, it would most likely survive. Its main ground of defense centers on a retroactivity argument. Under the *Huson* test for retroactive application of a new law, the Court would probably deny retroactive application of *Chadha* to the NWPA because retroactive application would not further the purpose and effect of the *Chadha* holding; it might produce substantial undesirable results.

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166. See *supra* note 143 and accompanying text.

167. See *supra* notes 144-49 and accompanying text.

If *Chadha* were retroactively applied to the NWPA, the legislative veto provision would probably be held unconstitutional for its failure to satisfy the presentment requirements of article I of the Constitution. But, because of the inconsistencies in the various severability tests being utilized by the courts, it is difficult to determine whether the veto provision would be found to be severable. One point that seems clear, however, is that it is hard to imagine that Congress ever would have passed the NWPA without reserving the ultimate control over high-level nuclear waste management and disposal.

*Pamela Goldberg*



APPENDIX\*  
Chronology

180 Days After Date of Enactment.	Secretary of Energy issues guidelines for recommendation of sites proposed to be studied indepth for possible licensing as repositories.
Not Later than 1 Year After Date of Enactment.	Secretary of Energy recommends to President at least 3 sites in not less than 3 geologic media to be studied for possible development and notifies States and Indian tribes of the recommendation.
Not Later than February 1, 1985.	Secretary recommends at least 2 additional sites to President for study.
Not Later than 60 Days After the Secretary's Recommendations.	President approves or disapproves sites for study and notifies States and Indian tribes of his decision.
After President Approves a Site for Study.	Secretary of Energy holds public hearings near each site and submits environmental assessment to States or Indian tribes.
After Secretary Submits Environment Assessment to States and Indian Tribes.	Secretary of Energy sinks study shafts at each site and carries out other site characterization activities.
After Completion of Site Characterization, public hearings and an EIS.	Secretary of Energy notifies States and Indian tribes of his decision to recommend to President approval of at least one site for licensing and development as a repository.
No Sooner than 30 Days after Notification of States by Secretary of Energy of His Decision to Recommend a Site to President.	Secretary of Energy may recommend the site to the President for approval for licensing and development.

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\* Reprinted from NWPA, H.R. REP. NO. 491, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3792, 3797.

Not Later than March 30, 1987, but not before Secretary of Energy Recommends a Site for Approval as a Repository.

If Congress Approves the Site. . . . .

President submits to Congress the recommendation of a site qualified for application for licensing as a repository.

The designation of a site as suitable for license application is effective if a petition for disapproval is not submitted to Congress by a State or Indian tribe, or if Congress acts to override a State or Tribal disapproval.

If A State or An Indian Tribe Submits to Congress a Petition for Disapproval.

Congress has 90 calendar days to pass a joint resolution overriding the petition of disapproval under expedited procedures.

If Congress Does Not Override a State or Tribal Disapproval.

President shall submit to Congress another site recommendation within 1 year of the disapproval.

When A Site Designation has become Effective (i.e., has not been Disapproved).

Within 90 days the Secretary of Energy shall submit to NRC a license application for development of the site.

Not Later than January 1, 1989 or the Expiration of 3 years After the Submission of the License Application (whichever is later).

NRC shall approve or disapprove a construction authorization for construction of a repository at the site.

Around 1995 . . . . .

Operation of the first national high level nuclear waste repository.