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Aftershocks of the Loss of the Legislative Veto: Severability and the Need for a Replacement Device

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Aftershocks of the Loss of the Legislative Veto: Severability and the Need for a Replacement Device

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I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.[1]

I. Introduction

In June of 1983, the Supreme Court, in *Immigration and Naturalization Service v. Chadha*,[2] found the legislative veto to be unconstitutional.[3] The Court's decision was exceedingly broad in both its scope and its impact. As a result, the opinion has been criticized for its expansiveness[4] and, in particular, for

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1. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), inscribed on the Jefferson Memorial, Washington, D.C.

2. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

3. *Id.* at 959.

4. The decision has been criticized by some commentators as overly broad in scope. *See* Strauss, *Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789; Moses, *Re-Separating the Powers: the Legislative Veto and Congressional Oversight after Chadha*, 33 CLEV. ST. L. REV. 145

its rigid constitutional analysis. The decision's "myopic"[5] reasoning becomes apparent once the function and use of the legislative veto is recognized.

The legislative veto device enabled the Congress, acting alone, to review and, if the circumstances dictated, to disapprove the action proposed to be taken by an independent regulatory agency or the executive branch.[6] This device was a means by which Congress could ensure that statutes it designed were effectively and correctly implemented.

The legislative veto was a simple tool which Congress could use to make certain that authority delegated to an independent agency or to the executive branch was carried out in a manner consistent with specific, legislative direction. As recognized by one commentator, the legislative veto permitted Congress to monitor the implementation of its policies, without the need of enacting additional legislation.[7] If the authority was exercised improvidently, or in contravention of legislative intent, Congress could simply "veto" the proposed action, preventing the contemplated action from taking effect.

As such, the veto was simply a way to monitor and to control the actions of the unelected bureaucracy and to ensure that the policymaking role was retained by the legislative branch.[8] It was a mechanism which promoted accountability to the Congress and ensured that critical legislative decisions were made,

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(1984-85). Indeed, Justice Powell concurred in the judgment of the Court on the basis that the decision's reasoning was broader than necessary. The narrower basis the concurrence relied on in finding the legislative veto unconstitutional was that its use in determining whether the statutory criteria for residence had been met was an assumption of a judicial function by the legislative branch in violation of the principle of separation of powers.

5. Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983) (White, J., dissenting).

6. A legislative veto provision typically is a provision included in a statute which requires an administrative agency or the Executive to submit a proposed regulation or contemplated action to the Congress for review. Congressional review is usually for a set period of time during which it can either specifically "veto" (disapprove) or, in some cases, approve the proposed regulation or action.

7. Javits and Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. Rev. 455, 456 (1977).

8. As noted by Justice White, the legislative veto is "an important if not indispensable political invention" that preserves "Congress' control over lawmaking." *Chadha*, 462 U.S. at 972-73 (White, J. dissenting).

or at least reviewed, by the Legislature.

This Article will discuss the significant role the legislative veto has played in reviewing and controlling the activities of the administrative agencies and the impact the *Chadha* decision has had on this congressional oversight. In the "wake" of the *Chadha* decision, the question of whether an unconstitutional legislative veto provision can be severed or removed from the body of a statute has come to the forefront. The following will examine the analytical framework used by the courts in making these severability determinations, and the consistency of these analyses with congressional intent surrounding the inclusion of a legislative veto provision. Finally, the Article will discuss the continuing need for a replacement mechanism for the legislative veto in order to facilitate Congress' ability to reassert its legislative prerogatives and to regain its control over the exercise of delegated functions.

II. Background

The legislative veto was first used to review presidential plans for reorganization of the Government, which at the time was growing in size and scope in response to the Depression.[9] Thereafter, the legislative veto, as characterized by Justice White, was used as a means to help balance the delegation of authority in new areas of government involvement and to resolve disputes between the executive and legislative branches over allocations of power.[10] Over time, the broad delegations of authority were sanctioned by the courts. This was based in part on a realization that it was impractical for Congress to shoulder the burden of making the numerous and detailed policy decisions required to ensure the efficient functioning of an increasingly large Government.[11] Consistently, the executive and independent agencies were empowered to issue rules, decisions and orders which had the full force and effect of a law in order to effec-

9. *Id.* at 968 (White, J., dissenting).

10. *Id.* at 969-70. The legislative veto has appeared in nearly 200 statutes ranging from budget impoundments, war powers, the space program, international agreements on nuclear energy, and education grants, to rulemaking by consumer protection agencies. *Id.* at 967-72. *See also id.*, app. at 1003.

11. Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1372 (1977).

tively implement and enforce delegated authority.[12]

As Congress increasingly delegated substantial authority, it sought to retain for itself some modicum of control over the administration of that authority through the use of the legislative veto.[13] The legislative veto not only gave Congress that control, but it also enabled Congress to legislate by articulating broad policy goals, leaving the implementation of specifics to the entity with developed expertise.[14] This was the beauty of the legislative veto: it recognized the need for and growth of the modern administrative state spawned by the increasing complexity of our society while it retained legislative control in the branch entrusted with that authority under the Constitution. This "fourth branch of government," which amassed considerable authority, was able to retain the necessary flexibility to administer the grant of power, while Congress, through the use of the legislative veto, could effectively oversee the exercise of that power. The legislative veto represented a "string" or contingency attached to a delegation of authority. Since the function being performed was originally that of the Congress, it was only appropriate that the regulatory end product be reviewed by that branch in which the fundamental authority resided. To this extent, the legislative veto actually enhanced the legislative role of the Congress under the Constitution. It promoted the principle of separation of powers, rather than violating it.

III. *Immigration and Naturalization Service v. Chadha*

A. *The Majority Opinion*

Given the function and utility of the legislative veto, it is somewhat curious that the Supreme Court in *Chadha* found the legislative veto to be inconsistent with the separation of powers doctrine. At issue in *Chadha* was a one-House legislative veto provision in the Immigration and Nationality Act.[15] Under the Act, Congress retained the ability to review and veto suspensions of deportation of aliens issued by the Attorney General.[16]

12. *See* Administrative Procedures Act, 5 U.S.C. § 551 (4), (5), (6) (Supp. 1985).
13. Javits and Klein, *supra* note 7, at 462.
14. *Id.* at 460.
15. Immigration and Nationality Act, § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1982).
16. 8 U.S.C. § 1254. The congressional review process typically involves the same

The House of Representatives vetoed the suspension of a deportable alien, Jagdis Rai Chadha.[17] The majority opinion, authored by Chief Justice Burger, determined that the House's action was "legislative in purpose and effect."[18] Specifically, it found that the "House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons . . . ."[19]

As the House's action affected Chadha's status, the Court found that the Constitution allowed Congress to legislate in only one way — using the article I procedures of bicameral passage of legislation and presidential presentment.[20] The one-House legislative veto, by definition, permitted Congress to act, without the necessity of both Houses acting on a disapproval resolution or of invoking the President's veto power. As such, the Court concluded that the device exceeded Congress' defined powers and was inconsistent with the integral design of the Constitution, providing for the separation of powers among the three branches of government.[21]

The Court let the precise structure of the Constitution govern its analysis of the legislative veto. It deferred to the "explicit and unambiguous" provisions of the Constitution which define the executive and legislative functions and disperse power among the separate branches.[22] The design of the Framers was strictly adhered to, as part of an effort to fulfill the purposes underlying the legislative procedures of article I and the role of the President in the lawmaking process.[23] Since, in the Court's analysis, the one-House veto violated the bicameralism and presentment requirements of the Constitution, the Congress failed to comply with the required constitutional procedure when it utilized the veto.

The Court placed great emphasis upon the intent of the

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activities used in the consideration of legislation. The committees of jurisdiction often hold hearings in which testimony is solicited from interested parties, followed by formal consideration in committee and action in one or two Houses.

17. H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40247 (1975).

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

19. *Id.*

20. *Id.* at 958.

21. *Id.* at 957-58.

22. *Id.* at 945.

23. *Id.* at 946.

Framers to divide and disperse power among the branches as a means to best protect liberty.[24] It recognized that the Constitution sought to divide the powers of the government into three defined categories, legislative, executive and judicial, "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[25] In the eyes of the Court, the careful delineation of the separate functions in the Constitution promotes stability and a check on any one branch assuming excessive power. While the Court conceded that the branches are not necessarily "hermetically"[26] sealed from one another, it did give conclusive weight to the fact that since a body of Congress was acting, it necessarily had to strictly abide by the Constitution's bicameralism and presentment requirements. Even though the legislative veto may be a useful way to "accomplish desirable objectives,"[27] the Court admonished the Congress to resist the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power."[28]

The Court's opinion recognizes that the legislative veto was a "convenient" device, which enabled Congress to act more easily and, perhaps, more efficiently. Yet, the Court set aside concerns of efficiency as a goal of the Framers of the Constitution in structuring the legislative process. Instead, the Court found that the constitutional requirements of bicameralism and presentment predominated the interests of efficiency. As articulated by the Court: "Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . . ."[29] Rather, "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[30]

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24. *Id.* at 950.
25. *Id.* at 951.
26. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)).
27. *Chadha*, 462 U.S. at 951.
28. *Id.*
29. *Id.* at 944.
30. *Id.* at 959.

B. *The Dissent*

This issue of efficiency was the springboard for Justice White's dissent. A key premise of the dissent was that mere convenience is not the driving force behind the use of the legislative veto.[31] As the dissent recognized, the legislative veto was much more than a convenient tool for a lazy Congress. Rather, its utility in ensuring responsiveness to the Congress was acknowledged and its death mourned:

> Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.[32]

Justice White was unwilling to engage in a strict and textual constitutional analysis of the legislative veto. Rather, the dissent approvingly quoted *Youngstown Sheet & Tube Co. v. Sawyer*[33] as the appropriate perspective to take:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.[34]

Justice White viewed the Constitution as a viable, working document which has the flexibility to respond to contemporary needs and modern problems of governance, without forsaking essential democratic principles.[35] The dissent feared that the unnecessary and complete separation between the branches would "handicap the effective working of the National Government as

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31. *Id.* at 972 (White, J., dissenting).

32. *Id.* at 968 (White, J., dissenting).

33. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

34. *Chadha*, 462 U.S at 978 (White, J., dissenting) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).

35. *Chadha*, 462 U.S. at 978 (White, J., dissenting).

a whole."[36]

Indeed, the methodical separation of powers, without consideration of the objective of an interdependent and functioning tripartite government, reflects a blindness on the part of the Court to the needs of the modern administrative state. It also ignores the utility of the legislative veto in promoting responsiveness consistent with the constitutional system of checks and balances,[37] enhancing Congress' role as lawmaker.

Justice White exposed the inconsistency in the Court's reasoning which countenanced extensive delegations of authority to independent and executive agencies, yet forbade the use of the legislative veto to review the exercise of that authority. As succinctly put by Justice White, the former reflects a recognition of the need for "accommodation and practicality."[38] The latter ignores the need for a "necessary check on the unavoidably expanding power of the agencies"[39] as they exercise power delegated by the Congress.

C. *Analysis of the Decision*

Clearly, the Supreme Court has recognized the need for and the efficiency brought by the delegation of authority and, with few exceptions,[40] has uniformly upheld broad delegations as constitutional. The problem that the dissent raised was one of consistency. The Court has seen fit to allow broad delegations of authority resulting in the growth of administrative agencies, yet, in *Chadha*, it has read the Constitution narrowly so as to "forbid Congress [from] qualify[ing] that grant [of authority] with a legislative veto."[41] Past recognition of the need to construe the Constitution with some flexibility was set aside in *Chadha*. It has been replaced with a strict adherence to the legislative procedures dictated in article I. The same considerations of efficiency that permit delegations of power should consistently form the basis for retaining some of that authority through the legis-

36. *Id.* at 999 (White, J., dissenting).
37. *See* Javits and Klein, *supra* note 7.
38. *Chadha*, 462 U.S. at 999 (White, J., dissenting).
39. *Id.* at 1002 (White, J., dissenting).
40. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
41. *Chadha*, 462 U.S. at 989 (White, J., dissenting) (footnote omitted).

lative veto.

It is indeed curious that the Court has not viewed expansive delegations of authority by Congress as an abdication of its role, while it refuses to sanction a reservation of that same authority through the use of the legislative veto.[42] As Justice White remarked:

> If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand [article] I as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test.[43]

It is for this reason that the *Chadha* decision is shortsighted. The legislative veto ensures that Congress plays the role of policymaker and legislature. As such, the device promotes the concept of separation of powers by enhancing the role of Congress in reviewing the exercise of delegated functions by administrators. Congress, as a result, can carry out its constitutional functions more effectively while promoting the system of checks and balances inherent in the doctrine of separation of powers. As articulated by Justice White, the legislative veto is "a reservation of ultimate authority necessary if Congress is to fulfill its designated role under [article] I as the Nation's lawmaker."[44]

One commentator has noted that the legislative veto serves to effectuate the legislative will, and also

> functionally preserves the separation of powers: by returning the final policymaking authority to the Congress, it is assured that the lawmaking powers will not be exercised by any other branch of the government. Without this check, certain congressional powers would be lodged outside of the legislative branch in violation of the doctrine of the separation of powers.[45]

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42. *See* Bledsoe, *Separating Power: No Legislative Veto of Agency Action*, 49 Mo. L. Rev. 404 (1984).

43. *Chadha*, 462 U.S. at 986-87 (White, J., dissenting).

44. *Id.* at 974 (White, J., dissenting).

45. Moses, *supra* note 4, at 150-51 (footnote omitted). *See also* Saks, *Holding the Independent Agencies Accountable: Legislative Veto of Agency Rules*, 36 Ad. L. Rev. 41,

Moreover, as Justice White's dissent points out, the regulations and decisions issued by independent and executive agencies "meet the Court's own definition of legislative action"[46] since they alter the legal rights and duties of others and involve policy determinations, yet they are not subject to the same requirements for legislative action under article I. The majority opinion dismissed in a footnote[47] the issue of whether executive, or for that matter, independent "lawmaking," through the issuance of decisions or regulations by administrative agencies, must follow the article I process. The Court's analysis failed to recognize that the use of the legislative veto simply registers a "negative,"[48] as demonstrated by the one-House disapproval veto provision in the Immigration and Nationality Act. As pointed out by Justice White, the power to exercise a legislative veto is not the power to write new, affirmative law without comporting with the article I procedures, just as the presidential veto power does not confer lawmaking power on the executive.[49]

Some commentators have criticized the Court for its formalistic approach which relies heavily on characterizing action as "legislative" in nature simply by identifying the acting branch.[50] If the executive branch were to promulgate a regulation, the Court would regard such action as "executive" in nature regardless of the fact that such a regulation has the same legal effect as legislation passed by both Houses of Congress. The Court was almost obsessed with compartmentalizing the particular action involved. While this is consistent with the Court's separation of powers analysis and its rigid structural view of the Constitution, it is incompatible with its prior decisions which facilitated the growth of the modern administrative state.[51]

As one commentator noted, "[c]ongressional action in re-

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53 (1984) ("By preserving the core role of Congress as policy determiner, a legislative veto enhances rather than diminishes the purpose of separation of powers.").

46. *Chadha*, 462 U.S. at 989 (White, J., dissenting).

47. *Id.* at 953-54 n.16.

48. *See* S. REP. No. 492, 99th Cong., 2d Sess. 10 (1986).

49. *Chadha*, 462 U.S. at 980 (White, J., dissenting).

50. *See* Strauss, *supra* note 4, at 797; Bledsoe, *supra* note 42, at 412.

51. *See* Schwartz, *The United States Supreme Court and the Laying of Regulations before the Legislature*, 100 LAW Q. REV. 9, 11 (1984) ("The *Chadha* opinion is based upon the type of formalistic construction of the separation of powers doctrine that would have made the rise of modern administrative law impossible.").

sponse to the demands of modern government has been examined under one standard, while congressional action in response to the modern government thus created appear to be examined under a different standard."[52] The dynamic nature of our society must be reflected in the way in which our Constitution is construed and applied, by avoiding overly formalistic and static interpretations. The vitality of the Constitution as a functioning and integrated document should be recognized in the way our nation approaches its contemporary method of governance.

IV. Severability

The preceding discussion identifies the utility of the legislative veto in promoting the accountability of agencies to the Congress and ensuring consistency with legislative intent. In the wake of the *Chadha* decision, the need to ensure responsiveness to the Congress has grown. Congress does have several means to review the activities of independent and executive agencies short of legislation, through hearings, riders on appropriations bills,[53] reporting requirements, and investigations. Yet, none is as effective or as decisive as the legislative veto.

The void created by the *Chadha* decision is highlighted by recent judicial determinations on the issue of severability. These cases focus on the question of whether an unconstitutional veto mechanism is severable from the body of a statute.

If the veto mechanism is found severable, the remaining statute will be upheld as constitutional. However, if it is not severable, then the entire statute falls with the unconstitutional veto provision. The resolution of the severability problem appears to hinge on three factors: the presence of a severability clause; congressional intent; and the ability of the underlying statute to function in the absence of the legislative veto provision.[54] The outcome of these cases often turns on the relative

52. Bledsoe, *supra* note 42, at 420.

53. A "rider" is typically an amendment, attached to an appropriations bill, restricting the expenditure of funds for a particular activity or program or making substantive changes in the law.

54. *Chadha*, 462 U.S. at 931-35 (1983).

weight afforded these different factors in the courts' analyses.[55] The severability of legislative vetoes relates directly to many of the pivotal, separation of powers issues discussed by the Court in *Chadha*. If a legislative veto is severed, there is necessarily a shift in power to that entity which is exercising the function delegated by Congress. Congress no longer has control over the contemplated action; the string attached to the delegation has been cut.

A. *Severability in* Chadha

The *Chadha* decision disposed of the severability issue initially, in an almost perfunctory manner. The Court cited as the operative standard the severability test in *Buckley v. Valeo*,[56] which favors severing the invalid provision "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not . . . ."[57] However, the Court declined to "embark on that elusive inquiry"[58] of examining legislative intent. Instead, it gave presumptive weight to the presence of a severability clause[59] in the underlying statute. These clauses typically provide that if a provision of an act is found unconstitutional, the remaining provisions are not affected and remain intact. The Court read this provision as "unambiguous"[60] evidence of congressional intent, plainly authorizing the presumption of severability. Only after establishing such a strong presumption did the Court examine the statute's legislative history. The Court conceded that Congress was "reluctant to delegate final authority over cancellation of deportations," but determined that such reluctance was "not sufficient to overcome the presumption of severability . . . ."[61] The Court reached this conclusion on the basis that there was inadequate evidence showing that Congress would have pre-

55. The relative weight afforded the presence or absence of a severability clause — which varies from presumptive weight in the case of the former to insignificant weight in the case of the latter — is a good example.

56. 424 U.S. 1, 108 (1976).

57. *Chadha*, 462 U.S. at 931-32 (quoting Buckley v. Valeo, 424 U.S. at 108 (1976)).

58. *Id.* at 932.

59. Immigration and Nationality Act, § 406, 8 U.S.C. § 1101 (1982).

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

61. *Id.*

ferred to retain the authority over suspensions of deportation, rather than delegate this function to the Attorney General, had it known that the legislative veto provision was unconstitutional.[62]

Greater emphasis was given by the Court to the presence of the severability clause, while evidence of legislative desire to retain the ability to review suspensions of deportation through the veto mechanism was regarded as less consequential.[63] The boilerplate severability clause was regarded as virtually conclusive evidence of severability, despite a reading of congressional intent which tended to rebut the presumption of severability. This analysis appears to give insufficient weight to the legislative history which showed a reluctance on the part of Congress to completely delegate this function and remove itself from the suspension process altogether. Instead, the Court examined whether Congress would have opted, in the alternative, to retain the full authority delegated.

This inquiry is insensitive to the practical legislative options that are available to Congress in drafting legislation and fashioning a delegation of authority. Congress could include more detailed statutory criteria to govern the exercise of the authority or limit or revoke the authority delegated altogether, if the legislative veto could not be used. Narrowing the inquiry to an artificial all-or-nothing choice often results in an inaccurate view of legislative intent, as the significance attached to the underlying statute tends to predominate the inquiry. The importance of the legislative veto to the statutory scheme tends to become overshadowed and subsumed.

The third part of the Court's severability inquiry relied on the test articulated by the Supreme Court in *Champlin Refining Co. v. Corporation Commission*,[64] which states that a provision will be presumed severable if what remains after severance is fully operative as a law. Finding that the administrative process could function independently of the legislative veto, the Court

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62. *Id.* at 934.

63. *Id.* at 932. Specifically, the Court stated that "[a]lthough it may be that Congress was reluctant to delegate final authority over cancellation of deportations, such reluctance is not sufficient to overcome the presumption of severability raised by § 406."

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

concluded the provision was severable.[65]

A dissenting opinion authored by Justice Rehnquist, and joined in by Justice White, dealt solely with the issue of severability. The opinion recognized the presumptive weight given to the presence of a severability clause, but criticized the majority opinion for its blindness to the significance of legislative intent. Simply, it recognized that the existence of a severability clause does not "conclusively resolve the issue."[66] Rather, it agreed with the Court in *United States v. Jackson,* when it stated that the ultimate determination of severability "will rarely turn on the presence or absence of such a clause."[67]

The dissent favored an analysis which focused more closely on legislative intent. The standard it preferred was one which severed the unconstitutional veto provision only if Congress would have intended to permit the Attorney General, exercising delegated authority, to suspend deportations without the congressional opportunity to veto.[68] The dissent's reading of the legislative history of the Immigration and Nationality Act departed from that of the majority opinion, in that it read the Act as demonstrating an unwillingness on the part of Congress to give the executive branch the ability to suspend deportations on its own.[69] Rather, it found that Congress consistently sought to retain some modicum of control.

The dissent viewed severing the unconstitutional veto provision as tantamount to expanding the authority of the Attorney General in a way which the Congress did not intend.[70] If the veto provision were severed, the authority delegated to the Attorney General would, in the dissent's view, necessarily become enlarged, as his decisions would no longer be subject to mandatory review and possible veto by Congress. Indeed, by definition, a legislative veto provision is a contingency placed on

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65. *Id.* at 935 (footnote omitted). The Court likened the aborted process that would result after severance to a report and wait procedure. The Attorney General would still transmit decisions regarding suspensions for congressional review. If Congress objected, it could pass legislation to overturn the decision.

66. *Id.* at 1014 (Rehnquist, J., dissenting).

67. *Id.* (quoting United States v. Jackson, 390 U.S. 570, 585 n. 27 (1968)).

68. *Chadha,* 462 U.S. at 1014 (Rehnquist, J., dissenting).

69. *Id.* at 1015 (Rehnquist, J., dissenting).

70. *Id.* at 1014 (Rehnquist, J., dissenting).

a delegation of authority, which if removed, necessarily results in a shift or imbalance in power in contrast with that contemplated by Congress. Severance would then effectively "redraft" the underlying statute in a manner which does not comport with legislative intent. As succinctly put by Justice White, "the Court's rewriting of the Act flouts the will of Congress."[71]

B. *Severability After* Chadha

Since the Court's *Chadha* decision, a rash of litigation has ensued over the severability of legislative veto provisions in a variety of statutes. In large part, courts have found these provisions to be severable based on an effort to divine congressional intent and an attempt to save the statute as a working document.[72] In some instances, a veto provision is found inseverable, usually based on a finding that Congress would not have completely delegated the underlying authority to be exercised without reserving for itself the opportunity for a veto.[73]

The analytical differences of these cases can be seen in the relative significance afforded by the courts to the presence of a severability clause, the intent of Congress in structuring the legislation, and the ability of the law to operate absent the veto provision. The Supreme Court in *Chadha* gave presumptive weight to the presence of a severability clause and, only secondarily, examined congressional intent. In the absence of a sever-

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71. *Id.* at 979 n. 16 (White, J., dissenting).

72. Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom.*, Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983); National Treasury Employees Union v. Reagan, 629 F. Supp. 762 (D.D.C. 1985); Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), *cert. denied*, 469 U.S. 852 (1984); Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 1259 (1986); EEOC v. Hernando Bank, 724 F.2d 1188 (5th Cir. 1984). *See also* Note, *Severability of Legislative Veto Provisions: A Policy Analysis* 97 HARV. L. REV. 1182, 1184 (1982) ("Modern courts have refused to assume dogmatically that legislatures would not have passed statutes but for the statutes' legislative veto provisions. Courts have instead developed flexible techniques for determining legislative intent — techniques that in recent years have tended to yield findings of severability.").

73. EEOC v. CBS, 35 Fair Empl. Prac. Cas. (BNA) 1127 (2d Cir. 1984); EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 467 U.S. 1232 (1984), *remanded*, 740 F.2d 966 (1984); American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982); City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987).

ability clause, the required analysis is less clear.[74]

Many courts have relied on the standard enunciated in *Champlin Refining Co. v. Corporation Commission,*[75] which permits severance unless a showing can be made that it is "evident" Congress would not have enacted the legislation without the veto provision. Few are willing to strike down the entire statute absent a strong showing that the veto provision is "inseparable"[76] from the body of the statute or is an "integral and necessary part of the legislative scheme. . . ."[77]

V. The Severability Clause: Its Significance

The absence of a severability clause has been afforded varying weight, as demonstrated by the litigation involving the Reorganization Act of 1977.[78] In *EEOC v. Hernando Bank,*[79] the Fifth Circuit found the one-House legislative veto provision[80] in the Reorganization Act of 1977 to be severable. At issue was whether the EEOC had authority to enforce the Equal Pay Act.[81] Enforcement authority had been transferred from the Secretary of Labor to the EEOC by Reorganization Plan No. 1 of 1978,[82] promulgated by President Carter under the Reorganization Act of 1977.

The Act authorized the President to reorganize the executive branch and its agencies, subject to congressional review. Under section 906 of the Act, a reorganization plan would be-

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74. *See* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 441 (D.C. Cir. 1982) ("The presence of a severability clause, which expressly sets forth congressional intent that a statute stand in the event one of its provisions is struck down, makes it extremely difficult for a party to demonstrate inseverability. When there is no such clause, however, as in this case, the test is less certain." (footnotes omitted)). The Supreme Court recently commented that in the absence of a severability clause, "Congress' silence is just that — silence — and does not raise a presumption against severability." Alaska Airlines, Inc. v. Brock, 107 S. Ct. 1476, 1481 (1987).

75. 286 U.S. 210, 234 (1932).

76. EEOC v. Allstate Ins. Co., 570 F. Supp. 1224, 1232 (S.D. Miss. 1983).

77. EEOC v. CBS, 35 Fair Empl. Prac. Cas. (BNA) 1127, 1130 (2d Cir. 1984) (quoting H.R. REP. No. 105, 95th Cong., 1st Sess. 42 (1977)).

78. The authors are indebted to Morton Rosenberg, Specialist in American Public Law, Congressional Research Service, for the research in this section.

79. 724 F.2d 1188 (5th Cir. 1984).

80. 5 U.S.C. § 906 (1982 & Supp. III 1985).

81. 29 U.S.C. § 206(d) (1982).

82. 43 Fed. Reg. 19,807 (1978).

come effective 60 days after transmittal to Congress unless either House passed a resolution of disapproval. Although no veto was exercised, a question arose as to whether the transfer of enforcement authority was valid as it was accomplished pursuant to an unconstitutional legislative veto. Simply, the inquiry was: can the statutory scheme and reorganization remain, absent the veto provision?

The court, in noting the absence of a severability clause in the Reorganization Act of 1977, was tempted to draw an inference of nonseverability but declined to give any real significance to the failure of Congress to incorporate a severability provision into the statute.[83] Instead, it relied on the finding in *United States v. Jackson* that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause,"[84] as justification for ignoring any inference that could be drawn from the absence of a severability provision.

The ability of the judiciary to manipulate a severability analysis to achieve a particular result becomes clear when the consistency of the reasoning used is examined. One must question a court's analysis when severability is virtually concluded if a severability clause is present, yet its absence is regarded as insignificant. As one commentator has remarked, "a court favoring severability can give apparently presumptive weight to the presence of a severability clause, but it can reject presumption rhetoric in the absence of such a clause by simply stating that the severability issue cannot be decided on the basis of the mere absence of the clause."[85] The amount of deference given to the

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83. M. Rosenberg, The Legislative Veto in the Courts: Constitutional Challenges Before and After Chadha 60-61 (unpublished manuscript).

84. EEOC v. Hernando Bank, 724 F.2d 1188, 1190 (1984) (quoting United States v. Jackson, 390 U.S. 570, 585 n.27 (1968)). The court also expressly disregarded the views of a Member which clearly indicated that a severability clause was deliberately left out because the legislative veto provision was viewed as an integral part of the legislative scheme. *See also* Muller Optical Co. v. EEOC, 574 F. Supp. 946, 953 (W.D. Tenn. 1983), *aff'd on other grounds*, 743 F.2d 380 (6th Cir. 1984). *But cf.* EEOC v. Allstate Ins. Co., 570 F. Supp. 1224, 1231 (S.D. Miss. 1983) (giving greater significance to Member's statements, noting that "[a]lthough not dispositive of the intent of Congress, the statements of one of the legislation's sponsors 'deserves to be accorded substantial weight in interpreting the statute.' " (quoting Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976)).

85. Note, *supra* note 72, at 1186. *See also* Cross, *Legislative Veto Provisions and Severability Analysis: A Reexamination*, 30 ST. LOUIS U.L.J. 537, 551 (1986).

presence or absence of a severability clause appears to vary, in a manner that will often yield a finding of severability.

Instead of pursuing an inquiry of the significance that should be afforded to the absence of a severability clause, the court in *EEOC v. Hernando Bank* turned to an analysis of whether Congress would have enacted the remainder of the Act without the veto provision. In examining the purpose behind enactment, it was evident that Congress delegated the reorganization function to the President for reasons of efficiency and expediency. Although specific limitations were placed on the reorganization authority,[86] the court recognized the inherent structure of the legislation in which Congress retained control over the substantive operations of the government and chose to allocate the reorganization authority to the President. The court concluded that nothing in the legislative history and the language of the Act itself "indicates that Congress would not have enacted the Reorganization Act without the legislative veto provision or that Congress even considered the issue of severability."[87]

Similarly, in *EEOC v. City of Memphis*,[88] the court relied on the "modern rule"[89] put forth in *Consumer Energy Council of America v. FERC*.[90] Again examining the severability issue raised by the Reorganization Act of 1977, the court noted the absence of a severability clause, but dismissed its significance, citing the *FERC* decision, which regarded the question of where the presumption lies as "mostly irrelevant," serving only to "obscure the crucial inquiry [of] whether Congress would have enacted other portions of the statute in the absence of the invalidated provision."[91]

Instead, the court's analysis turned on the importance of eliminating waste and overlap in the bureaucracy through reorganization under the Act. The court surmised that, given the underlying purpose of the statute, Congress would likely have intended to retain those programs transferred under the Act,

86. EEOC v. Hernando Bank, 724 F.2d 1188, 1191 (5th Cir. 1984).
87. *Id.* at 1191.
88. 581 F. Supp. 179 (W.D. Tenn. 1983).
89. *Id.* at 181.
90. 673 F.2d 425 (D.C. Cir. 1982).
91. *Id.* at 442.

instead of seeing them "perish" with the legislative veto. The fact that Congress has repeatedly appropriated funds to the EEOC for enforcement of transferred functions was regarded by the court as "ratification" by the Congress of the transfer.[92]

In *EEOC v. Allstate Insurance Co.*,[93] again litigating the validity of the EEOC's enforcement of the Equal Pay Act, the court gave some significance to the absence of a severability clause, commenting that it "suggests the inseverability of the provision."[94] The court referenced *Carter v. Carter Coal Co.*,[95] in which the Supreme Court viewed the absence of a severability provision as creating a presumption that the Legislature intended an act to be effective as an entirety; "that is to say, the rule is against mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it."[96]

The court examined in detail the legislative history of the Act to determine if Congress would have delegated the reorganization authority to the President without reserving for itself the review power inherent in the veto provision. It found that while Congress had some questions as to the constitutionality of the veto mechanism, it did seek to retain control over the reorganization process through the veto provision.[97] The decision noted that an amendment had been proposed to restrict the remedy a court may grant upon reviewing the constitutional status of a reorganization plan to that single plan before it, rather than to all such plans previously passed.[98] It took pains to clarify that the amendment was not offered "to in any way sever the one house veto provision from the remaining parts of the Act,"[99] but

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92. *See also* Muller Optical Co. v. EEOC, 574 F. Supp. at 946, *aff'd on other grounds*, 743 F.2d 380 (6th Cir. 1984) (The circuit court of appeals did not agree with the district court on the issue of ratification.).

93. 570 F. Supp. 1224 (S.D. Miss. 1983).

94. *Id.* at 1230 n.18.

95. 298 U.S. 238 (1936).

96. *Carter*, 298 U.S. at 312 (footnote omitted).

97. *See* EEOC v. Allstate Ins. Co., 570 F. Supp. 1230, 1232.

98. 123 CONG. REC. 9363 (1977). *See* Schwartz, *The Enforcement Authority of the EEOC: The Legislative Veto Provision in the Reorganization Act of 1977*, 33 U. KAN. L. REV. 101, 118 (contends that the nature of the amendment indicates an assumption of nonseverability and awareness on the part of Congress of the possibility of employing a severability clause).

99. EEOC v. Allstate Ins. Co., 570 F. Supp. at 1232.

simply to limit the effectiveness of an unconstitutional finding. Although the court gave considerable weight to the legislative history, it was likewise clear that the deliberate absence of a severability clause was given added significance. It concluded that the veto provision was "an integral and inseparable part of the grant of power to the President."[100]

The Second Circuit reached the same conclusion of inseverability in *EEOC v. CBS*,[101] but based its decision purely on an analysis of congressional intent. Recognizing that the Congress had delegated reorganization power to the Executive, the court focused on the effect of severance on congressional control over the reorganization process. Severance would give the statute "a positive operation"[102] beyond congressional intent and in a way that was inconsistent with the legislative history.[103]

The fact that this particular legislative veto provision contained expedited procedures for congressional consideration of executive action was seen as strengthening the role of Congress in the reorganization process.[104] Expedited procedures are special procedures which amend the internal rules of the particular House for its consideration of legislation.[105] They typically include procedures for mandatory referral of legislation to particular committees, hastening committee consideration of a disapproval resolution, time limits on floor debate, and privileged consideration on the floor.[106] These procedures are essential to ensure the expeditious handling of veto resolutions in the time frame specified for congressional review. Unfortunately, their inclusion is often regarded as controversial because they alter the traditional rules for handling legislation, preempting the prerog-

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100. *Id.*

101. 35 Fair Empl. Prac. Cas. (BNA) 1127 (1984).

102. *Id.* at 1129 (quoting Spraigue v. Thompson, 118 U.S. 90, 95 (1886)).

103. M. Rosenberg, *supra* note 83, at 62.

104. EEOC v. CBS, 35 Fair Empl. Prac. Cas. (BNA) at 1130. *See also* Muller Optical Co. v. EEOC, 574 F. Supp. at 946 (W.D. Tenn. 1983) *aff'd on other grounds*, 743 F.2d 380 (6th Cir. 1984); Alaska Airlines Inc., v. Donovan, 594 F. Supp. 92 (D.D.C. 1984), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 1259 (1986).

105. For Procedures of the House of Representatives, see W.H. BROWN, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, § 1013 (1985) (the document also includes exerpts from those statutes with legislative veto provisions including those with expedited procedures).

106. *See* Federal Trade Commission Improvements Act of 1980, § 21, 15 U.S.C. § 57a-1 (Supp. III 1985) (omitted as terminated).

atives of the congressional leadership. However, expedited procedures ensure timely consideration of veto resolutions and consequently enhance congressional control over the exercise of the delegated authority.[107]

While most courts in reviewing the Reorganization Act of 1977 found the veto provision to be inseverable,[108] it is indeed interesting that Congress responded to the Second Circuit's opinion in *EEOC v. CBS* by enacting legislation which ratified all past reorganization plans which had been implemented.[109] The Congress also amended the Reorganization Act[110] to put greater restrictions on the President's authority. This latter piece of legislation replaced the one-House disapproval mechanism with a two-House joint resolution of approval.[111] Under this procedure, reorganization plans would not take effect unless both Houses approved the action through passage of a joint resolution, which is presented to the President for signature or veto.[112]

The law expressly provides that failure of a House to act within the specified time frame for congressional review is equivalent to disapproval of the resolution.[113] Expedited proce-

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107. *See* H.R. REP. No. 128, 98th Cong., 1st Sess., pt.1 (1983). In reporting H.R. 1314, the Committee on Government Operations remarked that the use of expedited procedures was an accommodation to ensure a vote on reorganization plans and was an attempt to preserve as much of Congress' legislative authority as possible. *Accord* H. R. REP. No. 128, 98th Cong., 2d Sess., pt. 2 (1984).

108. *See* H.R. REP. No. 1104, 98th Cong., 2d Sess., app. 4, at 15 (1984).

109. Pub. L. No. 98-532, 98 Stat. 2705 (1984)(codified at 5 U.S.C. § 906 (Supp. III 1985)). Any plan that had been disapproved by Congress would not be affected by the legislation.

110. Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984)(codified at 5 U.S.C. § 901 (Supp. III 1985)). This legislation also extended the President's reorganization authority until December 31, 1984, and put further restrictions on the exercise of that authority.

111. Reorganization Act Amendments of 1984, § 3, 5 U.S.C. § 909 (Supp. III 1985).

112. A joint resolution is a device used by Congress as an alternative to a bill. According to Jefferson's Manual, a joint resolution is a bill so far as the processes of the Congress in relation to it are concerned. Joint resolutions are sent to the President for approval and have the full force and effect of law, once signed or, if vetoed, if overridden by the Congress with a two-thirds vote. W.H. BROWN, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 397 (1985).

113. Reorganization Act Amendments of 1984, § 3, 5 U.S.C. § 906(a) (Supp. III 1985)). Some Members view the approval mechanism as effectively a one-House veto. *See* 130 CONG. REC. H2520-21 (daily ed. April 10, 1984) (remarks of Rep. Levitas): Levitas & Brand, *Congressional Review of Executive and Agency Actions After Chadha:*

dures are still included to ensure prompt consideration by the Congress. Clearly, Congress' response to the litigation on the Reorganization Act of 1977 can be seen as an attempt to wrest greater control over the reorganization process and to assure its participation. As a result, the effectiveness of reorganization plans depends upon congressional determinations. A shift in control back to Congress has resulted.

VI. Recognizing the Function of the Legislative Veto: Congressional Review and Control

The Second Circuit's decision in *EEOC v. CBS* recognized that the legislative veto provision was included by Congress to promote and ensure congressional oversight of delegated actions. This is the proper focus for a severability analysis in that it acknowledges the true function of the legislative veto. Rather than straining the analysis in favor of severability by creatively divining legislative history or seeking justification in the cloak of preserving the remainder of the statute, the judiciary should engage in a true reading of congressional intent in making the delegation and the basis for retaining a veto. Often, for example, veto provisions are built into the legislation to permit Congress to revisit an issue if the circumstances at the time the legislation is considered are uncertain enough for a firm determination to be made.

This was in all likelihood the thought behind the inclusion of a legislative veto provision in the Natural Gas Policy Act of 1978.[114] The veto, by definition, was a means through which Congress could consider at a later point in time the effects of incremental pricing of natural gas and the wisdom of expanding it beyond an initial phase.[115] The uncertainty of effect, coupled with the desire to assess the situation after a preliminary phase had been implemented, argued for congressional review of future regulatory proposals. Although the court in *Consumer Energy*

"The Son of Legislative Veto" Lives On, 72 GEO. L.J. 801, 806 (1984). Despite this characterization, the Department of Justice views the approval mechanism as constitutional. *See* H. R. REP. No. 128, 98th Cong., 1st Sess., pt. 1, at 22-23 (1983).

114. 15 U.S.C. § 3417 (1982).

115. *See* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 442-43 (D.C. Cir. 1982).

Council of America v. FERC[116] recognized that Congress wanted to reserve judgment on the need for an extension of incremental pricing, it severed the unconstitutional veto. The court's decision was based on a finding that Congress had made a tentative decision in favor of an extension of the program, through its delegation of authority to FERC, thus evidencing an intent on the part of Congress that it would have enacted the remaining statute in the absence of the veto provision.[117] The legislative veto provision, by its nature, afforded Congress an opportunity to take a "second look" and to make an informed judgment on an issue with substantial policy implications. The result reached by this decision on the severability question was insensitive to the function of the veto and the apparent intent of Congress in its inclusion.

The test for severability, enunciated in the circuit court opinion in *Alaska Airlines, Inc. v. Donovan,*[118] illustrates this point. The court set forth the question of legislative intent as one under which it must be shown that Congress would have preferred no statute or delegation of authority in the absence of the legislative veto provision.[119] While consistent with the Court's analysis in *Chadha*, and subsequently in considering this particular case,[120] this test is an all-or-nothing inquiry which gives no consideration to the question of whether Congress would have passed an alternative version of the law if it were assured that the legislative veto provision was unconstitutional.[121] To engage in this type of analysis is equivalent to con-

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116. 673 F.2d 425, 444 (D.C. Cir. 1982).

117. *Id.*

118. 766 F.2d 1550 (D.C. Cir. 1985).

119. *See* Brief for Petitioner at 6, Alaska Airlines, Inc. v. Brock, 766 F.2d 1550 (D.C. Cir. 1985)(No. 85-920).

120. Alaska Airlines, Inc. v. Brock, 107 S. Ct. 1476, 1481 (1987), in which the Supreme Court held: "The final test for legislative vetos [sic] as well as for other provisions is the traditional one: the unconstitutional provision must be severed unless the provision created in its absence is legislation that Congress would not have enacted." (footnote omitted). In affirming the circuit court's finding of severability, the Supreme Court primarily focused on the legislative history of the Act, concluding that congressional interest in the veto provision was minimal. It further found that the strong direction of the Act's language independently required all carriers to hire protected employees, rendering the regulations issued by the Secretary of Labor, as well as the legislative veto provision attached to that regulatory authority, to be of little import in the statutory scheme.

121. *Id.* at 1560. *See* Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App.

struing legislative intent with blinders on. It ignores the different legislative options available to Congress and the nature of the deliberative process in drafting legislation. By imposing an artificial straitjacket on the inquiry of congressional intent, the result reached will often favor severance of the unconstitutional provision because Congress clearly preferred an enactment to none at all.[122]

Looking at the consequences of severability is a useful analytical tool. The district court, in *Alaska Airlines*,[123] was reluctant to sever the veto provision because to do so "might be an approximation of what Congress would have enacted. The task of determining the most preferential alternative to an unconstitutional statute belongs not to the courts, but to the Congress itself."[124] The judiciary should be hesitant to "rewrite" a law, in the guise of severance. This often not only contravenes legislative intent, but also works an imbalance in power between the legislative branch and the agency to which the authority is delegated.[125] As noted in the Petitioner's brief citing *McCorkle v. United States*, "[w]hen the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent."[126] The deliberate effort to save as much of the underlying statute when making severability determinations can result in a judicial preemption of legislative prerogatives.[127] Examining the effect of severance and comparing it with congressional intent would prevent this intrusion by the judiciary. It is also consistent with and promotes the concept of separation of powers in that it ensures that the allocation of power inherent

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1984), *cert. denied*, 469 U.S. 852 (1984), for a similar analysis. *See also* Brief for Petitioner at 9, *Alaska Airlines, Inc.* (No. 85-920).

122. Brief for Petitioner at 10, *Alaska Airlines, Inc.* (No. 85-920).

123. 594 F. Supp. 92 (D.D.C. 1984).

124. *Id.* at 94 n.3.

125. In the Supreme Court's consideration of the severability of this legislative veto provision, it appropriately recognized this point. It stated: "[T]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. In considering this question in the context of a legislative veto, it is necessary to recognize that the absence of the veto necessarily alters the balance of power between the Legislative and Executive Branches of the Federal Government." Alaska Airlines, Inc. v. Brock, 107 S. Ct. 1476, 1481 (1987).

126. 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1101 (1978).

127. *See* Brief for Petitioner at 10, *Alaska Airlines, Inc.* (No. 85-920).

in the statutory scheme is preserved.[128] Not only does it avoid manipulation by the judiciary, but it also acknowledges the constitutional role of Congress as lawmaker and defers to its delegation of authority.

Recent litigation over the severability of a legislative veto provision in the Budget and Impoundment Control Act of 1974[129] has focused on congressional control over the budget process and the power relationship between the branches. In *City of New Haven v. United States*,[130] the court examined the President's authority to defer the spending of funds for four housing programs under § 1013 of the Act.[131] Under the procedures of the Act, the President is required to notify Congress of a proposed deferral of funds and must make amounts available for obligation if either House disapproves the proposed deferral. Expedited procedures are included to provide for timely handling and voting on disapproval resolutions.

The court found that the veto provision was inseverable and the President's authority to defer invalid. In reaching its decision, the impact of a finding of severability was assessed to determine if the result would comport with congressional intent. Simply, the analysis is result-oriented[132] in that it sought to determine whether severance would accomplish a legislative result consistent with what Congress sought to achieve. The court gave

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128. *See* Shirley, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 COLUM. L. REV. 1808, 1822 (1985) (argues that a severability analysis should focus on the power relationship between the branches reflected in the statute in determining the importance of the veto provision to the legislative scheme).

129. Budget Impoundment and Control Act of 1974, § 1013, 2 U.S.C. § 684 (Supp. III 1985).

130. 634 F. Supp. 1449 (D.D.C. 1986), *aff'd in part*, 809 F.2d 900 (D.C. Cir. 1987).

131. Budget Impoundment and Control Act of 1974, § 1013, 2 U.S.C. § 684 (Supp. III 1985).

132. The court noted that a similar analysis was conducted in American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982), which found an unconstitutional committee-approval mechanism in an appropriations bill inseverable. The provision restricted the use of funds to reorganize the Department of Housing and Urban Development before a certain date without the prior approval of the Committees on Appropriations. The court concluded that Congress would not have placed a flat prohibition on reorganization in law and refused to sever the unconstitutional committee-approval language as that would have been the result. (Despite this decision, committee-approval mechanisms are still routinely inserted in appropriations bills. *See, e.g.*, Urgent Supplemental Appropriations Act of 1986, Pub. L. No. 99-349, 100 Stat. 710 (1986).

considerable significance to the legislative history of the Budget and Impoundment Control Act of 1974 in its decision. It characterized that history as one in which Congress was "intent on recovering its primacy in matters of money and spending"[133] and sought to "wrest *control* over the budget from what is perceived as a usurping Executive . . . ."[134] The Act was viewed as a culmination of a quest by Congress to restrict the President's power to impound funds and to reassert control over the budget process through the use of notice requirements and veto provisions.[135] As an "integral component of the control machinery,"[136] it was recognized that severance of the veto provision would destroy legislative control over the budget process, which was the *sine qua non* of enactment.[137]

The court thus appears to have relied almost exclusively in its severability inquiry on the legislative intent of retaining a legislative veto and the desire of Congress to remain a pivotal player in the budget process. Although the court concluded that, absent a veto provision, Congress would not have conceded "any deferral authority to the President *at all*",[138] its analysis did not focus precisely on this question. Clearly, the court engaged in the appropriate inquiry in which the result of severability and its consistency with congressional intent was of primary importance.

The remaining factors in the court's severability analysis were given less significance. The fact that the Budget and Impoundment Control Act did not contain a severability clause was mentioned in a footnote together with the inference that its absence was not dispositive, but merely evidence of congressional intent.[139] Likewise, the question of whether or not the statute would be operable without the veto provision was given short shrift. While recognizing that the Congress has been overturning

133. City of New Haven v. United States, 634 F. Supp. 1449, 1455 (D.D.C. 1986).

134. *Id.* at 1454.

135. The President's authority to rescind or cancel the spending of funds is subject to approval by Congress through passage of a recission bill, within 45 days of transmittal of the President's notification of recission. Budget and Impoundment Control Act, § 1012, 2 U.S.C. § 683 (Supp. III 1985).

136. *City of New Haven*, 634 F. Supp. at 1456.

137. *Id.* at 1459.

138. *Id.* (emphasis added).

139. *Id.* at 1453 n.4.

deferrals through the inclusion of language in appropriations bills, the court noted that such action does not demonstrate that the Budget and Impoundment Control Act is operable. Rather, it illustrated that the Congress was acting pursuant to the constitutional requirements for legislating.[140] No scrutiny was made of the functioning of the deferral process without the use of a congressional veto, unlike other decisions where courts have concluded either that a report-and-wait procedure would keep the statute effectively working[141] or that Congress could simply enact legislation overturning the proposed action.[142]

The District of Columbia Circuit Court, in *City of New Haven v. United States*,[143] considering the same issue, used a similar analysis. The court was preoccupied with the legislative history prompting the inclusion of the legislative veto, focusing in particular on the manner in which the statute would operate without the legislative veto and its consistency with congressional intent.[144] The absence of a severability clause was again noted in a footnote, accompanied by a comment that the court "need not rely on the absence of a severability clause to support our holding of inseverability" because "more direct evidence of congressional intent conclusively establishes that Congress would not have intended section 1013 to survive excision of its legislative veto provision."[145]

In the 99th Congress, efforts were made to address the deferral issue through the introduction of legislation amending the Budget and Impoundment Control Act of 1974[146] and through amendments to appropriations bills. Legislation was introduced, but not acted upon, to submit deferrals proposed by the President for approval by Congress through the passage of

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140. *Id.* at 1459.

141. Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), *cert. denied*, 469 U.S. 852 (1984); Alaska Airlines, Inc. v. Donovan, 766 F. 2d 1550 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 1259 (1986); Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1985).

142. National Treasury Employees Union v. Reagan, 629 F. Supp. 762 (D.D.C. 1983).

143. City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987).

144. *Id.* at 905-06.

145. *Id.* at 905 n.15.

146. S. 2229, 99th Cong., 2d Sess. (1986); H.R. 4205, 99th Cong., 2d Sess. (1986).

deferral bills.[147] The effect of such legislation would be to treat deferrals in the same manner that recissions are now treated under the Act. Another bill would have replaced the one-House veto mechanism with a joint resolution of disapproval[148] in an attempt to maintain the original intent of Congress in structuring the deferral process. What type of review mechanism is used to replace the unconstitutional veto provision will, of course, determine whether the Executive or Congress has the greater edge in controlling deferrals.

The Urgent Supplemental Appropriations Bill[149] for fiscal year 1986 contained a provision which made the President's deferral authority inapplicable to appropriations made in the bill and in subsequent appropriations acts.[150] This proposal was not without controversy. Those who supported this proposal viewed the residual authority left to Congress to disapprove deferrals as inadequate, because corrective legislation had to be passed. Although deferrals are routinely disapproved in appropriations bills,[151] it was feared that even with specific legislation disapproving deferrals,[152] the President still retained the ability to defer funds which have been appropriated in legislation he

147. *Id.*

148. H.R. 4618, 99th Cong., 2d Sess. (1986). Legislation was also introduced to repeal the deferral authority in its entirety (H.R. 2247, 99th Cong., 1st Sess. (1985)). A House resolution was also proposed, expressing the sense of the Congress that the deferral authority was unconstitutional due to the presence of an inseverable legislative veto (H.R. Res. 411, 99th Cong., 2d Sess. (1986), in the hope of creating legislative intent for a reviewing court to consider.

149. H.R. 4515, 99th Cong., 2d Sess. (1986).

150. H.R. 4515, 99th Cong., 2d Sess. § 201 (1986). *See also* H.R. 5234, 99th Cong., 2d Sess. § 315 (1986), which provided that the President's deferral authority did not apply to funds appropriated by the bill. This provision was deleted by the Senate. *See* H.R. CONF. REP. No. 649, 99th Cong., 2d Sess. 76 (1986).

151. Urgent Supplemental Appropriations Act of 1986, Pub. L. No. 99-349, 100 Stat. 710 (1986). *See also* debate on H.R. 5234, Department of Interior Appropriations for Fiscal Year 1987, 132 CONG. REC. H5205 (daily ed. July 31, 1986) for statement of the Office of Management and Budget in opposition to the use of committee vetoes.

152. *The Deferral Process After Chadha, 1986: Hearing on the Deferral Process as Provided by the Congressional Budget and Impoundment Control Act of 1974 Before the Committee on Rules*, 99th Cong., 2d Sess. 124, 131 (1986) (Statement of Milton J. Socolar, Special Assistant to the Comptroller General, GAO). Interestingly, the proposed language in § 201 of H.R. 4515 was regarded by some as ineffectual in repealing the deferral authority since this authority is not completely derived from § 1013 of the Budget and Impoundment Control Act. *See id.* at 54 (Statement of Richard Ehlke, Specialist in American Public Law, Congressional Research Service).

has signed. As a result, the President could wield a line-item veto of sorts, which some view as a disruption of the balance of power between the branches.[153]

This provision was deleted in conference at the insistence of the Senate.[154] Assurances had been given by the executive branch that no policy deferrals would be proposed for the balance of 1986.[155] This agreement was designed to bring a temporary cease-fire to the ongoing political struggle. While the constitutional status of the deferral procedure is still in doubt, a shift in power has inured to the President. To some, this may be regarded as a preferable outcome even though it may be an accession of power away from Congress.

There is considerable thought among fiscal conservatives that the President should retain strong deferral authority as an appropriate means to curb unnecessary spending.[156] The President's role in the budget process is critical in preventing inefficient and unjustified expenditures, consistent with the nature of the executive function. To counterbalance this power, the Congress should play a pivotal role in reviewing, and if necessary, disapproving proposed deferrals, as the legislative veto provision had enabled it to do. As noted by one commentator, the Act had delineated a careful boundary between the Executive and Congress, "allowing for considerable discretion in the operation of the executive branch while permitting Congress an opportunity

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153. A line-item veto power would enable the President to veto particular portions of a bill, while approving other portions of the same bill presented to him for signature. *See* remarks of Congressman Brooks and Congressman Panetta, 132 CONG. REC. H2548-50 (daily ed. May 8, 1986) debating an amendment offered by Congressman Armey to delete § 201 of H.R. 4515. *See also The Deferral Process After Chadha, 1986: Hearings on the Deferral Process as Provided by the Congressional Budget and Impoundment Control Act of 1974 Before the Committee on Rules*, 99th Cong., 2d Sess. 112 (1986) (Statement of David Vladeck, Attorney, Public Citizen Litigation Group).

154. *See* S. REP. No. 301, 99th Cong., 2d Sess. 3 (1986). The Senate Appropriations Committee recommended deletion of the House language due to "procedural implications" it would pose in the Senate.

155. *See* Statement of Congressman Whitten, 132 CONG. REC. H4105 (daily ed. June 24, 1986); H.R. REP. No. 649, 99th Cong., 2d Sess. 76 (1986) (explaining that the deletion of the provision is based on assurances from the Office of Management and Budget that no further policy deferrals would be proposed for the balance of the calendar year, also noting that deletion would allow the courts time to address the deferral issue and the Congress to act in future legislation).

156. *See Hearing of the Committee on Rules, supra* note 152, (statement of James C. Miller, Director of the Office of Management and Budget).

to reiterate its previously stated intent with regard to the program at issue."[157] The balance between the branches struck in the Budget and Impoundment Control Act that was disrupted by the *Chadha* decision needs to be restored. The search to replace the veto provision and the congressional power it represented should begin quickly if Congress is to regain its budgetary prerogatives. The type of mechanism chosen and the political climate that surrounds its choice will determine the allocation of power among the branches.

VII. Replacement for the Legislative Veto

In other areas as well, Congress has begun to search for alternatives to the legislative veto. There is a continuing interest on the part of Congress to secure and retain control over its delegations. The need to ensure agency accountability and responsiveness, which has been disrupted by the *Chadha* decision and by subsequent decisions on the severability issue, endures. The veto mechanism was a political tool which was used to accommodate the interests of the delegating and implementing entities. Often it was included as a compromise between the executive and legislative branches.[158] The beauty of the legislative veto was that it preserved the ability of Congress to review the implementation of its policies while at the same time preserving the executive's flexibility to administer the law.

As articulated by one commentator, the legislative veto represents an accommodation between the branches, on issues of interest to each, as a means of best preserving a balance while accomplishing the needed delegation of power.[159] Through severance of unconstitutional veto provisions, the basic delegation of authority remains without the check or contingency of congres-

157. Clokey, *INS v. Chadha and the Impoundment Control Act of 1974: A Shift in the Balance of Power*, 45 U. PITT. L. REV. 673, 688 (1984).

158. *See* Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), *cert. denied*, 469 U.S. 852 (1984); Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982); Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983) (All discussed the use of a legislative veto in achieving the compromise that led to enactment of the statute. Yet all found the veto provision to be severable based on the preference of saving the remaining statute and a determination that Congress would have preferred the severance option to no statute at all.).

159. Moses, *supra* note 4, at 806.

sional acquiescence that was part of the statute as originally structured by the legislature. Simply put, a shift in the power of decisionmaking occurs. If the significance of the legislative veto to the statutory scheme is overlooked, an imbalance in power different from that contemplated by Congress results. In order to restore the appropriate allocation of power, Congress must replace existing unconstitutional veto provisions with alternative devices. The joint resolution has emerged as a viable mechanism since it meets constitutional scrutiny, is simple yet effective in content, and can be acted upon relatively quickly as long as it contains expedited procedures for timely consideration. While other means to insure the accountability of independent regulatory agencies — through appropriation measures, specific restrictions on the agency's statutory authority, and indirectly through shorter authorization periods and conducting oversight hearings[160] — are available, and could be used to supplement a joint resolution mechanism, these options are not as efficacious.

Congress has begun to focus on replacement mechanisms for the legislative veto. This has raised many larger issues, including the autonomy of independent agencies, their accountability to the Congress, and the necessity of restrictions on broad delegations of authority, as well as the "workability" of a replacement device. A case in point involves congressional review of rulemaking by the Federal Trade Commission.

Following closely in the footsteps of *Consumers Energy Council of America v. FERC,*[161] the District of Columbia Circuit Court held the congressional veto of the Commission's used car rule[162] unconstitutional.[163] The rule had been promulgated pursuant to a congressional directive in § 109(b) of the Magnuson-Moss Warranty Act to initiate a rulemaking proceeding dealing with warranties in the sale of used cars.[164] Opposition to the rule

160. *See* Levitas and Brand, *Congressional Review of Executive and Agency Actions After Chadha: "The Son of Legislative Veto" Lives On*, 73 GEO. L. J. 801 (1984) (discussing alternative devices).

161. 673 F.2d 425 (D.C. Cir. 1982).

162. 46 Fed. Reg. 41,328 (1981)(to be codified at 16 C.F.R. pt. 455) (proposed August 14, 1981).

163. Consumer Union v. Federal Trade Comm'n, 691 F.2d 575 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983).

164. 15 U.S.C. § 2309(b)(1982).

stemmed from its required disclosure of known defects, ambiguities in the drafting, unintended effects on the used car market, and possible conveyance of misinformation to consumers.[165] Despite numerous articulations of legislative intent,[166] the rule exceeded congressional expectations and the delegation of authority. While certain aspects of the rule did comport with the grant of authority, the rule was vetoed with the hope that the Commission would revise and repromulgate it.[167]

A two-House legislative veto provision[168] had been included in the Federal Trade Commission Improvements Act of 1980 to assure appropriate review of regulations[169] issued by the Commission governing "unfair or deceptive acts or practices . . . ."[170] The breadth of the rulemaking authority was perceived as, and continues to be, enormous. This is particularly true since neither "unfair" nor "deceptive" is a defined term in the Federal Trade Commission Act.[171] These regulations often embody broad policy

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165. *See* additional views of Congressmen Lee and Corcoran, H.R. REP. No. 417, 97th Cong., 1st Sess. 27-30 (1981).

166. *See* H.R. REP. No. 181, 96th Cong., 1st Sess. 12 (1979) ("While no amendment was offered to the Commission's propose[d] rule on used cars, the Committee is concerned that aspects of that propose[d] rule might violate the congressional intent of the Magnuson-Moss Warranty -Federal Trade Commission Improvement Act. The Committee urges the full Commission to weigh the legislative history carefully before promulgating a final rule in this area. The Committee intends to monitor closely the rule and hold hearings, or take other appropriate action, on the subject, if necessary.") *See also id.* at 44-47 (additional views of Congressman Preyer); S. 1991, 96th Cong., 1st Sess. § 23 (1979) (a provision clarifying that the rule may not require a mandatory warranty or inspection of used cars); S. REP. No. 500, 96th Cong., 1st Sess. 31-32 (1979).

167. *See* H.R. REP. No. 417, 97th Cong., 1st Sess., 27-31, (Dissenting, Additional and Supplemental Views) (1981).

168. Federal Trade Commission Improvements Act of 1980, § 21, 15 U.S.C. § 57a-1 (Supp. III 1985) (omitted as terminated).

169. *See* additional views of Senators Schmitt and Goldwater, S. REP. No. 184, 96th Cong., 1st Sess. 18 (1979), which expressed the need for a legislative veto:

> The Congress has little control over the far-flung activities of this agency short of passing entirely new legislation. Because of the time and uncertainty involved in action on a bill which addresses a specific agency action, this approach is not an effective means of dealing with the many and diverse regulatory activities of the FTC. What is needed is a systematic procedure for the Congress to express its will with regard to specific regulatory initiatives.

170. The Federal Trade Commission Act, § 5(a)(1), 15 U.S.C. § 45(a)(1) (1982 & Supp. 1985).

171. In the past, Congress — both the House and the Senate — included a provision in reauthorization bills to define "unfair acts or practices." *See* H.R. 2385, 99th Cong., 1st Sess. § 2 (1985); S. 1078, 99th Cong., 1st Sess. § 9 (1985).

determinations of considerable economic impact, yet still have the full force and effect of law despite the absence of congressional consideration. Congressional concern over FTC rulemaking and the appropriate mechanism to facilitate review of its regulatory end product has been an issue that has continued to pervade the Commission's reauthorization process.

As the legislative history of the Federal Trade Commission Improvements Act of 1980 indicates, the legislative veto provision was the pivotal factor in achieving the compromise that led to its enactment. The Commission operated without an authorization from 1977 to 1980 due to the controversy between the House and the Senate over congressional review of Commission rules. The House twice rejected conference reports in the 95th Congress for lack of inclusion of legislative veto provisions.[172] In the 96th Congress, the Senate included a provision which would subject Commission rules to congressional review and disapproval by *joint* resolution, which are resolutions acted on by both Houses and sent to the President for approval, in response to perceived constitutional concerns with the simple or concurrent resolution.[173] The House bill, H.R. 2313, included a provision to disapprove rules by concurrent resolution and the House expressly instructed its conferees to insist on inclusion of a veto provision in the conference report.[174]

The veto provision was regarded as an essential element to enhance the Congress' oversight of the agency's activities and, in particular, to review those regulations which at that time were regarded as unnecessary, duplicative, or simply ill-advised.[175] At that time, an activist Commission had made controversial regulatory proposals in areas including funeral practices, used car sales, and children's advertising. Without the veto, Congress was compelled to include specific provisions that restricted rulemaking or investigations in particular areas. In the advertising area,

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172. 124 CONG. REC. 32,334 (1978). 124 CONG. REC. 5017 (1978).

173. *See* 126 CONG. REC. 2038-39 (1980).

174. 126 CONG. REC. 4345-47 (1980).

175. *See* debate on H.R. 2313, The Federal Trade Commission Improvement Act of 1979, 125 CONG. REC. 32,454-32,483 (1979). S. REP. NO. 500, 96th Cong., 1st Sess. 2-3 (1979) (expressing concern over various FTC rulemakings in the areas of used car sales, advertising, and standards and certification, and over rulemaking procedures in general).

for example, this provision exists to this day.[176] Indeed, the congressional debates surrounding the Commission's reauthorization is replete with concerns over the regulatory agenda of the FTC and the breadth of its authority. Questions even arose as to whether the Commission's rulemaking authority should be reexamined by the Congress.[177]

Given the pivotal nature of the veto provision, it is curious that no severability analysis was conducted by the court in *Consumer's Union v. FTC*.[178] Had the court engaged in this endeavor, it would have discovered the importance that provision played in achieving a reauthorization in 1980, as the legislative history demonstrates. Clearly, it was an integral part of the legislation and an essential contingency to the Commission's rulemaking authority in the eyes of Congress. As the Conference Report stated:

> Under this provision the authority of the Federal Trade Commission to promulgate rules is conditioned on those rules being submitted to the Congress for review and possible disapproval . . . . By requiring that the Commission submit a rule to Congress for review and possible disapproval, the Congress, under this provision, hereby provides a mechanism to determine whether a rule submitted to it by the Commission becomes effective.[179]

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176. *See* Federal Trade Commission Improvements Act of 1980, § 11(b), 15 U.S.C. § 57a (1982 & Supp. III 1985) which has been repeatedly extended in appropriations measures since its lapse in October, 1982. *See* most recently, Pub. L. No. 99-591, Making Continuing Appropriations for Fiscal Year 1987, H.R. REP. No. 1005, 99th Cong., 2d Sess. 71 (1986).

177. *See* 125 CONG. REC. 32,457 (1979) (remarks of Cong. Bereuter); *id.* at 32,458 (remarks of Cong. Coughlin); *id.* at 32,456 (remarks of Cong. Shumway).

178. *See* Note, *supra* note 72, at 1187 (argues that the legislative veto provision could be found severable since it was added as an amendment after the initial grant of rulemaking power, but recognizes that the amendment could be construed as a "legislative desire to modify the previous manifestation of intent"). The reasons for not examining the severability issue may have been twofold. The provision was only temporary in that it expired at the end of Fiscal Year 1982 (Federal Trade Commission Improvement Act of 1980, § 21, 15 U.S.C. §57a-1 (1982), although it had been extended through an appropriations bill until September 30, 1982 (Pub. L. No. 97-377, § 101(d), 96 Stat. 1830, 1870 (1982)). Additionally, the law expressly provided for expedited consideration by the courts of the constitutionality of the legislative veto. Federal Trade Commission Improvements Act of 1980, § 21(f), 15 U.S.C. § 57a-1(f)(1982). These two factors taken together may have been read as limiting a reviewing court's inquiry to the constitutional question and as evidence of the uncertainty of Congress behind the legislative veto inherent in the nature of a temporary provision.

179. H.R. REP. No. 917, 96th Cong., 2d Sess. 38 (1980).

Justice White alluded to the importance of the FTC veto in his dissent to the Court's affirmance of *United States Senate v. FTC*,[180] noting that Congress debated the breadth of the FTC's rulemaking authority and settled upon the legislative veto provision as a means for Congress to review the expansive and critical policy pronouncements made by the FTC.[181]

Congress continues to wrestle with a replacement mechanism for review of the Commission's rulemaking activities. In the 99th Congress, legislation languished in conference for lack of an agreement on this issue. The House bill, H.R. 2385, contained a simple joint resolution of disapproval, without expedited procedures.[182] The Senate counterpart, S. 1078, included a similar mechanism for rules issued by the FTC and the Consumer Product Safety Commission (CPSC) but did have special procedures for expedited consideration of resolutions.[183] The appropriateness of expedited procedures is basically a political battle over the ability of the leadership to completely control the consideration of legislation, coupled with the amount of deference that should be given to the particular agency's ability to regulate. The importance of expedited procedures cannot be overstated, as they ensure that a timely and fair vote will be taken on the issue at hand and that the collective desire of the Congress will not be preempted by a few. Controversy over the inclusion of these procedures, together with other issues, led to a stalemate. As a result, the Commission continues to operate without an authorization, as it has since fiscal year 1983.[184]

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180. 463 U.S. 1216 (1982).

181. *Id.* at 1218 (White, J., dissenting).

182. A request was made to the House Rules Committee on August 1, 1985 to permit an amendment to be offered on the floor. With time, it became clear that the Rules Committee would not allow an amendment, denying the House the ability to vote on this issue. The amendment was reluctantly withdrawn. The bill was considered thereafter under the suspension of the Rules procedure (*See* House Rule XXVII), which requires a super-majority for passage, and effectively limits those amendments which can be offered to the bill. *See* 131 CONG. REC. H7501-2 (daily ed. Sept. 17, 1985) (statements of Reps. Lott and Lent).

183. *See* S. 1078, 99th Cong., 1st Sess. §§ 16, 17 (1985), 131 CONG. REC. 10,170-75 (daily ed. July 26, 1985), which provides for legislative veto of rules issued by the Federal Trade Commission and Consumer Product Safety Commission.

184. In the first session of the 100th Congress, the Senate acted on legislation (S. 677) reauthorizing the Commission, and reinserted the same veto provision for FTC rules contained in the preceding Congress' Senate bill. *See* 131 CONG. REC. S4625-8 (daily ed.

Efforts are still afoot to provide for an across-the-board legislative review for all agency rulemaking. Last Congress, the Senate Judiciary Committee reported S. 1145, the Rulemaking Procedures Reform Act of 1985. The purpose of the legislation was to "rebuild the legislative veto of agency regulations as a means of increasing [agency] accountability, consistent with the constitutional requirements for legislative action, as defined by the Supreme Court."[185] The legislation amended the Administrative Procedures Act[186] to subject agency rules to congressional review and disapproval by joint resolution, with provisions for expedited consideration. Under the terms of the bill, rules were considered recommendations[187] and had no legal effect until the congressional review period had expired without enactment of a disapproval resolution. Rules were classified into two categories, major and nonmajor, as defined by their economic impact, with different time periods for congressional review. If both Houses passed a disapproval resolution with respect to a rule, a point of order could be raised if an appropriations bill for the relevant agency did not contain a provision prohibiting the use of funds to implement the rule.[188] This provision was designed as an enforcement mechanism to ensure that the agency does not use appropriated funds to implement the rule disapproved by Congress. As such, these restrictions contained in appropriations statutes would act as an effective check on the agency and would ensure that the will of Congress is carried out.

Similar legislation, H.R. 1339, the Regulatory Oversight and

Apr. 6, 1987).

185. S. REP. No. 492, 99th Cong., 2d Sess. 2 (1986).

186. Section 3 of S. 1145 added a new chapter 8 to title 5 of the United States Code.

187. Section 3(a) of S. 1145.

188. *See* S. REP. No. 492, *supra* note 185, at 4. The Department of Justice has expressed concern that this procedure bypasses the President in that it preempts the Executive's review of a congressional determination to disapprove an agency rule. This assumes that the appropriations bill at issue will reach the President's desk before the joint resolution, which given the short time frame for congressional review, is a large assumption. Further, the President does play a role in the appropriations process as the Executive does in other legislation under the presentment requirement of article I, § 7, cl. 2 of the Constitution. Finally, this provision amends the internal rules of the House to enable a Member to make a point of order against consideration of an appropriations bill consistent with the ability of each House granted by the Constitution to determine the rules of its proceedings (U.S. CONST. art. I, § 5, cl. 2). For a similar mechanism see S. 1078, 99th Cong., 1st Sess. (1985).

Control Act of 1985, was introduced in the House by Congressman Trent Lott. Although it adopted a similar distinction between major rules and other than major rules, the bill subjected major rules to an approval, rather than a disapproval process. Regulations issued would have had no effect unless specifically approved by Congress through the passage of a joint resolution. Conversely, rules other than major rules would have become effective unless disapproved. Expedited procedures were included and a regulatory review calendar was created in the House to handle increased floor activity in the consideration of resolutions. To ensure that Congress did not preempt the judiciary, a provision was included to clarify that congressional approval of a rule would have no presumptive effect with respect to the validity or review of the rule under the Administrative Procedures Act.[189]

VIII. Conclusion

The Supreme Court's *Chadha* decision altered the delicate balance of power that existed between the Congress and the independent and executive agencies to which it delegates power. The aftershocks of *Chadha* are still being felt. As courts examine the question of whether a veto provision is severable from the body of a statute, the issue of separation of powers pervades the analysis. The appropriate inquiry should focus on the allocation of power intended by Congress in making the original delegation of authority and the significance attached to the veto provision in the statutory scheme in striking that balance. The effect of severance should be examined and its consistency with the desire of Congress to retain a role in the implementation of that authority through the legislative veto should be assessed. The function and utility of the veto, as a procedural device, should not be overshadowed by the desire to retain the substantive portions of the statute. Judicial rewriting of legislation, under the cloak of seeking to preserve as much of the underlying statute as possible, is not only inappropriate, but also borders on an intrusion into the legislative domain.

Congress will continue its efforts to replace the legislative

189. H.R. 1339, 99th Cong., 1st Sess. § 807(b) (1985).

veto and to restore its lost authority over the implementation of delegated functions. It is only through a replacement device that Congress will truly fulfill its constitutional function, envisioned by the Framers over two hundred years ago, to write the laws of our nation. If the Government is to function effectively, accountability and checks on the exercise of delegated power is essential. The legislative veto fulfilled that role. Its replacement needs to be quickly and effectively found and the prerogatives of the legislative branch regained and asserted.