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THE POST LEGISLATIVE VETO RESPONSE:
A CALL TO CONGRESSIONAL ARMS

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In Immigration & Naturalization Service v. Chadha, the United States Supreme Court struck down as unconstitutional the so-called legislative veto in almost all its forms and varieties. The Court reasoned that all legislative action—defined by the Court as such action having "the purpose and effect of altering the legal rights, duties, and relations of persons"—requires bicameral approval and presentment to the president under article I of the Constitution. Since the one-House veto exercised in Chadha "operated . . . to overrule the Attorney General and mandate Chadha's deportation," it violated these article I requirements. Moreover, it was

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1. 103 S. Ct. 2764 (1983).
2. Id. at 2780-88.
3. Id. at 2784.
4. Id. at 2786.
5. Id. at 2784.
6. Id.
"hardly surprising" that shortly after *Chadha*, the Court summarily affirmed two circuit court opinions striking down legislative vetoes as applied to agency rulemaking.\(^8\)

What was perhaps not foreseen by the Court was that the lower federal courts would be cast in a sea of confusion on *Chadha*'s collateral issues of severability\(^9\) and retroactivity.\(^10\) In the short time period since the Court's sweeping pronouncement, lower federal court decisions have scattered in all directions on these and other related issues,\(^11\) thereby rendering *Chadha*'s impact measurably greater than the Court, or even Justice White in dissent,\(^12\) could possibly have conceived.

This article addresses the problems created in the aftermath of *Chadha*. It starts with a discussion of the decision's retroactivity and suggests that the Supreme Court's own precedents support a prospective application of *Chadha*'s constitutional holding.\(^13\) The article then outlines the chaos that has erupted among the federal jurisdictions as a result of the severability issue.\(^14\) It also discusses the post-*Chadha* congressional and executive floundering that has contributed to the confusion.\(^15\) After plotting the history of the legislative veto and demonstrating the need for a viable substitute,\(^16\) the article con-

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> [g]iven the Court's recent decision in [*Chadha*], the summary affirmance of the Court of Appeals' decisions striking the veto as unconstitutional is hardly surprising.

> These cases illustrate the constitutional myopia of the *Chadha* reasoning as applied to independent regulatory agencies and cast further light on the destructiveness of the *Chadha* holding.

*Id.* at 3557 (White, J., dissenting).

8. *Id.* at 3556, aff'g *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982); *United States Senate v. FTC*, 103 S. Ct. 3556 (1983), aff'g *Consumer Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam).

9. *See Chadha*, 103 S. Ct. at 2774-76. The "severability" issue was whether the veto provision contained in § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(1) (1982), could be severed from the remaining portions of the law, so as to save those portions from constitutional invalidation. *Id.* at 2774.

10. The Court in *Chadha* made no mention of the retroactive effect of its constitutional holding, but this does not undercut the issue's importance. *See infra* notes 17-123 and accompanying text.

11. *See infra* notes 18-136 and accompanying text.

12. Not even Justice White, in his dissent, anticipated the grave inequities that would be perpetrated by retroactive application of *Chadha*. *See Chadha*, 103 S. Ct. at 2792-2811. *See also infra* notes 81-101 and accompanying text.

13. *See infra* notes 18-123 and accompanying text.


15. *See infra* notes 137-59 and accompanying text.

16. *See infra* notes 140-57 and accompanying text.
cludes that Congress should ultimately take the initiative and bring our federal system back to order.17

I. RETROACTIVITY

The Court in Chadha made no mention of whether or under what circumstances lower federal courts should apply its decision retroactively. Supreme Court case law18 and the events that have occurred in the wake of Chadha19 suggest, however, that the Court should have considered this issue, for it is arguable that Chadha’s constitutional determination should not be applied retroactively.

A recent Supreme Court case concerning the retroactive application of a constitutionally-based decision is Northern Pipeline Construction Co. v. Marathon Pipe Line Co.20 In Marathon, the Court held that Congress’ grant to bankruptcy judges of “jurisdiction over all ‘civil proceedings arising under [the bankruptcy laws] or arising in or related to cases under [those laws]’ ”21 violated the life tenure and fixed compensation clauses of article III of the Constitution.22

In clear recognition of the destructive effect such a decision would have on the administration of the bankruptcy laws and the rights of all parties involved, the Court gave immediate consideration to the retroactive effect of its holding.23 The Court summarized the three considerations it gleaned from its own precedents bearing upon the issue of retroactivity:

[F]irst, whether the holding in question “decid[ed] an issue of first impression whose resolution was not clearly foreshadowed” by earlier cases . . . ; second, “whether retrospective operation will further or retard [the] operation” of the holding in question . . . ; and third, whether retroactive application “could produce substantial inequitable results” in individual cases. . . .24

After briefly applying these factors to the Marathon case, the Court ruled that its constitutional holding “shall apply only prospec-

17. See infra notes 158-74 and accompanying text.
18. See cases discussed infra notes 20-75 and accompanying text.
19. See infra notes 81-101 and accompanying text.
21. Id. at 54 (quoting 28 U.S.C. § 1471(b) (1976 & Supp. IV 1980) (emphasis added by Court)).
22. Id. at 58-60.
23. Id. at 87-88.
24. Id. at 88 (emphasis added) (citations omitted).
tively." Moreover, in further recognition of the certain chaotic impact of its decision, the Court stayed its judgment for several months.

In light of Chadha's devastating holding, which according to Justice White's dissent, "strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history," one would think that the Court would have given the retroactivity issue equal urgency in Chadha. In fact, a simple application of the three factors considered determinative in Marathon suggests that Chadha should be applied prospectively as well.

A. Unprecedented Interpretation

The constitutional issue in Chadha clearly presented "an unprecedented question of interpretation" of article I. As of the date Chadha was decided, the legislative veto mechanism had been relied upon by Congress for more than half a century, and appeared in a massive array of laws. Moreover, until Chadha, established Supreme Court precedent extended great latitude to such long and continuous governmental practices and created a presumption of their constitutionality. In addition, the only word from the Supreme Court concerning the veto's constitutional status was announced in 1976 in a concurring opinion of Justice White, wherein he opined

25. Id.
26. Id. The Court stated that "[i]t is in this limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." Id. The subsequent history of Marathon's effect on the bankruptcy system, and the Court's grant of another stay is comprehensively reviewed in Note, Manville: Good Faith Reorganization or "Insulated" Bankruptcy, 12 Hofstra L. Rev. 121, 128 n.48 (1983).
27. Chadha, 103 S. Ct. at 2810-11 (White, J., dissenting).
29. See infra notes 140-53 and accompanying text; see also infra note 57 (court describing the veto as "time honored").
31. See, e.g., Myers v. United States, 272 U.S. 52, 175 (1926); Ex parte Grossman, 267 U.S. 87, 118-19 (1925); Fairbank v. United States, 181 U.S. 283, 307-09 (1901). See also United States v. Woodley, 726 F.2d 1328, 1337-39 (9th Cir. 1983) (stating that only with the advent of Chadha has the Supreme Court changed its thinking on the constitutional presumption for continuous practices).
that the veto procedure was in fact constitutional.\textsuperscript{32} Although prior to Chadha there had been much written on both sides of the veto's constitutional validity,\textsuperscript{33} the very fact that there was such widespread disagreement suggests that Chadha's ultimate resolution was not "clearly" foreshadowed.\textsuperscript{34} Nevertheless, even if the veto's ultimate demise was predicted by some members of Congress,\textsuperscript{35} Supreme Court case law suggests that since Chadha "was a clear break with the past,"\textsuperscript{36} Congress as a whole may still have been entitled to rely on the veto's established and engrained use and presumed constitutionality.\textsuperscript{37}

Moreover, in its recent decision determining the retroactive effect of a criminal procedure ruling,\textsuperscript{38} the Supreme Court instructed that the purpose of this "foreshadowed" category is to determine whether law enforcement authorities reasonably relied on past rules of criminal procedure.\textsuperscript{39} Where reliance was reasonable, it is more likely that the decision will be only prospectively applied. Here, analysis should focus not only upon congressional reliance, but also upon those parties and authorities who have relied upon statutes containing vetoes. Such parties would include, for example, those litigants who have obtained civil judgments pursuant to laws containing legis-

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\item \textsuperscript{32} Buckley v. Valeo, 424 U.S. 1, 282-86 (1976) (White, J., concurring). Furthermore, in declining to address the veto issue, the majority merely suggested that the veto mechanism was a subject of disagreement. \textit{Id.} at 140 n.176. The Court made no further mention of the veto's constitutionality.
\item \textsuperscript{33} \textit{Compare Abourezk, supra note 30; Cooper \& Cooper, The Legislative Veto and the Constitution, 30 Geo. Wash. L. Rev. 467 (1962); Javits \& Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U. L. Rev. 455 (1977) (all suggesting veto was constitutional), with FitzGerald, Congressional Oversight or Congressional Foresight: Guidelines From the Founding Fathers, 28 Ad. L. Rev. 429 (1976); Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983 (1975) (both opining that the veto was unconstitutional). For a more comprehensive compilation of the different views, see Chadha, 103 S. Ct. at 2797 n.12 (White, J., dissenting).
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\item \textsuperscript{34} \textit{See supra note 24 and accompanying text.}
\item \textsuperscript{36} Solem v. Stumes, 104 S. Ct. 1338, 1343 (1984) (quoting Desist v. United States, 394 U.S. 244, 248 (1969)).
\item \textsuperscript{37} \textit{Id.} The Court in Stumes noted that even if an ultimate resolution was foreshadowed because the Court's precedents were severely criticized, "authorities are generally entitled to rely on existing caselaw, whatever its disrepute." Stumes, 104 S. Ct. at 1343 n.6. Therefore, although some members of Congress may have noted the veto's possible unconstitutionality, Congress was nevertheless justified in relying on past Supreme Court case law in support of the veto's constitutionality.
\item \textsuperscript{38} \textit{Stumes, 104 S. Ct. 1338 (1984).}
\item \textsuperscript{39} \textit{See id. at 1343.}
\end{itemize}
relative vetoes, while authorities would include administrative agencies delegated authority under statutes with vetoes. These parties, who will be injured by court decisions striking down entire laws because they contain vetoes, cannot and should not be expected to have “foreseen” that these laws would be nullified by a subsequent Court decision. Under the third consideration below, specific cases and corresponding inequitable results are discussed in detail. Thus, the Court’s first factor, the unprecedented interpretation of the constitutional issue in Chadha, strongly buttresses prospective application of Chadha. Furthermore, the last two considerations are equally supportive of nonretroactivity.

B. Furtherance of the Holding

“[R]etroactive application would not further the operation” of Chadha’s holding. In Linkletter v. Walker, for example, the Court was confronted with the question of whether the exclusionary rule, as applied to the states by the landmark Mapp v. Ohio decision, should be extended retrospectively. The Court focused on the purpose of the rule, which was to deter illegal searches and seizures by police, and decided that retroactive application of the rule would have no impact on past police actions. Here, Chadha was directed at the proper constitutional procedures that Congress must undertake before enacting law; rendering void all actions taken under authority of past congressional legislative initiatives that did not conform to the Chadha Court’s interpretation of article I has nothing to do with Congress’ future compliance with those constitutional requirements.

While some may argue that prospective application of Chadha

40. See infra note 60 and accompanying text.
41. See infra notes 81-101 and accompanying text.
42. Id.
44. 381 U.S. 618 (1965).
46. Linkletter, 381 U.S. at 619-20.
47. Id. at 629-30, 636-37.
48. Id. at 636-37. The Court stated that “[t]he misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved.” Id. at 637.
49. Chadha, 103 S. Ct. at 2780-88. Of course, Chadha was not decided to “deter” Congress from taking unconstitutional legislative action. Therefore, the first Marathon factor, see supra text accompanying note 24, is concededly arguable on this ground. Nevertheless, the Chadha opinion was directed at Congress’ appropriate procedure for taking legislative action.
would condone past laws and actions that did not meet constitutional muster, this argument alone has not persuaded the Court. In Linkletter, for example, it was, in effect, argued that by applying the exclusionary rule only prospectively the Court would be condoning past illegal searches by allowing unconstitutionally seized evidence to form the basis of convictions. This argument, however, did not prevail. Chadha's constitutional holding should, therefore, apply only to future attempts by Congress to exercise already enacted vetoes, and to all congressional undertakings to enact unconstitutional veto procedures after Chadha was rendered. It should not apply to past laws containing vetoes where the actions pursuant to those laws have already occurred.

For example, in several cases discussed later in this article, convictions and civil judgments were obtained under laws containing vetoes enacted prior to Chadha. It is being argued that these case dispositions should be nullified in light of Chadha's holding. Rendering void otherwise flawless convictions and judgments, however, has nothing to do with Congress' future compliance with article I, and, more importantly, will result in extremely inequitable consequences.

In addition, since Chadha was decided, the Reorganization Act of 1977 has been the focus of mass confusion created by the lower federal courts. The courts' analyses of the severability issues related to that Act will be discussed in a later section. The Act does, however, provide some insight into the proper resolution of Chadha's retroactivity.

The Act was passed to eliminate waste and overlap in the executive branch and its agencies. Congress therefore delegated authority to President Carter to restructure and reorganize the bureaucracy by preparing reorganization plans, which were required to be submitted to both Houses of Congress for review. The Act further pro-

50. Cf. Brief for Petitioner at 14, Linkletter, 381 U.S. 618 (arguing that Mapp afforded the petitioner a personal constitutional right to be spared conviction based on unconstitutionally seized evidence).
51. See infra notes 95-101 and accompanying text.
52. Id.
54. See infra notes 124-36 and accompanying text.
55. Id.
57. See id. §§ 901(c)-901(d), 903.
vided that the plans became effective if, within sixty days from their submission, neither House passed "a resolution stating in substance that the House does not favor" the plan. 58 President Carter did in fact restructure the executive agencies, and the government has been functioning under that structure for a number of years. 59 To apply Chadha to this law, and thereby strip entire administrative agencies 60 of their enforcement authority, would not only create utter chaos, but would do nothing to promote Chadha's constitutional holding. 61 Thus, it is precisely this type of law and corresponding consequences to which Chadha should not be retroactively applied.

Nonetheless, one district court has already ruled, in EEOC v. Allstate Ins. Co., 62 that Chadha should be retroactively applied to the Reorganization Act. 63 The court suggested that it was "required" to do so, 64 despite the Supreme Court's specific instruction in Linkletter "that the Constitution neither prohibits nor requires retrospective effect." 65 The Supreme Court recently dismissed the appeal of the Allstate decision, 66 leaving the lower court ruling intact.

The court in Allstate applied, or rather, misapplied, the Mara-

58. Id. § 906(a).
61. Of course, the administrative agencies will be stripped of their powers only if a court finds that the remaining portions of the Act are inseverable from the veto sections. See, e.g., EEOC v. Allstate, 570 F. Supp. 1224 (S.D. Miss. 1983); EEOC v. Westinghouse Elec. Corp., 33 F.E.P. Cases 1232 (W.D. Pa. 1984) (both cases striking down entire Act). Even those courts that have found the remaining portions severable have failed to acknowledge that Chadha should not apply to past laws containing vetoes where Congress is not presently attempting to exercise those vetoes. See, e.g., EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984); Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983); EEOC v. Jackson County, 33 F.E.P. Cases 963 (W.D. Mo. 1983).
63. Id. at 1232-33.
64. See id. The court stated that "by holding that the Reorganization Act of 1977 is unconstitutional thereby undercutting EEOC's authority to sue, which clearly must rely on a statutory grant of power, this Court decides a narrow and isolated issue, one which is required of it by . . . Chadha." Id. at 1233 (emphasis added).
thon factors, and came to conclusions opposite to those suggested here. Under the first factor, the court mistakenly asked whether its own case presented a question of first impression, rather than properly asking whether Chadha was an unprecedented interpretation of article I. By doing so, the court, in effect, found that Chadha foreshadowed itself. The court then stated that “Congress was well aware that such a decision might ultimately invalidate their use of the one-house veto scheme.” As was previously discussed, however, this argument is contrary to Supreme Court case law concerning retroactivity. Furthermore, if Congress failed to pass laws every time a question was raised as to the constitutional validity of its action, the federal government would be in even greater turmoil than that created by Chadha. Congress, of course, had the right to rely on the veto’s established validity up until the date of Chadha.

The Allstate court analyzed the second factor in terms of whether its decision would retard the application of Chadha. It failed, however, to note how Congress’ future compliance with article I would be enhanced by striking down a previously enacted law under which Congress was not then attempting to exercise a veto.

Finally, the court boldly stated that “there are no individual cases in which retroactive application of [the] decision would produce inequitable results.” Although blatant inequitable results have not yet surfaced in relation to the Reorganization Act, there are several other examples discussed in the next section.

In contrast to Allstate, the court in EEOC v. Pan Am. World

67. See supra note 24 and accompanying text. The Allstate court actually cited Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), which, as the Supreme Court noted in Marathon, 458 U.S. 50, 87-88, had summarized the three factors. See Allstate, 570 F. Supp. at 1232-33.
68. Allstate, 570 F. Supp. at 1233.
69. See supra text accompanying notes 24, 28.
70. Allstate, 570 F. Supp. at 1233.
71. Id.
72. See supra notes 35-37 and accompanying text.
73. See supra notes 28-37 and accompanying text.
74. Allstate, 570 F. Supp. at 1233.
75. Id. The court also found support in the Supreme Court’s silence in Chadha on the retroactivity of its holding.
76. It is somewhat inequitable that employees who are discriminated against in jurisdictions that have not struck down the entire Reorganization Act have the resources of the EEOC to protect them, while employees in jurisdictions that have invalidated the Act must sue their employers on their own. This inequity, however, does not result merely from the retroactive application of Chadha, but also from conflicting judicial conclusions as to the severability of the veto contained in the Act, once Chadha is applied retroactively.
77. See infra notes 81-101 and accompanying text.
Airlines\textsuperscript{78} expressed very different sentiments about Chadha's retroactive effect. Although the court declined to rule specifically on the retroactivity issue in light of its disposition of the controversy before it,\textsuperscript{79} it offered the following opinion in dictum:

This Court believes that a respectable argument can be made that Chadha should not be applied retrospectively. Some prudential considerations must affect such sudden far sweeping constitutional pronouncements by the Court. We note that the notorious Miranda rule nor Mapp were [sic] applied retrospectively. To have done so would have produced utter chaos. Chadha invites chaos. The Supreme Court could have considered this problem, but it did not. . . .\textsuperscript{80}

C. Inequitable Results

Retroactive application of Chadha has already resulted in "inequitable results\textsuperscript{81}" in individual cases. City of Alexandria v. United States\textsuperscript{82} is a prime example of the gross unfairness that will be exerted when Chadha is not limited to prospective application. In that case, the City claimed that the General Services Administration ("GSA") had broken its contract to sell the City a parcel of surplus government real estate.\textsuperscript{83} The GSA operated under a statute that delegated to it certain congressional power over the public lands, and that required the GSA to notify a congressional committee if it intended to sell the lands;\textsuperscript{84} the statute's corresponding regulation gave the GSA authority ultimately to sell the land if no adverse comment

\footnotesize{78. 33 F.E.P. Cases 1232 (S.D.N.Y. 1984) (Pan Am. II) (denying motion for reconsideration of its decision in 33 F.E.P. Cases 260 (S.D.N.Y. 1983) (Pan Am. I)).
79. Pan Am. World Airways ("Pan Am.") refused to abide by a subpoena issued by the EEOC, which was investigating Pan Am. for employment discrimination. 33 F.E.P. Cases at 1232-33. Pan Am. argued that the EEOC had no enforcement power because the agency was delegated authority through a law containing an unconstitutional legislative veto. Id. at 1233-34. The court decided that the EEOC could proceed with its investigation if it received authorization from the Dept. of Labor, the agency having such authority before being replaced by the EEOC. Pan Am. I, 33 F.E.P. Cases at 266-67.
80. 33 F.E.P. Cases at 1233 n.2. The court further noted: "Possibly the Court in Chadha was unaware of the far reaching possibilities of its sudden discovery that the time honored process of legislative veto, authorized since 1932 in 295 separate Congressional procedures in 196 different statutes, was unconstitutional. Perhaps it did not foresee the consequent disruption to ongoing litigation." Id. at 1233 (footnotes omitted) (emphasis added).
81. See supra note 24 and accompanying text.
82. 3 Ct. Cl. 667 (1983) (Alexandria I).
83. Id. at 668, 673.
was made by the appropriate congressional committee. In Alexandria, the GSA administrator, though himself acquiescing in the terms of the transaction, had received a tip that the committee would not approve the sale to the City; as a result, he never submitted it for congressional consideration. The GSA argued, therefore, that no contract had been consummated because the deal was never transmitted to Congress for review and ultimate authorization as was required by the law and regulations.

Although the parties never argued Chadha's constitutional issue, the court reached out sua sponte and ordered the parties to brief the impact of that decision on the case. The court subsequently found that the review procedure, though not "an explicit veto by one House of Congress," was unconstitutional under Chadha. The court therefore ruled that because the GSA administrator would have entered into the contract with the City had he not relied on the review mechanism, a contract "in fact" existed between the City and the GSA. Furthermore, in its later decision denying a rehearing, the court analogized the review procedure to an "unlawful condition precedent."

This case demonstrates the grave inequity perpetrated by retrospective application of Chadha to such facts. The GSA administrator, relying on procedures that both parties to the alleged contract presumed to be valid, never thought that his actions would ultimately bind the GSA. It is grossly unfair to declare conduct "unlawful" after the fact, when it was engaged in more than four years before Chadha was rendered and was thus perfectly acceptable at the time it occurred. The court could only have speculated when it decided that the contract would have been approved in the absence

85. See 40 U.S.C. § 484(b)(9) (1976) and 41 C.F.R. § 10-47.304-12(a), (d), (f) (1982). The statute itself did not explicitly create a veto power for Congress.
86. Alexandria I, 3 Ct. Cl. at 673.
87. Id. at 673.
88. Id. at 675.
89. Id.
90. Id. at 677-78. The court reviewed the previous practice of the law and its corresponding regulation involved in the case and held "that the practice of a committee of the House of Representatives of intervening in and stopping negotiated sales of surplus property proposed by the GSA is an unconstitutional invasion of the separation of powers." Id. at 678.
91. Id. at 678.
93. See Alexandria I, 3 Ct. Cl. at 669.
of what it termed to be an unconstitutional veto power. Had Congress known that it would ultimately be required to meet the bicameral and presentment requirements before blocking a sale, it may, of course, have done so. Thus, this court’s use, or misuse, of Chadha has resulted in unfortunate consequences.

In addition to Alexandria, the potential exists for more far reaching consequences if Chadha is applied retroactively in a current case concerning the District of Columbia Home Rule Charter. Under the Home Rule Act, which contained a veto provision, Congress delegated authority to the local D.C. government to legislate laws. In 1981, when the Mayor of the District proposed the District of Columbia Sexual Assault Reform Act of 1981, the House of Representatives adopted a resolution to veto the act. The sexual assault statute that was in effect at that time remains operative today. The defendant in the current case is apparently arguing, however, that his conviction under this law is void because the House had no constitutional power to veto the 1981 law and keep the old statute in effect. If the defendant prevails, it may lead to thousands of otherwise legitimate and valid convictions being cast aside. This is the precise result that the relevant Supreme Court precedents mandate must be avoided by applying a holding only prospectively.

Although avoiding the retroactivity issues, two District of Columbia Superior Court opinions have held that Chadha, and thus the bicameral and presentment requirements, do not apply where Congress exercises its plenary power over the District of Columbia.

94. Id. at 678. The court stated that without what it termed to be Congress’ unlawful veto power, see supra note 90, “the only way Congress could override the GSA disposal decision would be by enacting further legislation.” Id. at 678. It would have been unlikely, however, for Congress to have adhered to the article I requirements if it assumed that it was acting constitutionally through one committee. If Congress knew that it would be held to the article I standards, it may very well have made a practice of doing so in stopping sales. It is inequitable for the court to hold Congress to a standard of which it had no knowledge.


97. Id. at § 1-233(c)(2).


99. United States v. Langley, Crim. No. F-3666-82 (Super. Ct. D.C., March 30, 1984) (amended memorandum opinion); United States v. McIntosh, Crim. No. F-4892-83 (Super. Ct. D.C., March 30, 1984). In Langley, the defendant was indicted and convicted subsequent to Chadha, Langley, slip op. at 1, and in McIntosh, the defendant was indicted after Chadha and was awaiting trial. McIntosh, slip op. at 2. Both courts avoided the retroactivity argument advanced by the government.
In other areas, individual parties are experimenting with still other inventive litigative forays to challenge existing judgments rendered prior to the invalidation of the legislative veto. Exxon Corporation, for example, sought relief from a $1.6 billion judgment against it, entered before Chadha was decided, arguing that the judgment was void because it was obtained under a statute that contained invalid vetoes which are inseverable from the remainder of the law. The Temporary Emergency Court of Appeals appropriately ruled that Chadha does not apply retroactively to invalidate the challenged statute. Nevertheless, other such creative litigation attempts are sure to follow.

Although other courts have not yet addressed the retroactivity issue directly, their opinions suggest a recognition of the need for judicial restraint in applying Chadha's holding. In Silverman v. Mayor of D.C., for example, the court avoided the constitutional issue surrounding the Home Rule Act. The appellants in the case wanted to convert their apartment complex to a condominium and a cooperative pursuant to D.C. law. The District Council, however, sought to prevent the conversion by enacting a series of "emergency" measures—and subsequently permanent legislation—under authority from the Home Rule Act. Appellants sued in federal district court on several constitutional grounds, none of which involved Chadha. Their action was dismissed for lack of jurisdiction, and they appealed the dismissal.

The court of appeals reversed, but in doing so it specifically declined to address Chadha's impact on the District's rulemaking authority. Unlike Alexandria, the court did not find the need to reach out and seize the issue. Moreover, it is particularly interesting

101. Id.
103. 727 F.2d 1121 (D.C. Cir. 1984).
104. Id. at 1122 n.1. The constitutional issue is whether the veto mechanism contained in the Home Rule Act is unconstitutional and thus, whether the entire Act fails.
105. Id. at 1122.
106. Id. The emergency measures last for 90 days and do not require congressional review. Id. at 1122 n.1.
107. Id. at 1123. The appellants alleged violations of due process and equal protection.
108. Id. at 1123.
109. Id. at 1122.
110. Id. at 1122 n.1. After outlining the veto procedure operating in the Home Rule Act, the court concluded it would make no decision regarding Chadha's effect "on this lawmaking procedure." Id.
to note that although the court specifically instructed the district court to resolve the issues of collateral estoppel and res judicata immediately upon remand, it did not require the lower court to analyze any Chadha issues. Thus, the court of appeals, though merely deciding a jurisdictional controversy, did, at least implicitly, express a reluctance to create Chadha issues by applying the ruling retroactively.

In National Wildlife Federation v. Clark, the court also displayed a reluctance to interpret Chadha expansively. In Clark, the Secretary of Interior refused to abide by a statute containing a veto provision, and its corresponding regulation, because it was his opinion that Chadha rendered the entire legislation unconstitutional and thus void. The court ruled that the Secretary must comply with the appropriate administrative procedures, including repeal of the regulation after notice and comment, before he disregards Congress’ guidelines. In its earlier opinion granting a preliminary injunction against the Secretary, the court stated that the Secretary should have the benefit of full commentary from all parties on the constitutionality of the law in question. The court suggested that the law, which concerned the disposition of public lands, may be exempt from Chadha’s holding, since Congress may have been exercising its proprietary rather than legislative powers when it acted to oversee the Secretary’s decisions. Proprietary powers were not explicitly mentioned by Chadha as bound by the bicameral and presentment requirements of article I.

Such cases demonstrate that the federal courts are in apparent disagreement as to whether and under what circumstances Chadha’s

111. Id. at 1123 n.3.
114. 43 C.F.R. § 2310.5 (1983). Both the statute, see supra note 113, and the regulation require the Secretary to temporarily withhold the sale or lease of public lands when so requested by a House Committee. This requirement has been interpreted as consistent with the bicameral and presentment requirements of the Constitution, because the scope and duration of any withdrawal requested by a single House remains in the discretion of the Secretary of Interior. See Pacific Legal Foundation v. Watt, 529 F. Supp. 982, 1004 (D. Mont. 1981).
116. Id. at 828-29.
118. Id. at 1156-58.
119. See supra note 113.
121. See supra note 4 and accompanying text.
constitutional holding should apply. If the courts see fit to render thousands of settled government decisions void under the rubric of Chadha, chaos will obviously result. At the least, retroactive application of Chadha would provide litigants with an opportunity to attack policies adversely affecting their interests where other modes have been unsuccessful or exhausted. In the long run, unbending retroactive application of Chadha only makes comprehensive remedial legislation that much more imperative. Congress must address this situation before the post Chadha juggernaut exceeds manageable proportions and subjects the federal government to an unending cycle of challenge by affected entities. One such proposal is discussed in Part IV of this article. There is, in addition, another area deserving of Congress’ attention that is causing even greater bewilderment among federal courts since Chadha: whether the other provisions of a statute containing an unconstitutional legislative veto remain “‘fully operative as a law.’” This question is referred to herein as the issue of severability.

II. SEVERABILITY

The Reorganization Act of 1977 has, as previously discussed, been the focal point of particular turmoil among the federal courts. The following discussion is intended merely to outline the confusion that has erupted as a result of the different resolutions to the severability of this particular Act. It does not seek to analyze the issues on their merits or to argue for a specific outcome that the courts should reach. Rather, it suggests that the potential exists for the confusion to spread as other laws make their way through the courts, and that Congress must not wait for the Supreme Court to eventually bring our system back to order.

The typical scenario in these cases involves an action by the EEOC to enforce the employment discrimination laws against an allegedly discriminatory employer. The employer moves to dismiss

122. See infra note 170 and accompanying text.
123. Chadha, 103 S. Ct. at 2775 (quoting Champlin Refining Co. v. Corporations Comm'n, 286 U.S. 210, 234 (1932)).
124. See supra note 53.
125. See supra notes 53-54 and accompanying text.
the action, arguing that the EEOC has no authority to sue since the agency was created pursuant to an unconstitutional grant of power.\textsuperscript{128}

Courts have disagreed on almost every conceivable issue involved in these cases. They have differed, for example, on such issues as: (1) the appropriate standard for determining whether a law is severable;\textsuperscript{129} (2) whether the specific veto mechanism contained in the Reorganization Act is severable;\textsuperscript{130} (3) whether the veto device and Congress' delegation of authority to the President affected any substantive rights;\textsuperscript{131} (4) whether Congress has subsequently ratified the remaining portions of the Act through appropriations;\textsuperscript{132} and (5)
legislative veto

whether lower federal courts should even get involved in deciding the issue at this point.\(^{133}\)

The result of these divergent decisions is that the EEOC currently has power to enforce the discrimination laws only against those employers located in jurisdictions that did not strike down the entire Reorganization Act.\(^ {134}\) In other jurisdictions, the EEOC may enforce the laws only if specifically authorized to do so by the Department of Labor, the agency that had such authority prior to President Carter's reorganization.\(^ {135}\) Rarely has one Supreme Court decision supplied the impetus for such widespread pandemonium among the federal jurisdictions. As suggested more fully in Part IV, Congress must address these problems in upcoming legislation.\(^ {136}\)

III. CONGRESSIONAL AND EXECUTIVE FLOUNDERING

The courts are not singly responsible for perpetrating the confusion over the reach of Chadha, for several statutes have been passed since the decision that include suspect legislative vetoes.\(^ {137}\) There appears to be no logical legal theory to support Congress' insistence on enacting prototype veto provisions post Chadha. Congress may be unhappy with the Supreme Court's decision in Chadha and its implications, but it is not within the province of the courts to ratify or invalidate legislation in the manner propounded by the Reorganization Act of 1977.\(^ {138}\)

\(^{133}\) In EEOC v. Pan Am. World Airways, 33 F.E.P. Cases 1232 (S.D.N.Y. 1984), the court colorfully opined:

> No jurisprudential purpose will be served, and scarce judicial resources on all levels will be wasted if we, and every other district judge who happens to have an Equal Pay Act or ADEA lawsuit on his or her docket should immediately woo the Muse and set down a lengthy opinion having the same 50-50 chance of being right as the Allstate opinion has.

Id. at 1236. For the court's resolution of the problem, see supra note 79.

\(^{134}\) See cases cited supra note 130.

\(^{135}\) See supra note 79.

\(^{136}\) On April 10, 1984, the House of Representatives passed a bill that would extend the authority delegated to the President under the Reorganization Act of 1977, and that would replace the unconstitutional veto contained in that Act with a joint resolution provision, H.R. 1314, 98th Cong., 2d Sess., 130 Cong. Rec. H2519 (daily ed. Apr. 10, 1984); see infra notes 168-69 and accompanying text.

cations for a shift in executive-legislative power sharing, but the meaning of the holding is not beyond comprehension.

This is not to say, however, that the judiciary and Congress are alone in floundering in the post Chadha sea, for the executive branch has seized upon the Court’s decision to provide itself with yet another arrow in its quiver to guard the bureaucracy from congressional oversight. The general counsel to the Federal Communications Commission has recently argued that Chadha supports a constitutional privilege for the executive agencies to refuse to comply with Congressional investigations into their adjudicatory processes if Congress does not first comply with article I’s bicameral and presentment requirements.\textsuperscript{138} Congress, however, has long had the constitutional power to investigate the administration of executive agencies.\textsuperscript{139} The executive branch’s use of Chadha as an offensive weapon should not, therefore, be permitted to reduce Congress’ historically-based investigative role.

IV. A CALL TO CONGRESSIONAL ARMS

As the foregoing discussion reveals, even in the short time since Chadha was rendered, the decision has wreaked havoc upon our system of government. Moreover, the potential clearly exists for further damage. Obviously, neither the courts nor the executive branch, which precipitated the decision, can be relied upon to clean up the governmental devastation caused by the Supreme Court’s pronouncement. The following sections demonstrate that Congress is the appropriate body to redress Chadha’s destructive force, and that Congress must immediately undertake this duty, by replacing the veto with a viable substitute.

A. Historical Underpinnings of the Congressional Veto

The legislative veto arose in response to the increasingly complex range of government involvement in daily life and the need to accommodate executive efficiency with legislative accountability.\textsuperscript{140} In 1929, President Hoover recognized that a legislative veto could

\textsuperscript{139} See McGrain v. Daugherty, 273 U.S. 135 (1927).
play a key role in the United States Government of the twentieth century. Congress faced the need to reorganize parts of the federal bureaucracy, as well as the structure of the executive branch, and realized that this task would be better accomplished by the executive branch itself. Congress therefore agreed to delegate to President Hoover the authority to reorganize the executive branch; Congress, however, retained the power to disapprove of his reorganization plans through a legislative veto.142

The legislative veto thus made its twentieth century debut through the reorganization plans; it went on to become a popular and effective means for Congress to fulfill its constitutional responsibilities, while simultaneously delegating, of necessity, authority to the executive branch.143 Control through the legislative veto mechanism spread into numerous areas over the years, as Congress delegated more authority to deal realistically with the growing complexity of the society served by the government.144

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

Consequently, use of the legislative veto developed as the number and complexity of issues addressed by Congress increased. New technologies and an urbanized society presented Congress with a need to rely on the expertise of particular agencies, yet Congress could not relinquish its responsibility and control of policy. Actions in the area of war powers,145 budget impoundment and control,146

142. Id. at 164.
144. The growth of the legislative veto coincides with the explosion of social and economic legislation of the late 1960's and early 1970's. See Cooper & Hurley, The Legislative Veto: A Policy Analysis, 10 Cong. & the Presidency 1, 3 (1983).
foreign arms sales,\textsuperscript{147} nuclear proliferation,\textsuperscript{148} export controls,\textsuperscript{149} immigration policy,\textsuperscript{150} regulatory policy,\textsuperscript{151} and many other areas ultimately became subject to legislative veto.\textsuperscript{152} The legislative veto was the quintessential accommodation between Executive and Legislative authority: the Executive obtained a charter to affect congressional policy on a wide basis, while the Congress retained ultimate responsibility for the decision making process.\textsuperscript{153}

The purpose of the legislative veto was to assure that the final responsibility and accountability for the actions taken under the delegated authority rested with the elected representatives of the people. Congress must answer to the people every two\textsuperscript{154} or six years.\textsuperscript{155} If a member of Congress makes decisions with which his or her constituents disagree, the constituents can make their views known at the polls. But that is not the case with the unelected officials in the bureaucratic agencies, who, of course, do not run for office, and who are not, therefore, directly accountable to the general public. Under our system of government, which is based on democratic principles, those who are accountable to the people must have the final say over the rules and regulations that have the force and effect of law. If Congress finds that a rule or regulation is arbitrary, oppressive, or contrary to the intent of the law, then the Congress ought to have the right to stop that rule from going into effect. The legislative veto provided a means for doing that.

Justice White, in his \textit{Chadha} dissent, recognized that the legislative veto is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory

\textsuperscript{147} International Security Assistance and Arms Control Act of 1976, 22 U.S.C. \textsection 2776(b) (1982).
\textsuperscript{149} Export-Import Bank Amendments of 1974, 12 U.S.C. \textsection 635(e) (1982).
\textsuperscript{150} Immigration and Nationality Act, 8 U.S.C. \textsection 1254 (o)(2) (1982).
\textsuperscript{151} See, e.g., Education Amendments of 1974, 20 U.S.C. \textsection 1232d(a) (1982).
\textsuperscript{152} For a list of other statutes subject to legislative vetoes, see INS v. Chadha, 103 S. Ct. 2764, 2811-16 (1983) (White, J., dissenting) (app. 1, listing 56 statutes containing legislative veto provisions); RULES AND PRACTICE OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 271, 97th Cong., 2d Sess. 755-60 (1982).
\textsuperscript{153} Of course, some believed that “[t]he legislative veto was conducive to legislative sloppiness.” \textit{The Court Vetoes the Veto}, Newsweek, July 4, 1983, at 18, col. 2 (statement of Professor Peter L. Strauss).
\textsuperscript{154} See U.S. CONST. art. I, \textsection 2, cl. 1.
\textsuperscript{155} See id. at art. I, \textsection 3, cl. 1.
agencies, and preserves Congress' control over lawmaking. . . .

[T]he veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker.\textsuperscript{156}

In toto, Justice White's dissent clearly offers a more realistic version of today's working government than that portrayed by the majority opinion. The Constitution is not a static document, nor a relic of history. It is a living growing charter that retains its principles by dynamic interpretation.\textsuperscript{157}

B. The Legislative Response Post Chadha

We are now faced, in the wake of the Chadha decision, with a preponderance of questions as to how Congress and the Executive Branch should operate without the traditional legislative veto. Modern reality dictates that there be some means of striking accommodations between the branches. Those accommodations often mean sharing responsibilities between the branches, while insuring that Congress simultaneously retains control over the delegated responsibility. It has been noted that "[t]he practical basis for this mutual understanding of shared roles has not been altered by the Court's [Chadha] decision. With or without the blessing of the judiciary, Congress will continue to control agency actions by means other than the full-fledged, regular legislative process."\textsuperscript{158} These other measures could include Congress' repeal of delegated authority or refusal to delegate future authority, the termination of funds through appropriations riders, shortening periods of authorization, as well as other methods. These particular measures may not be as efficient or orderly as legislative vetoes and they may become somewhat heavy-handed or draconian in application, but they might be increasingly used nevertheless.

Congress is, however, continuing to move forward in a variety of more conventional ways. A Congressional Research Service study cites seventeen legislative veto provisions that have been enacted

\textsuperscript{157} See Gompers v. United States, 233 U.S. 604, 610 (1914):

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

\textsuperscript{158} CONGRESSIONAL RESEARCH SERVICE, THE LEGISLATIVE VETO AFTER CHADHA 14 (L. Fisher, Fall 1983).
since the Supreme Court ruling on June 23, 1983, that would not stand under the Chadha decision. However, several alternatives to the traditional types of vetoes have been proposed that are likely to stand the test of the Chadha decision. These include a “report and wait” procedure whereby the executive branch or an agency is required to “wait” before its action takes effect. During this waiting period, Congress may disapprove the executive action through enactment of a joint resolution that must pass both Houses and be signed by the President. To be at all effective, however, such a disapproval procedure would have to include provisions to expedite consideration of the resolution. “Expedited procedures” would facilitate discharging the resolution of disapproval if the Committee that was considering it did not act within a specified period of time. This approach is not the best framework for replacing the traditional legislative veto, however, because if the President vetoes the resolution of disapproval, Congress must have a two-thirds majority to sustain its disapproval of the resolution.

Another alternative, sometimes referred to as the “son of legislative veto,” is attracting growing political support and offers a measure of control that is comparable to that of the traditional one- and two-House vetoes. Under this proposal, no executive action or regulation would become effective unless approved by Congress through enactment of a joint resolution, which must pass both Houses and which requires the President’s signature. This, of course, would permit one House of Congress to prevent executive action from taking effect, and would thus operate similarly to the traditional legislative vetoes. Furthermore, to avoid imposing unrealistic demands on the Congress, this option could be limited to “major” regulations, generally defined as those having an annual economic impact of $100 million or more, or those having otherwise major significance. It has been suggested that the President could present the various regulatory proposals under a “regulatory calendar,” whereby Congress could consider approval similar to the way it considers om-

159. Id. at 33.
161. Id.
162. For examples of expedited procedures see id., § 9(e); S. 1080, 98th Cong., 1st Sess., § 13(a); H.R. 220, 98th Cong., 1st Sess., § 621(a)(6).
163. See U.S. CONST. art. I, § 7, cl. 2.
165. For a definition of a major regulation see H.R. 220, 98th Cong., 1st Sess., § 621(a)(6); S. 1080, 98th Cong., 1st Sess., § 4(a).
nibus budget reconciliation packages.\textsuperscript{166}

A combination of the approval and disapproval proposals could produce an effective means of Congressional control. For example, the approval procedure could apply to major regulations, while the disapproval mechanism could offer control over non-major regulations.\textsuperscript{167}

Having surveyed some of the leading proposals for future Congressional action, there still remains the problem created by Chadha concerning those laws currently containing suspect legislative vetoes. As previously argued, we do not believe that Chadha should be routinely applied retroactively to all past laws and actions. It must be acknowledged, however, that once the courts stroll down the wrong path, it will be difficult to lead them the right way.

The House of Representatives has already passed a bill that would replace the unconstitutional veto contained in the Reorganization Act of 1977\textsuperscript{168} with a joint resolution approval provision such as that described above.\textsuperscript{169} This bill is one step toward bringing our federal system back to order in the wake of Chadha.

In addition to this bill, legislation has been introduced by Congressman Levitas that attempts to address comprehensively the confusion created by the courts concerning the issues of severability and retroactivity. This legislation would repeal all existing delegated authority within 180 days of the law's enactment, unless Congress reinstated the authority with or without an alternative legislative veto procedure.\textsuperscript{170} This “super sunset” legislation will thereby clear the uncertainty that now exists regarding whether a particular law is severable, or whether agencies have valid authority to enforce the laws.

Although such legislation may seem extreme, as our case law analysis demonstrates, the impact of Chadha warrants immediate attention. Congress can and must move forward to resolve the governmental bewilderment caused by the Chadha decision. Although Chadha concerned the legislative veto of the Attorney General's stay

of an alien’s deportation, a quasi-adjudicative determination, the decision’s repercussions affect many other areas. There are, for example, a host of other uses of the veto in the foreign policy area that fall under the Chadha holding, including the War Powers Resolution and the Budget and Impoundment Control Act of 1974, as well as other diverse areas of international relations and domestic policy.

V. CONCLUSION

The Supreme Court’s constitutional ruling in Chadha has affected our government as few decisions have or ever will. While the Court’s own precedents suggest that the decision should be applied only prospectively, Congress must immediately address the problems created in the post Chadha period. Not only must Congress institute viable substitutes to the legislative veto, but it must also rectify the confusion that exists concerning the many laws currently on the books containing unconstitutional veto provisions.

174. See supra note 157.